

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 527 OF 2014

DAVID KARIUKI1ST APPELLANT

BUDGET PAYLESS CAR HIRE & TOURS 2ND APPELLANT

VERSUS

JOSHUA WAMBUA MUTHAMA RESPONDENT

(Being an appeal from the judgment on quantum of the Chief Magistrate's Court at Milimani Civil Case No. 5470 of 2011 delivered on 5/12/2013)

JUDGMENT

This appeal addresses the issue of quantum, liability having been settled by consent at 75% against the appellants and 25% contributory negligence on the part of the respondent. Both parties have filed submissions which I have on record.

The respondent in the amended plaint pleaded that he suffered fracture of the left tibia and fibula and a deep abrasion of the right thigh. The lower court awarded Kshs. 1,100,000/= general damages for the injuries sustained by the respondent.

The appellants were aggrieved by the said award and lodged this appeal. In the memorandum of appeal filed herein the appellants faulted the lower court in awarding excessive general damages, disregarding the submissions made and also that the law relating to award of general damages was not followed. The lower court was also faulted for relying totally on the submissions of the respondent to write the judgment rather than the evidence presented.

There are two medical reports by Dr. Wokabi dated 25th September, 2011 and 6th November, 2012 respectively and one by Dr. R.P. Shah dated 25th January, 2013. The respondent had attained full recovery by August 2012. Comparable injuries should ordinarily attract comparable awards. The appellant cited the case of **Florence Njoki Mwangi Vs. Peter Chege Mbitiru (2014) eKLR**. The appellant sustained fracture of the right mid shaft femur, fracture of mid left femur where an award of Kshs. 700,000/= was made for those injuries.

In the present case however the injuries related to fracture of the left tibia and fibula. The respondent cited the case of **Charles Mwanja and another Vs. Batty Hassan (2008) e KLR** where an award of Kshs. 800,000/= was made for fractures of tibia and fibula. The medical reports of Dr. Wokabi cited above portray the respondent as having gone through several rehabilitative procedures to address his injuries. He must have suffered a lot of pain and there is no evidence that the recommended surgery in the first report was ever undertaken.

Dr. R.P. Shah on the other hand in his report dated 25th January, 2013 observed that the respondent had attained full recovery and his permanent disability does not exceed 5%. There was no stiffness of any joint or significant deformity.

The appellate court may interfere with the award of the lower court if it is shown that it was too high or

too low so as to give an erroneous estimate, or that the court took into account irrelevant matters and failed to take into account the relevant ones. Further, interference may be made to address an award which was erroneous, outrageous or clearly wrong. – see **Kemfro Africa Limited Vs. A.M. Lubia & Another (1982- 88) 1KLR 727.**

I have taken into account the submissions of counsel, cited authorities and the medical reports presented in evidence. I am persuaded that the award made by the lower court was inordinately high so as to reflect an erroneous estimate in the circumstances of this case. It was not within the limits reflected in decided cases of comparable injuries.

Accordingly, there is reason to interfere with the same which I hereby do by reducing the award of general damages from 1,100,000/= to Kshs. 800,000/= which shall be subjected to 25% contributory negligence leaving a balance of Kshs. 600,000/=. To that extent only, this appeal succeeds. The respondent shall be entitled to costs and interest at court rates based on the said figure from the date of the judgment of the lower court.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th Day of November, 2017

A. MBOGHOLI MSAGHA

JUDGE