



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 9 OF 2015**

**JUMA SALIM MWAMANENO.....APPELLANT**

**VERSUS**

**JOSHUA NDIRANGU KIBOI.....RESPONDENT**

**J U D G M E N T**

1. On 7/01/2015, the trial court, Hon. P.K. Mutai, RM, in Kwale SRMCC No. 186 of 2013 entered Judgment for the Appellant against the Respondent in which the Respondent was held liable at 80% and an award made of Kshs.120,000/= for general damages and Kshs.900/= special damages.

2. The appeal is premised on the complaint that the trial court error in failing to consider and take into account the submissions on quantum when there was no rebuttal by the Respondent and choosing to rely on own authority thereby descending into the arena of conflict that the trial court placed over reliance on failure to produce a medical report yet there it was produced and exhibited to Court P3 from and treatment notes and lastly that the award was too low regard being had to the extent of the injury pleaded hence a manifestation of error in application of relevant principles.

3. According to the plaint and the evidence led at trial, the plaintiff suffered compound fracture of the right tibia and fibula. According to the evidence of the Appellant, he was yet to recover as at the date of giving evidence and complained of continued pains. Beyond the oral evidence by the plaintiff there was never any other evidence on the residual effect of the injuries upon the plaintiff.

**Analysis and determination**

4. The submissions filed by the appellant seem to challenge the findings of the trial court on both liability and quantum of damages assessed. However, this is clearly a departure from the Memorandum of Appeal which is unequivocal that the appeal is against the judgment on quantum of damages only. Even the 5 grounds set out clearly a challenge on the assessed damages and not on finding on liability. Even at this level, it is enough to say that the appellant is bound by his pleadings in the Memorandum of Appeal hence I will not venture to address the complaint about the finding on liability. I will treat the appeal for what it is, limited to the question of assessment of damages payable.

5. This being a first appeal, the mandate of this court is now well settled. It is to review and reassess the entire evidence and come to own conclusions. In other words, the court proceeds by way of a retrial. Even then the court must appreciate two things; that the task of assessing of damages is indeed a difficult one<sup>[1]</sup> and largely discretionary and that the court lacks the benefits enjoyed by the trial court of hearing the witnesses and observing them as they testified.<sup>[2]</sup>

6. In determining a first appeal the court takes the caution not to slightly interfere with the decision of the trial court and can only interfere where it be demonstrated that in coming to the decision it did the trial court acted on wrong principles of law took into account some irrelevant fact or ignored to take into account relevant matters or that the award so reached was so low or so high as to make it an entirely erroneous estimate of damages the plaintiff was entitled to. See ***Ken Odondi & 2 Others vs James Akoth Ombura [2013] eKLR and Kemfro Africa Ltd vs Amm Lubia & Another [1982 – 88] 1KLR 777.***

7. For the instant appeal, the court has to look at the appellants complaints and be convinced or persuaded that as crafted the same disclose reliance on wrong principles of law or that the award is so low as to be capable of description as a deprivation. That task can only be undertaken by scrutiny of the impugned judgment. The trial court in coming to its assessment said;

**“I have considered submissions by the Plaintiff relied on the**

**case of Soven Peterson & Anor vs Charles Muhavi Isinga CA No. 149 of 2003 ELDORET. In this case the Plaintiff sustained a compound fractures of the left tibia and fibula and multiple soft tissue injuries. Permanent incapacity was assessed at 8%. The Plaintiff was awarded Kshs.400,000. The Plaintiff did not however produce medical report.**

**I have considered on my own the case of Raphael Mutuku vs Samuel Ngare Nairobi HCCC No. 116 of 1990. In this case the Plaintiff sustained a fracture on although more extensive. Doing the best I can and taking into consideration injuries sustained, I award the Plaintiff Kshs.120,000 as general damages on 100% liability”.**

8. One of the principles of assessment of damages is that comparable injuries should attract comparable damages. That to this court is the very foundation of the age-old importance of *‘stare decicis’*. It is clear to me upon reading that Judgment that the trial court was not only led by the Appellant to a decided case on comparative injuries but also of own research read another. In both cases the claimants suffered injuries to the tibia and fibula but the Eldoret case was of more severe injuries compared to the instant case. However, the extent severity was limited to soft tissue injuries only save that the residue incapability was assessed at 8%. In it, the court awarded Kshs.400,000/= in 2008.

