



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 18 OF 2016

Arising from the judgment of Hon D Ocharo (SRM) delivered on 18.2.2015

(CORAM: GIKONYO J.)

DAVID KIMATHI KABURU..... APPELLANT

-Versus-

DIONISIUS MBURUGU ITIRAI..... RERSPONDENT

JUDGMENT.

Aggrieved by decision

[1] By a judgment delivered on 18th February 2015 by Hon D Ocharo (SRM), the Respondent was awarded a sum of Kshs 630,000 being General Damages for pain and suffering and loss of amenities for injuries sustained in a road traffic accident which occurred on 6th January 2011. The Appellant was aggrieved by the said judgment and he filed this appeal raising the following grounds in the Memorandum of Appeal filed in court on 6th May 2015:-

- a. The Learned Magistrate erred in fact and in law in finding that the Respondent was entitled to General Damages amounting to Kshs 630,000 which amount was inordinately high considering the injuries he suffered.***
- b. The Learned Magistrate erred in law in failing to consider the Appellants submissions on quantum and the authorities cited in support of the case thereof.***
- c. The Learned Magistrate erred in disregarding the medical evidence produced by both Appellant and Respondent as regards the injuries suffered and in so doing made wrong assessment and subsequently an inordinately high award.***
- d. The Learned Magistrate erred in law in failing to consider conventional awards made in cases where claimants suffer injuries of similar nature.***

[2] When the appeal came up for hearing on 24th April 2017, the court, with the consent of the parties, directed that the Appeal shall be disposed of by way of written submissions. Parties filed submissions which shall be accordingly evaluated.

Submissions by the Appellant

[3] It was submitted for the Appellant that the Respondent sustained dislocation of the right hip joint and fracture of the right femur bone. These injuries were confirmed by the doctors who examine the Respondent. But, the Learned Trial Magistrate based his finding and award on general damages on misapprehension of the facts and the evidence on the injuries sustained by the Respondent. In addition, the trial magistrate totally disregarded the Appellant's submissions and authorities on quantum and acted on wrong principles in reaching his conclusion. Therefore, the award of general damages of Kshs 630,000 was based on a misconception of evidence.

Respondent's submissions

[4] The Respondent submitted that the Appellant had failed to establish how the award of Kshs 630,000 as general damages was inordinately high or excessive bearing in mind that the Respondent suffered fragmental fracture of midshaft right femur and intertrochanteric fracture femur as per the medical report by Dr. Mutuku Catherine Mwendu. According to the Respondent, the Appellant's allegation that the Respondent suffered only one fracture is not factual. To the Respondent, the trial magistrate exercised his discretion judiciously in making an award of Kshs 630,000 and that the Appellant had not laid any basis for this court to interfere with that discretion. The Respondent further submitted that the trial court neither awarded a wrong sum nor proceeded on a wrong principle as it took into consideration the nature of the injuries that the Respondent suffered and the ramifications of those injuries to the well being of the Respondent.

DETERMINATION

Court's statutory duty

[5] This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses when they testified. See **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123** and **KIRUGA V KIRUGA & ANOTHER [1988] KLR 348**.

The legal test

[6] This Appeal is only on quantum of damages, liability having been agreed on the ratio of 90:10 in favour of the Respondent. As a matter of law, assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

"...the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 high that it must be wholly erroneous estimate of the damages".

See also the case of **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1** where it was stated that:-

"a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle" - see EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278.

I will apply the foregoing test on the facts of the case.

Evaluation of evidence

[7] Only the Respondent gave oral testimony. Documentary evidence was also produced. According to a medical report by Dr. Mutuku who examined the Respondent, the Respondent suffered fragmental fracture midshaft femur and intertrochanteric fracture femur. He was currently said to be in a fair general condition and able to walk without support except he had a wobbly gait with a limp on the right lower limb and complained of severe pain on the right hip joint and entire limb mostly in the morning or when it was cold and upon walking for long distance. The medical report by Dr. Sophia Opiyo stated that the Respondent suffered plated fracture mid shaft femur and intertrochanteric fracture with fixation screws. These are the injuries sustained by the Respondent.

The award

[8] Both medical reports by Dr. Mwendu and Dr. Sophia were in agreement that the Respondent suffered fragmental fracture mid shaft femur and intertrochanteric fracture. I am aware on **the case of ALEX NJAGI -VS- KENYA BUS SERVICES LIMITED NBI HCCC. NO. 2614/88** general damages of Ksh. 200,000/= were awarded for a fracture of the right femur, multiple lacerations and severe pain in the chest. In **KASANGA MUSUMBA -VS- ARUS LUTTUNYO – MOMBASA HCCC. NO. 259 OF 1994**, the Court awarded general damages of Kshs. 120,000/= for a fracture of the shaft of the femur. I am alive to the fact that these are fairly old authorities. **In a more recent case namely; ELDORET STEEL MILLS LIMITED VS ELPHAS VICTOR ESIPLIA ELDORET CIVIL APPEAL NO. 72 OF 2006**, Ngenye J awarded the Respondent Kshs 300,000 as general damages for pain and suffering where he had sustained sub-trochanteric fracture of the right femur and fracture of the metal-tarsal bones of the right foot. The said decision was delivered in the year 2013. But, it should be noted that Dr. Mutuku who examined the Respondent stated that although the Respondent is currently in a fair general condition and able to walk without support, he has a wobbly gait with a limp on the right lower limb and complained of severe pain on the right hip joint and entire limb mostly in the morning or when it was cold and upon walking long distance. I must remind myself that there is no one case which is exactly like the other and each case should be decided on its own merits. The post-traumatic consequences on the Respondent are severe and will have a bearing on the amount of damages. Therefore, taking into account the totality of all the circumstances in this case and in light of the injuries sustained by the Respondent, I find the sum of Kshs 630,000 awarded by the trial magistrate as General Damages for pain and suffering to be reasonable and fair estimation of damages. The trial magistrate correctly exercised his discretion in the assessment of damages; the award was not excessive; was not based on wrong principle; did not take into account irrelevant factor; did not leave out of account any relevant factor; and was not inordinately low or high as to be wholly erroneous estimation of damages. Accordingly, I uphold the decision of trial court as is and dismiss this appeal with costs to the Respondents. It is so ordered.

Dated, signed and delivered in open court at Meru this 15th day of November, 2017

F. GIKONYO

JUDGE

In the presence of:

Mr.Mwirigi Advocate for Respondent

Kairu & McCourt for Appellant – absent

F. GIKONYO

JUDGE