



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 45 OF 2014

PATRICK KINYANJUI NJAMA.....APPELLANT

VERSUS

EVANS JUMA MUKWEYL.....RESPONDENT

[Being an appeal from the original judgment and decree of C. N. Mbogo, Chief Magistrate,

(as he then was) in Eldoret CMCC No. 812 of 2011 delivered on 26th March 2014]

JUDGMENT

1. This appeal revolves around *quantum of damages*. The claim in the lower court was for the tort of *negligence*. Liability was settled by *consent* in the ratio of 75% to 25% in favour of the respondent.
2. The learned trial magistrate assessed general damages for *pain and suffering* at Kshs 1,500,000; *loss of earning capacity* at Kshs 2,362,320; *future medical expenses* at Kshs 50,000; and, *special damages* at Kshs 20,385 less the *contributory negligence*. The respondent was also granted interest and costs.
3. The appellants filed a memorandum of appeal on 15th April 2014. It raises *four* grounds. They can be condensed into *three*. First, that the amount of various heads of damages was *exorbitant*; secondly, that the learned trial magistrate *disregarded* the submissions made by the appellants' counsel; and, thirdly, that the learned trial magistrate employed wrong *principles* in assessing damages.
4. At the hearing of this appeal, the appellant relied largely on written submissions filed on 17th October 2016. Learned counsel submitted that the respondent did *not* suffer permanent disability. In her view, an award of Kshs 600,000 was sufficient. She attacked the award for being so high as to disclose an *error of principle*.
5. The appeal is contested by the respondent. The respondent's submissions were filed on 3rd March 2017. They are on a three-strand. First, that the respondent suffered *multiple fractures* and extensive soft tissue injuries. They resulted in 30% disability. Secondly, the evidence on loss of earnings was unchallenged; and, thirdly, that there is no basis for the appellate court to interfere with the discretion of the learned trial magistrate. I was implored to dismiss the appeal.
6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
7. As a general rule, an appellate court will not interfere unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
8. The respondent (PW1) was driving from Mombasa when the accident occurred. He was treated at Molo and Kijabe hospitals. At the time of his trial, the injuries had not healed. He produced the discharge summaries. He suffered a fracture on the left leg; and, three other fractures on the right leg. A metal plate was fixed on the right leg. He was using crutches for mobility. He testified that the safety belt caused damage to his urethra and pelvic region. He underwent an operation. He was on a catheter for three months. He testified that he required a further operation at Kijabe hospital. The cost would be Kshs 50,000. The further surgery was slated for 19th September 2012. He said his libido was negatively affected.
9. When cross examined, he conceded that the P3 form did not record the fractures; but the treatment notes from Kijabe Hospital particularized the injuries. The notes did not indicate injury to the pelvic region or hips. The medical chits revealed only two fractures on the

right leg. The medical report produced in evidence did not also show injury to the pelvic area.

10. From the medical report by Dr Charles Andai dated 21st September 2011, the respondent suffered “*serious soft tissue and skeletal injuries*”. They included: segmental fracture of the right femur mid shaft; segmental fracture of the right tibia shaft (open); fracture of the right fibula; and, fracture of the left 3rd metatarsal bone. Recovery was expected in *one and a half years*. There was need for further surgery estimated at Kshs 50,000 to remove the metal plates. The doctor assessed disability at 30%.

11. It is instructive that the appellants sent the respondent for a second medical opinion by Dr. N. O. Ongera (plaintiff’s exhibit 15). The report is dated 12th March 2013. He confirmed that the plaintiff was still on crutches for ambulation of the right leg; and, that there was an external fixator device. *Further surgery* was required to remove the *fixator*. He concluded as follows:

“*He has healed well on his wrist and left foot; right femur also healing well and expected to have full function. His right leg still poses a challenge....many people with such injury end up inevitably with amputation. His leg has been saved by use of external fixator and bone transplant procedure.*”

12. The respondent was a driver for *Multiple Hauliers Company*. He was earning Kshs 19, 686 per month. He was 35 years at the time of the accident. He said he would also earn a sum of Kshs 8,000 in allowances to Kampala; and, some night out allowances. He would also be paid Kshs 4,000 on return from Kampala with a load; and, further bonuses of Kshs 2,500. He produced pay slips [exhibit 12 (a) to (d) and 13]. He said that after the accident, he could no longer work as a driver.

13. On cross examination, he said he had worked for nine years. The allowances and bonuses were paid in cash. He did not have documentary evidence to support the payments. He said he would have worked until the ripe age of 70 years.

14. Regarding special damages, the respondent produced a bundle of payment receipts for medical expenses [exhibit 9 (a) to (e)]; receipt of Kshs 4,000 for the medical report by Dr Andai [exhibit 10 (b)]; and, a receipt of Kshs 3,000 paid to counsel for the demand letter [exhibit 11 (b)].

15. The appellant closed his case *without* calling any witness. The only evidence was the second medical opinion by Dr. N. O. Ongera (plaintiff’s exhibit 15). I thus find that the evidence of the plaintiff was largely *uncontroverted*. In particular, there was no challenge regarding his employment, age, or salary. I note however that there was *no* documentary evidence to prove the bonuses and allowances claimed by the respondent.

