



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.18 OF 2018**

**BETWEEN**

**WILLISENGSIUS ADONGO WAGANDA.....APPELLANT**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE.....RESPONDENT**

*(An appeal from the Judgment and decree of the Principal Magistrate's Court, Mbita*

*in*

*PMCC No.8 of 2015 delivered on the 25/04/2018 – Hon. S. Onger, PM)*

**JUDGMENT**

1. The name, **WILLISENGSIUS**, is an unusual name but it belongs to the appellant, **WILLISENGSIUS ADONGO WAGANDA**, who sued the respondent, **KENYA MEDICAL RESEARCH INSTITUTE**, in **PMCC NO.8 OF 2015** at **MBITA** for damages arising from a road accident which occurred on 12<sup>th</sup> December 2014, along Tonga-Kisaku Road involving a motor vehicle **Reg. No. KBR 663U** belonging to the respondent.

2. It was pleaded that the said motor vehicle so carelessly and dangerously driven, controlled and/or managed such that it violently hit and injured the appellant who was a pedestrian walking lawfully along the said road.

As a result, the appellant suffered loss and damages and filed this suit against the respondent.

3. The respondent denied ownership of the material vehicle and occurrence of the accident and contended that if indeed the accident occurred, then it was solely occasioned by the appellant's negligence.

At the trial, consent on liability was entered at the ratio of 70% to 30% in favour of the appellant.

Quantum of damages was the only issue left for determination by the trial court and in that regard, the trial court considered the submissions and authorities presented by each party and awarded general damages in the sum of Kshs.800,000/= less 30% contributory negligence i.e. Kshs.560,490/=.

4. The claimed special damages for future medical expenses, medical report and medical treatment were declined for want of proof.

The appellant was dissatisfied with the award and preferred the present appeal on the basis of the grounds in the memorandum of appeal dated and filed herein on 18<sup>th</sup> July 2018.

5. The appeal proceeded by way of written submissions with the firm of **H. OBACH & PARTNERS ADVOCATES**, appearing for the appellant and the firm of **PETER M. KARANJA & CO. ADVOCATES**, appearing for the respondent.

Basically, the appeal is essentially on quantum of damages for pain, suffering and loss of amenities. The appellant thus contended that the award of general damages made by the trial court was too low in the circumstances and the failure by the court to award special damages for future medical expenses was against the weight of the evidence adduced in respect thereof.

6. The duty of this court is to re-consider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence by the appellant (PW1) was re-considered alongside the necessary medical documents (**P. Exhibit 1, P. Exhibit 3 and P. Exhibit 5**).

7. In particular, the medical report (**D. Exhibit 1**) by **DR. OLIMA** dated 19<sup>th</sup> April 2016, indicated that the appellant suffered compound comminuted fractures of the 1/3<sup>rd</sup> right tibia and fracture of lower 1/3<sup>rd</sup> right fibula. In addition, he suffered soft tissues injuries to the lower back.

The injuries healed with residual permanent effects such as deformity and shortening of the limb.

8. The medical notes rather than report (P. Exhibit 5) by **DR. NEEMA MBARUK**, more or less confirmed the injury and its residual effect. He however, recommended corrective surgery to ease the pain and discomfort from the deformity. He opined that this would cost about Kshs.146, 000/= exclusive of theatre and bed charges.

9. The appellant proposed an award of Kshs.2 million general damages inclusive of future residual expenses. In doing so, he relied on decisions of the High Court in **JOSEPH MUSEE MUA –VS- JULIUS MBOGO MUGI & OTHERS (2013) e KLR, FLORENCE HARE MKAHA –VS- PWANI TAWAKAL MINI COACH & ANOTHER (2012) KLR and MICHAEL MAINA GITONGA –VS- SERAH N. NJUGUNA (2012) e KLR.**

The proposal was made under several heads which came to a sum total of Kshs.2 million.

10. The respondent proposed an award of Kshs.400,000/= general damages for pain, suffering and loss of amenities on the basis of several High Court decisions duly cited in the submissions presented at the trial.

In awarding Kshs.800, 000/= general damages, the trial court placed more reliance in the case of **JOSEPH MUSEE MUA –vs- JULIUS MBOGO MUGI** (supra) where the plaintiff was awarded to 1.3 million for injuries resulting in permanent disability of 5%. Herein, the trial court observed the degree of permanent disability was not disclosed.

11. In an appeal such as the present one, the guidance to arriving at a suitable conclusion was provided by the Court of Appeal in its decision in **KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICE –VS- L.M. LUBIA & ANOTHER (1983-88) 1 KAR 777**, where it was held:-

**“The principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that:-**

**It must be satisfied that either the judge, in assessing the damages 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”.**

12. The question here was whether the award of Kshs.800, 000/= general damages for pain, suffering and loss of amenities was in the circumstances inordinately low.

In his submission, the appellant indicated that in making the award, the trial court did not put into consideration that the injury suffered resulted in some deformity as shown in the medical report by **DR. OLIMA**. However, that was not the case as the judgment of the trial court shows that the deformity was acknowledged only that the degree of the resultant disability was not mentioned in the medical report.

13. In view of all the authorities cited by both sides in the trial, the award made by the trial court in respect of general damages was reasonable and adequate in the circumstances. It was neither too high nor too low for this court to make adjustments to it.

As for the claim of future medical expenses, this was pleaded in paragraph eight (8) of the amended plaint dated 18<sup>th</sup> May 2016 but the amount of Kshs.300, 000/= was not specifically proved as required of any special damages.

14. It was not clear on what basis the amount was claimed as the medical report by **DR. OLIMA** did not indicate that the appellant would require future treatment as the injury suffered healed, hitherto with a deformity.

The notes by **DR. MBARUK (P. Exhibit 5)** could not be given priority over the undisputed medical report by **DR. OLIMA**. In any event, the good doctor was merely expressing a non-binding opinion or suggestion.

In the absence of cogent evidence to prove the claimed future medical expenses, no damages could issue under the head.

15. In sum, this appeal is lacking in merit and is hereby dismissed with costs.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 19<sup>th</sup> day of December, 2018].**