



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 18 OF 2015

NDATHI MWANGI.....1ST APPELLANT

DAVID KILO.....2ND APPELLANT

JOSHUA MWAURA.....3RD APPELLANT

VERSUS

BENSON LUMUMBA NDIVO.....RESPONDENT

(Appeal against the judgment of Hon. E.Kimilu SRM, in Chief Magistrates' Civil Case No. 370 of 2011 in Naivasha)

JUDGMENT

Background

1. The plaintiff was involved in an accident on 15th November, 2010, and by consent, the defendants were found liable at a ratio of 90:10%. This is an appeal essentially on quantum.

2. The lower court on 20th January, 2015 entered judgment for the plaintiff, the respondent herein. The acknowledged injuries suffered by the plaintiff for which the damages in the suit were awarded were as follows:

- a. Fracture of the ulna
- b. Compound fracture of the femur in the middle one third
- c. Compound displaced fracture of the left tibia and fibula
- d. Soft tissue injuries
- e. Laceration on the right leg

3. The judgment made an award as follows:

- a. Liability: 90:10% liability awarded by consent of parties.
- b. General damages for pain, suffering and loss of amenities Kshs 1,500,000/=
- Less 10% Kshs 150,000/=
- c. Future medical expenses Kshs 350,000/=
- d. Doctors court attendance fee Kshs 15,000/=
- e. Special damages Kshs 471,000/=

Total

Kshs 2,186,000/=

f. Costs and interest thereon at court rates

4. The appellant asserts the trite rule that in awarding damages the court should make comparable awards based on comparable injuries citing **Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd [2013] eLKR**. Accordingly, the appellants have provided authorities they consider disclose awards for injuries comparable to those suffered by the respondent. They seek a reduction of the awarded damages from Kshs 1,500,000/= to between Kshs 800,000/= to Kshs 1,000,000/=.

5. The authorities relied on by the appellant on quantum of damages include:

- **Ram Gopal Gupta v Nairobi Tea Packers Ltd & 2 Others [2017] eKLR** where Kshs 800,000/= was awarded for a claimant who had suffered compound fractures involving tibia and fibula, tear of medial as well as collateral ligaments of left knee;

- **Joyce Moraa Oyaro v Hussein Dairy Ltd [2016] eKLR** where the court awarded Kshs 1,300,000/= for cerebral concussion, blunt injuries and bruises to forehead, deep cut to upper right maxilla, cut to right aspect of zygomatic process, blunt injury to anterior aspect of chest wall, cut wound to on right breast, deep cut wound on right shoulder, comminuted fracture to right humerus, lacerations to right forearm posteriorly, deep cut wound on left leg to medial aspect, deep cut wound to posterior aspect of left leg lower 1/3, comminuted fracture on right leg that resulted in amputation, and pelvic fracture.

6. The respondent /plaintiff however points out that after he was discharged from hospital, he was followed up at orthopaedics, and a medical report of 13th April 2011 on him showed following:

- Inability to walk without crutches
- Pain in the left hip joint and leg
- Pain in the chest at times
- Incision scar (13cm) on lower posterior aspect of the forearm
- Incision scar (13cm) on left gluteal region
- Scar (4cm) lateral aspect of thigh
- Restricted movement at the left hip joint
- Extensive scar of the anterior aspect of the right thigh (the donor site for skin graft)

The respondent was in crutches for six months and has a shortened leg.

7. I agree with the appellant that the injuries in **Ram Gopal's case** were far more serious than those in the present case. That is not to say the effect of the injuries on the respondent as an individual was less or more on his life of the individual as that can never be ascertained by a court.

8. The respondent relied on the following cases:

- **James Gathirwa Ngugi v Multiple Hauliers EA Ltd & Anor HCC No 658 of 2009** where Kshs 1,500,000/= was awarded for injuries including: compound comminuted fracture of right tibia, compound comminuted fracture of right fibula. Compound fractures involve the tearing of the skin due to fracture.

9. The respondent's fractures of left tibia and left femur were comminuted, that is fragmented, whilst left fibula fracture was only linear. These are less complicated and extensive than the injuries in James Gathirwa's case, although Gathirwa did not suffer any injury to the femur (shin bone) at all. He however had injuries in the head (parietal region) and bruises and cuts on hands and face, in addition to pathological re-fracture of right leg said to be caused by disease leading to weakness of bone.

10. I consider the injuries in **Gathirwa** to be more complex especially given the fact that the doctors adjudged him to have 10-20% disability. No disability level was indicated for the respondent.

11. It is beyond argumentation that no two accidents will ever result in exactly the same injuries or the same set of injuries. Accordingly, it is the duty of the court, on the basis of its best appreciation of the various authorities cited and using its closest approximation of the compensable value of the injuries in the case before it relative to those cited in authorities, and given the passage of time, to pronounce itself on the appropriate compensation.

Disposition

12. In this case, I consider that taking everything into account, the general damages awarded to the respondent were too high and I would

reduce the same to Kshs 1,250,000/=. Deducting the 10% contribution, I therefore set aside the lower court judgment to this extent and award Kshs 1,210,000/= general damages for pain suffering and loss of amenities.

13. Costs shall be in the cause..

Orders accordingly.

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

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for the Appellant
2. Ngunjiri For Respondent
3. Court Clerk Quinter