16. From the original medical report, it is clear that the respondent suffered: segmental fracture of the right femur mid shaft; segmental fracture of the right tibia shaft (open); fracture of the right fibula; and, fracture of the left 3rd metatarsal bone. Recovery was expected in one and a half years. There was need for further surgery estimated at Kshs 50,000 to remove the metal plates. The doctor assessed disability at 30%.

17. The second medical opinion largely corroborated those findings. Dr. Ongera found the respondent on crutches for ambulation of the right leg with external fixator device. *Further surgery* was required to remove the *fixator*. Except for the right leg, the respondent was healing well. He concluded that the “*right leg still poses a challenge....many people with such injury end up inevitably with amputation. His leg has been saved by use of external fixator and bone transplant procedure.*”

18. Granted the severe injuries, I am hard pressed to say that the award of Kshs 1,500,000 for *pain and suffering* was exorbitant; or, that it was founded on *wrong principles*. I have perused some precedents for similar injuries. In *Joseph Mwanza v Eldoret Express*, Kisumu High Court, Civil Case 160 of 2004 (unreported) the court awarded Kshs 1,200,000 in damages. It is noteworthy that the plaintiff in that case suffered *40% disability*. In *Zachary Kariithi v Jashon Ochola*, Kisumu High Court, Civil Appeal 153 of 2012 [2016] eKLR, the plaintiff had compound fractures to the right tibia/fibula; and, femur bone mid shaft. There were fractures to the right femur bone; 3rd, 4th, 5th ribs and multiple soft tissue injuries. An award of Kshs 1,500,000 was upheld. I thus *decline* to disturb the award of damages for *pain and suffering*.

19. Regarding the *loss of earnings*, the evidence of the respondent was *uncontroverted*. The respondent was a driver for *Multiple Hauliers Company*. He was earning Kshs 19, 686 per month. He produced pay slips [exhibit 12 (a) to (d) and 13]. He said that after the accident, he could no longer work as a driver. Although the second medical report said he was healing well; and, the original report stated he would require *one and half years* to heal, there was doubt he would ever resume full duties as a driver. I remain alive that he can learn a new trade.

20. There was *no* proof of the cash bonuses or allowances. The respondent was aged 35. I thus find that the multiplier of 10 years applied by the trial court was reasonable. I have also studied page 64 of the record of appeal. The respondent’s submissions in the lower court were as follows: that the lower court should adopt the basic salary of *Kshs 19,686* up to the age of *50 years*. That would have been a period of *15 years*. The learned trial magistrate applied the lower threshold of *10 years*. I thus find it self-serving for the respondent to resile from its earlier position; and, to now ask the appellate court to adopt a multiplier of 2 years.

21. From what I have said, it is *not* true that the respondent’s submissions were *completely* disregarded. Final *submissions* are only for the *guidance* of the court: they are *unlike* pleadings. There is *no* requirement that each and every submission or authority tendered be revisited by the trial court in its judgment. See *Joshua Shitawa v Kishan Builders Limited*, High Court, Eldoret, Civil Appeal 32 of 2012 [2015] eKLR.

22. The arithmetic by the learned trial magistrate was as follows: the proved salary of Kshs 19,686 x 12 x 10 =2,362,320. The learned trial magistrate said he would take into account the lump sum payment. He however failed to *discount* the amount which was being received as a lump sum. To take care of the accelerated payment, I will round off the figure to Kshs 2,000,000.

23. I now turn to future medical expenses. Both doctors concurred that the respondent required *further surgery* to remove the *fixator*. Dr.

Andai put the cost at Kshs 50,000. A claim for future medical expenses is in the nature of *special damages*; and, must be specifically pleaded. I am satisfied that at paragraph 5 of the amended plaint, the sum of Kshs 50,000 was *pleaded*. In view of the report by Dr. Andai, I find that the award of Kshs 50,000 was *proved*.

24. The remainder of special damages of Kshs 20,385 was particularized at paragraph 3 of the amended plaint. However, the respondent only *strictly* proved the following: Kshs 4,000 for the medical report; Kshs 3,000 for the pre-suit demand letter; and, Kshs 3,785 as treatment expenses. The total is Kshs 10,785. The *cost* of obtaining the police abstract, P3 form and motor vehicle search were *not* proved. The learned trial magistrate erred by awarding Kshs 20,385 as special damages merely because the same were pleaded in the plaint.

25. In the result, the appeal succeeds only in *part*. Judgment is now entered in favour of the respondent against the appellant as follows-

- i. General damages for pain and suffering.....Kshs 1,500,000.
 - ii. Loss of earnings.....Kshs 2,000,000.
 - iii. Future medical expenses.....Kshs 50,000.
 - iv. Special damages..... Kshs 10,785.
- Subtotal.....Kshs 3,560,785.*
- Less 25% liability.....Kshs 890,196.25*
- Net award.....Kshs 2,670,588.75*

26. The upshot is that the appellant shall pay the respondent the sum of Kshs 2,670,588.75. I also award the *respondent* interest and costs in the *lower court*. I order that each party shall bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 29th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Nyachiro for the appellant instructed by Nyachiro Nyagaka & Company Advocates.

Mr. Omondi for Mr. Abok for the respondent instructed by Abok Odhiambo & Company Advocates.

Mr. J. Kemboi, Court Clerk.