



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 136 OF 2014

ERIC OTIENO AYIEKOAPPELLANT

VERSUS

MICHEAL NGONDO.....RESPONDENT

[An appeal from the judgment of the Resident Magistrate in Winam PMCCC No. 100 of 2013

Delivered on the 27th November, 2014]

JUDGMENT

On 25th March 2013 the Appellant was involved in a motor accident and sustained the following injuries

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1. Displaced fracture of the left leg femur bone midshaft
2. Deep cut on the left leg heel
3. Pain and swelling on the left thigh
4. Wounds on the left ankle
5. Tenderness on the chest.

He sued the Respondent for damages. A consent on liability was recorded in the ratio 70%:30% against the Respondent. He was subsequently awarded general damages in the sum of 200,000/=. He has appealed against that award on the ground that it is inordinately low and not commensurate with the injuries. Mr. Okoth, his Learned Counsel has submitted that the trial magistrate did not consider the appellant's oral testimony nor analyze the medical evidence tendered; That he did not also consider cases where the Plaintiffs sustained similar injuries. He urged this Court to set aside the award in the lower court and replace it with an award of Kshs.600,000/=. He cited 2 cases -

1. Fakir Mohammed V. Joseph Mugambi & 2 others [2010]eKLR

2. Phillip Kipkemoi Ngeno V. Modern Construction Builders & Contactors Limited [2004]eKLR.

He also prayed for the costs of the appeal.

Mr. Kimanga, Learned Counsel for the Respondent, opposed the appeal and submitted that at the trial the

appellant testified that the fracture had fully healed and only the chest pain remained; That this was also confirmed by the Doctor who produced the medical report and that therefore the trial court had taken everything needed to be considered into account. He urged this Court to be guided by the principles that should guide an appellate court as set out in **Selle V. Associated Motor Boat Company [1968] EA 123 and Nkube V. Nyamiro [1983] KLR 403**. He cited two authorities where plaintiffs with similar injuries got lower awards.

1. Peter Kanithi Kimunya V. Aden Guyo Haro [2014]eKLR

2. John Mwangi Gatei & 2 others V. Godfrey Mwangi Mwaniki [2015]eKLR.

This being an appeal against the quantum of damages I am mindful of the principle in **Butt V. Khan [1981]KLR 349** that -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately too high or low.”

I have subjected this appeal to the principle set out above. The accident occurred on 25th March 2013. The injuries sustained by the Appellant are not disputed and it is correct that it was his evidence that he had fully recovered and gone back to his work as a boda boda despite Dr. Onyimbi's prognosis that the injuries had affected his optimal physical fitness and gainful productivity and would do so for two to three years.

In the judgment the trial magistrate stated that he had duly considered the injuries as well as the authorities cited by Counsel. Those same authorities have been cited before me. The plaintiffs in the two authorities cited by Counsel for the Appellant sustained almost similar injuries to his – fracture of the femur and other soft injuries and were fully healed. In both cases the plaintiffs were awarded Kshs.600,000/=. In **Peter Kanithi Kimunya V. Aden Guyo Haro** (Suppra) cited by Counsel for the Respondent though the injuries were similar the suit was dismissed and the award of 180,000/- is but what the Court would have awarded in 2008. In the **Mwangi Gatei** case the injuries were less serious than those of the plaintiff in the instant case and if the trial magistrate took into consideration those cases then he clearly did not take inflation into account. Comparable injuries should be compensated with comparable awards – see **Fakir Mohammed V. Joseph Mugambi Kiara & 2 Others** (Suppra) and **Ali V. Muhozozo [1983]KLR 602** where the Court of Appeal held -

“It is an error in principle in determining the appropriate award of general damages, if the court's decision does not take into account awards for similar injuries in previous cases and the effect of inflation.”

The award of damages in this case is inordinately inadequate as the trial magistrate failed to take into account awards for similar injuries as well as inflation. The appeal is allowed and the award of Kshs.200,000/= increased to Kshs.600,000/=. The special damages of Kshs.25,235/= awarded by the lower court shall remain undisturbed and so shall the consent on liability hence judgment for the appellant shall be for Kshs.437,664.50/= which shall attract interest at court rates from the date of judgment in the court below. He shall also get the costs of this appeal. It is so ordered.

Signed, dated and delivered at Kisumu this 3rd day of August 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Mireme for the Appellant

N/A for the Respondent

Evon – Court Assistant