



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 149 OF 2009**

**PHILIP MUSYOKA MUTUA.....APPELLANT**

**VERSUS**

**LEONARD KYALO MUTISYA.....RESPONDENT**

***(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Machakos before Hon. Mrs. Nderitu S.R.M delivered on 10<sup>th</sup> August 2009 in Machakos CMCC No. 56 of 2008).***

**JUDGMENT**

1. This is an appeal on quantum emanating from a judgment of the trial court in a personal injury claim, wherein the parties had recorded a Consent on liability at the ratio of 10:90 in favour of the plaintiff/respondent as against the defendant/appellant. The only issues raised by the appellant in their Memorandum of Appeal dated 1/9/2009 were on quantum of damages as follows:

*“i The learned trial magistrate erred in assessing of general damages for pain and suffering at Ksh. 400,000.00 and failed to apply the principles applicable to the award of damages and comparable awards made for similar injuries.*

*ii The award of general damages is inordinately high and not all commensurate with the injuries sustained by the plaintiff/respondent.*

*iii The said award is out of keeping with either Kenyan awards for comparable suffering.*

*iv The learned trial Magistrate erred in not considering the submissions and authorities submitted on behalf of the appellant.*

**Reasons wherefore the Appellant prays that:-**

*(a) This appeal be allowed with costs*

*(b) The Judgment and decree of the senior Resident Magistrate's court made on the 10<sup>th</sup> August, 2009 in Machakos Civil Case No. 56 of 2008 – Leonard Kyalo Mutisya v. John Kamau Ngugi & Philip Musyoka Mutua against the appellants be set aside and/or reviewed.*

2. The plaintiff had pleaded the following specific injuries: -

*“7. As a result of the accident the plaintiff sustained severe and extensive bodily injuries and has suffered loss and damage.*

**Particulars of injuries**

(i) Cut wound on the face near right eye

(ii) Blunt injury to the forehead

(iii) Bruises on the chest

- (iv) Blunt injury to both the shoulder
- (v) Deep cut wound on the left hand
- (vi) Bruises on the left hand
- (vii) Fracture distal left radius

**Particulars of special damages**

a) Police Abstract .....	Ksh.200
b) P 3 form filling .....	Ksh. 1500
c) Medical Report .....	<u>Ksh. 2000</u>

**Ksh.3700**

And the plaintiff claims general damages for pain suffering and loss of amenities.

3. On 13/7/2009 the parties’ advocates appeared before the trial magistrate and recorded the following consent:

*“By consent, judgment on liability be entered in favour of the plaintiff as against the defendant at 90:10. The following documents i.e P 3 form, medical report by Dr Kamuyu, police abstract, treatment record, receipt for Ksh., 200/- for obtaining copy of police abstract receipt for Ksh. 500/- for obtaining copy of records same, medical report by Dr. Wambugu all be admitted without calling makers thereof, we shall file submissions.”*

The consent was adopted by the court and parties were asked to file their submissions on assessment of damages.

4. The trial court entered Judgment for general damages for pain suffering and loss of amenities in the sum of Ksh. 400,000/- subject to 10% contribution on negligence leaving a sum of Ksh. 360,700/= to be paid to the Plaintiff. It is for this amount that the appellant felt aggrieved and consequently appealed.

**SUBMISSIONS**

**Appellant’s submission.**

5. The appellant urged the court to refer to Dr. Wambugu’s medical report who had classified the injuries as skeletal which resulted to 2% incapacitation. He had found the respondent to have the following injuries:

- (a) Close fracture left radius bone.
- (b) Forehead and facial laceration wounds
- (c) Blunt trauma to the chest

6. The court was referred to **David Kamande Mbui v. Kenya Bus Services Ltd**, Nairobi HCCA No. 281 of 1998 where an award of Ksh. 100,000/= was made for a compound fracture of proximal right ulna olecranon with displacement of radial head, injuries of the median nerve and deep cut wound on the right elbow. See also the Court of Appeal in **Zipporah Wambui Wambaira & 17 others v. Gachuru Kiogora & 2 others [2004]** eKLR where the same amount was considered adequate for soft tissue injuries.

7. Finally, they urged the court to award a sum of Ksh. 120,000/= which would be adequate compensation. They also prayed for the costs of the appeal.

**Respondent’s submission**

8. She urged the court to dismiss the allegation that the sum of Ksh. 400,000 was excessive for the injuries sustained. The amount was sufficient considering the inflation rate. The respondent had been admitted for 3 days and thereafter he would go for regular medical check-ups.

9. They urged the court to consider the authorities relied upon in the lower court i.e **Jane Munguti v. Simon Peter Mwangi & Anor** HCCC NO. 910 Of 1991, **Mushambi Onde Gona v. Associated vehicle Assemblers Ltd & Anor** Msa HCCC No. 9191. In **Kennedy Ago Lidweye v. Steel plus ltd Nai** HCCA NO. 248/2010 the respondent had sustained a compound fracture of the right distal radial ulna and the award of Ksh. 400,000/= was upheld. In **Samuel Muchama v. Kenneth Maundu** Machakos HCCA No. 102 of 2008 where the respondent had sustained blunt injuries to the head and chest and cut wounds and an award of Ksh. 380,000/= was upheld. Consequently, the respondent urged this court to dismiss the appeal with costs.