9. The case researched by the trial court itself was however fairly comparable to the injuries in this appeal and in a judgment dated 1998 the court awarded Kshs.185,000.00. The court having had the benefit of those decisions as a guide, and the decision being clearly binding on him and having found that the injuries on the matter before him were more severe, it was an error for the trial court to have awarded a sum lower than that awarded more than 18 years earlier.

10. Granted that assessment of damages is indeed a difficult task and largely discretionary, were guidelines are given to a court or otherwise brought to its attention, the court is bound to give a valid reason for departure from such guidelines. I hold that the trial court had a duty to consider the ages of the case he was referred to and that he came by out of own industry and try, as much as possible, to give an award comparable to those in the decided case. That task the trial court clearly failed to undertake.

11. Additionally, in this appeal the treatment notes reveal that the plaintiff’s fractures having been reduced by *Plaster of Paris* (POP) on the 12/5/2013, the plaster remained in situ well after 28/8/2013. It is therefore correct to conclude that the Appellants was with the POP for a period in excess of 3 months unlike the case of Raphaniel Mutuku (supra) where the POP was applied for only 4 weeks. The length of period the plaintiffs remained under POP must be taken to the period it took him to heal and therefore the period his pains and suffering persisted. That was another fact the court had a duty to consider but which it went silent about.

12. General damages for pains and suffering are awarded to compensate the plaintiff for the pains suffering and inconveniences to his life he underwent due to the tort of the defendant hence the length of suffering is always a relevant factor.

It would appear that the trial court did not consider this as important for which reason he clearly erred. As a result this court finds that the award made by the trial court was inordinately too low as to amount to an outright erroneous estimate of damages payable a fact occasioned by failure to consider relevant factors and has in effect occasioned an injustice. In the words of the learned author and editor of Halsbury Laws of England, 4<sup>th</sup> Edition Vol. 12 page 446

**“Damages for pains and suffering and loss of amenities constitute a conventional sum which is taken to be the sum which the society deems fair, fairness being interpreted by courts in the light of previous decisions”.**

13. In Kenya, Madan JA, in *Ugenya Bus Services vs James Kongo Gachohi* CACA 66 OF 1981 underscored the need to be reason in making awards and take into account the effect of inflation in erosion of value of money and the fact that the days of small and stingy awards are long gone. The Judge said:

**“I also know that the days of small and stingy awards are long gone..... even without the curse of inflation they were niggardly.**

**I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which the inflation has brought into one lives”.**

14. In the instant matter a sum that was reasonable compensation in the 1990s did not remain reasonable in 2015. For those reasons I consider the award made by the trial was too low and invite interference.

15. Being so guided by the need to make a compensatory award and having read the entire record, while overly aware that I ought not so slightly and freely interfere with the trial court decision and noting that I have the mandate to come to my own assessment having considered the entire material before me, I have come to the finding that a sum of Kshs.350,000/= for general damages would be a fair and a reasonable award for the plaintiffs pains and suffering out of the injuries sustained.

16. Accordingly, the judgment of the trial court awarding to the Appellant the sum of Kshs.120,000/= is set aside and on its place substituted with a judgment of Kshs.350,000/= being general damages for pains and suffering. That sum shall attract interest from the date of the judgment of trial court till payment in full.

17. There is a complaint captured by the appellant at ground 2 of the Memorandum of Appeal essentially castigating the trial court for failure to consider decisions cited by the appellant and opting to use on researched decision. That complaint, in all fairness, cannot be honest. Even the excerpts, I have quoted from the Judgment show that the trial court read and gave consideration to the decision cited to it. Secondly, a Court of Law is not confined to base its decision upon only the law cited to it by the parties. A court of law is deemed to know the law and even where parties cite no law or decision, it has a duty to decide the matter in accordance with law and cannot be constricted in knowing and finding out where the law and justice of the case lies. In a recent decision by the Court of Appeal in *Kwanza Estates Ltd -vs- Dubai Bank Ltd [2016] eKLR*, the Court of Appeal made itself very clear on this point and said:-

**“A Judge in determining a dispute is not restricted only to the provisions of law cited by a party”.**

18. This ground of appeal, I have said, was unfair to the judicial officer but I now add, it was misconceived and utterly unnecessary.

19. I also award to the Appellant the costs of this Appeal.

Dated at Mombasa this 16<sup>th</sup> day of November 2017.

**P.J.O. OTIENO**

**JUDGE**

**Read and delivered at Mombasa this 24<sup>th</sup> day of November 2017.**

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**JUDGE**

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**[\[1\]](#) H West & Sons vs Shepherd [1964] AC 364**

**[\[2\]](#) Ugenya Bus Service vs Gichui [1976 – 1985] EA 575**