



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R MWONGO, J

CIVIL APPEAL NO. 19 OF 2015

(Being an Appeal from the Judgment delivered on 28th January, 2018 in

Naivasha SPMCC No 217 of 2011, (Hon. Shadrack M Mwinzi – SRM)

ANDERSON HUNTE NJUGUNA.....1ST APPELLANT

LOCHAB BROTHERS LIMITED2ND APPELLANT

ALFRED KIPSORIO KIPLIMO.....3RD APPELLANT

-VERSUS-

DAVID NJIHIA NJOROGE.....RESPONDENT

JUDGMENT

Background

1. This is an appeal on the quantum awarded by the lower court in this matter. The brief background is that on 28th March, 2010, the Respondent was a fare paying passenger in a matatu registration number KBA 216 B Toyota which was driving along Maai Mahiu- Naivasha road. It was involved in an accident with Mercedes Benz Actross lorry registration number KBC 202 C/ Z B 6663 belonging to the 2nd Appellant and driven by the 1st Appellant.

2. During the hearing of the suit in the lower court, the parties agreed on liability at 85%:15% in favour of the plaintiff. The injuries particularised in the plaint are as follows:

- a. Blunt injury to the anterior chest wall
- b. Fracture of the left humerus (upper arm)
- c. Blunt injury to the right thigh

The appellant also sought special damages as follows:

- | | |
|--------------------|-----------|
| a. Medical report | 3,000.00 |
| b. Police Abstract | 200.00 |
| c. Treatment | 47,850.00 |

3. The appellant also prays that the court do make a finding that each party should bear its own costs of the appeal.

4. The lower court awarded Kshs 51,058.00 as special damages and Kshs 551,058.00 as general damages. The appellant has appealed on the

grounds that the damages awarded are excessive and aggravated.

5. After the judgment, in June 2015, the appellant filed the appeal and obtained stay of execution, and as a condition of stay, the court required them to pay Kshs 200,000/= to the plaintiff from the decretal sum.

6. The parties filed written submissions and authorities in the trial court, which they rely upon. The appellant submitted that Kshs 150,000/= was reasonable compensation, whilst the respondent had prayed for Kshs 700,000/=.

7. The appellants authorities: in **Elizabeth Wairimu Maina v William Nyauma Bangiri HCC No 294 of 1993** the plaintiff sustained fracture of right clavicle and bruise wounds to right check, was discharged the same date and healed completely the award was 140,000/=. In **Kasarani Sportsview Hotel Ltd v James Mathenge Munene HC Civil App No 546 of 1999** for injury to right elbow with fracture of lower end of humerus bone and joint dislocation, soft tissue injuries to left elbow and back and head injury and loss of consciousness, the award was Kshs 250,000/=

8. Further in **Regina Namataka Bennaars v Farmers Choice Company Ltd and Another [2005] eKLR** the injuries were fracture of femur to right leg which became shortened by 1½ inches, the court awarded Kshs 200,000/= general damages.

9. The respondents' authorities: In **Lucas Mono v Combine Warehouse Ltd Mombasa HCCC No 99 of 1988** the plaintiff was hospitalised for 24 days, and remained off work for 4 months, the court awarded Kshs 280,000/=

10. In addition reliance was placed on **Stephen Ngunza Mbandi v Dismus Kitiane Eliud and Another Nairobi HCCC No 138 of 1987**, where the plaintiff suffered a fracture of the left humerus and due to non-union, further treatment was proposed including internal fixation and bone grafting. The court awarded Kshs 200,000/= in general damages.

11. Before the doctor was called to give evidence the parties entered into a consent. The plaintiff gave evidence as PW1 stating his injuries as follows: *"I had a broken left arm, the pelvis and left side of the head...I can't lift heavy objects"*. He produced the P3 Form (PExb 1) and Medical Report PExb 6. The only other evidence was by the Police investigator PW 2.

12. The Doctor's Report shows that the plaintiff was admitted in hospital for two weeks, and was *"put on the following treatment: oral analgesics, oral antibiotics, tetanus toxoid injection and open reduction and internal fixation of the fracture"*.

13. The authorities provided to the court were all over ten years old with the oldest, Stephen Ngunza mbandi, being twenty seven years old. The parties ought to have been more industrious and provided more recent authorities. My view is that it would not be imprudent to take an average five percent inflation rate annually, so that in twenty years there would be a one hundred percent inflation increase and similar increase in costs. From the authorities cited, the general award for fracture which healed without complications appears to be in the range of 200,000/= to 280,000/=. In some of the cases, the injuries resulted in complications and or shortening of the leg.

14. In the present case there were no complications and the plaintiff was discharged from hospital within two weeks. I think an award of 250,000/= increased by 50% covering ten year inflation would be adequate compensation. I would award 375,000/= in general damages.

Disposition

15. Accordingly, I set aside the lower court's award of Kshs 551,058/= for general damages and hereby substitute with an award of 375,000/= in general damages.

16. This award, reduced by 15% to cater for the plaintiff's apportioned liability, amounts to 318,750/=: payable to the respondent. I do not interfere with the award of special damages or the costs in the lower court.

17. Each party shall bear their own costs of the appeal.

Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu for the Appellant

2. Omenta For Respondent

3. Court Clerk Quinter