



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 33 OF 2015

CORAM: D. S. MAJANJA J.

BETWEEN

ROBERT KITHINJI KITHAKA.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.E.W. Wambugu, RM dated 12th June 2015 at the Chief Magistrates Court at Meru in Civil Case No. 402 of 2011)

JUDGMENT

1. The appellant is dissatisfied with the award of Kshs. 250,000/- as general damages by the trial court. He prays that the award be enhanced on the grounds stated in the memorandum of appeal dated 9th July 2015 as follows:

- 1. The learned magistrate erred in law and in fact in awarding the appellant the sum of Kshs. 250,000/- as general damages for pain and suffering, a sum that was too low in view of the nature and extent of injuries suffered by the appellant.*
- 2. The learned magistrate erred in failing to properly and sufficiently address her mind to the nature, extent and residual effects of the injuries [and] has she done so, she would have awarded a higher amount.*
- 3. The learned magistrate erred in law in failing to fully analyse and appreciate the facts of the case, the evidence of injuries and the extent thereof and she arrived at an erroneous award.*
- 4. The learned magistrate erred in law in failing to consider the appellant's submissions on quantum, and in so doing arrived at an erroneous decision.*

2. The appellant sustained a fracture on the left leg involving both tibia and fibula, fracture of the left collar bone and bruises all over the body in an accident that took place on 2nd January 2011 when the motor cycle registration number KBD 792A which he was riding, was knocked by the respondent's motor vehicle registration number GK A007V along the Mukothima – Giaki road. The issue of liability was settled in a test suit and apportioned at 80:20 against the respondent.

3. The nature and extent of the appellant's injuries as outlined at paragraph 2 above was not in dispute. Dr Gerald Murithi, who examined the appellant, testified and produced the medical report. He confirmed the appellant's injuries and noted that after the accident, a POP cast was applied to his leg and he was discharged on the next day walking on crutches. The cast was removed after 3 months whereupon it was discovered that the fractures were not uniting. He was admitted to hospital again on 9th April 2011 and the fractures fixed by operation and inserting a metal plate. He was discharged on 25th April 2011. Dr Murithi observed that at the time of examination, the leg was swelling after walking some distance. The ankle joint was painful and quite stiff due to prolonged immobilization and the shoulder joint painful due to the clavicle fracture. He concluded that the appellant sustained a serious leg injury which would result in painful ankle joint for the rest of his life.

4. In submissions before the trial court, the appellant submitted that a sum of Kshs. 2,000,000/- would be reasonable and relied on the case of ***Edward Mzamili Katana v CMC Motors Group Ltd and Another MSA HCCC No. 70 of 1997 [2006]eKLR*** where the plaintiff sustained a head injury leading to concussion, cut wound and bruises of the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injury with multiple fractures of left 5th, 6th and 7th ribs, fracture of the left femur upper 1/3 shaft. He was awarded Kshs. 1,300,000/- in 2006.

5. The respondent suggested that a sum of Kshs. 200,000/- was appropriate. It cited the case of **Hassan Noor Mahmoud v Tae Youn Ann MSA HCCC No. 2068 of 2002 [2001] eKLR** where the plaintiff sustained a fracture of the lower 1/3 of the left tibia and fibula and a fracture of the left clavicle. He was awarded Kshs. 200,000/- in 2001.

6. After setting out the nature of the injuries, the trial magistrate concluded that, *“Further, he will experience the pains for the rest of his life. I have taken into consideration the nature of the injuries, the cited authority, inflationary trend and award Kshs. 250,000”*

7. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

8. The issue is whether the award is adequate taking into account awards given for comparable injuries in other cases. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR**)

9. In order to assist the court assess damages, the duty of the advocates is to cite appropriate cases from which the court can reach a fair decision. The appellant sustained two fractures and minor soft tissue injuries. The case cited by the appellant reflected multiple and more complex fractures and soft tissue injuries. These were obviously more serious injuries and the award was an outlier in terms of the damages awarded. The case cited by the respondent was more reflective of the injuries sustained by the appellant although it was quite dated. I also note that the magistrate remarked that the decision cited by the appellant was not attached to the submissions, a fact I confirmed when I reviewed the original file.

10. This is a case where counsel for the appellant must take the blame for failing to assist the court to arrive at a fair decision by citing more recent and relevant cases so that the trial court can come up with a conventional award or an award that is reflective of the general trend of awards of injuries in similar cases. The trial magistrate cannot be blamed for disregarding the authority cited by the appellant and then using the case cited by the respondent as a starting point, adding an element of inflation and hence increasing the final award to Kshs. 250,000/-. I do not detect any error on the part of the trial magistrate that would warrant interference.

11. I dismiss the appeal. As the respondent did not attend the hearing, I make no order as to costs.

DATED and DELIVERED at MERU this 24th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Matiri instructed by Murango Mwenda and Company Advocates for the appellant.