## **ISSUES FOR DETERMINATION**

10. The court has referred to the record of appeal, the submissions and authorities and has framed the following issue for determination:

- (a) Whether the award of Ksh. 400,000/- was an inordinately high compensation for the injuries sustained to justify interference by an appellate court.

## **DETERMINATION**

11. The appellant and respondent did not avail any witness since they had agreed to produce the documents to be relied upon by consent. The trial Magistrate in awarding the amount averred that the defendant/appellant had not filed its submissions. However, the Record of Appeal contains submissions dated 29<sup>th</sup> July 2009 and a medical report by Dr Wambugu.

### ***Duty of first appellate court to review evidence***

12. This being a court of first appeal, it has a duty to re-evaluate, analyse and make its own independent conclusion. See ***Peters v. Sunday Post Ltd.*** (1958) E 424. However, as discussed below, the court can only interfere with an amount awarded by the trial court if it is inordinately high or low.

13. The discharge summary from Machakos General Hospital shows the respondent was admitted on 21/9/2007 and discharged on 24/9/2007. Final diagnosis was collar fracture of the left radius. The report also contained the following injuries:

- (i) Bruised chest of minimal bleeding
- (ii) Cut wound on the wrist

The respondent was first treated at Machakos General Hospital immediately after the accident and therefore the doctor was able to establish the injuries sustained. However Dr. Kimuyu Judith in her report stated the respondent had sustained the following injuries. She examined the respondent on 8/11/2007.

- (i) Cut wound on the face, right zygomatic area
- (ii) Blunt injury to the forehead
- (iii) Bruises to the chest
- (iv) Blunt injury to both shoulder
- (v) Bruises to the left hand
- (vi) Fracture to the left distal radius

14. The medical report by Dr. Wambugu shows he examined the respondent on 5/5/2009 and found him to have sustained the following injuries -

- (i) Closed fracture left radius bone
- (ii) Forehead and facial laceration wounds
- (iii) Blunt trauma to the chest

He also referred to the x-ray films availed to him and confirmed a fracture distal radius bone. The chest and skull X-rays were normal. The cut wounds were cleaned, stitched and dressed. The degree of incapacitation was 2%.

15. It is not in dispute from the documents discussed above that the respondent sustained the following:

- (i) Closed fracture radius bone
- (ii) Bruises on the forehead and left hand
- (iii) Cut wound on the face.

The appellant urged the court to rely on ***David Kamande***, supra, in assessment on damages. This was a **1998** case (ten year old decision) in which an amount of Ksh.100,000/- was adequate compensation as at that time. Again in ***Zipporah Wambui***, supra, the amount of Ksh. 100,000 was reasonable as at that time. The respondent on the other hand urged that Ksh. 400,000 was adequate compensation. In ***Kennedy Ago Lidweyer***, supra, the respondent had sustained a compound fracture to the right distal radial ulna an award of Ksh 400,000 was awarded

which in this court's opinion, the injury was more severe than the injury sustained by the respondent in this instant appeal. In **Samuel Muthama**, supra, the award was Ksh.380,000/=, was reasonable since the injuries sustained by the respondent were more severe: there was an injury to the eye with peri-orbital oedema, blunt injury to the head with loss of consciousness for about four hours and permanent incapacitation of 4% was assessed.

***Principles for interference with award of damages***

16. The principles upon which the appellate court may interfere with the award made by the trial court are settled as observed in **Kemfro Africa Limited T/A "Meru Express Services 1976" & Gathogo Kanini v. A.M. Lubia & Olive Lubia [1982 – 1988]** 1 KAR 727, 730 where Kneller J.A said:

*“ The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge in assessing the damaged, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”*

17. In view of the above principle, it is this court's opinion that since money cannot renew a physical frame that has been shattered or battered, the respondent is only entitled to what in the circumstances, is fair compensation on the principle that comparable injuries should be compensated by comparable awards. The court finds that an award of Ksh.300,000/= would be adequate compensation for the injuries sustained, and taking into account the inflationary trends.

**ORDERS**

18. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appeal is allowed. The trial court's award on damages is set aside and a sum of Ksh.300,000/= is awarded for pain and suffering subject to contribution on liability as agreed by the parties. The special damages are awarded as proved at Ksh.850/-
2. There shall, therefore, be judgment for the Respondent/Plaintiff against the Appellant/Defendant in the sum of Ksh.270,850/- together with costs in the trial court and interest until payment in full.
3. Each party to bear its own costs of the appeal.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF NOVEMBER 2018.**

**G.V. ODUNGA**

**JUDGE**

**Appearances:-**

M/S Muri Mwaniki & Co. Advocates for the Appellant

M/S Anne M. Kiusya & Co. Advocates for the Respondent