



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 98 OF 2013**

**GILBERT KIRIAGO OTWORI..... APPELLANT**

**VERSUS**

**RICHARD METET.....RESPONDENT**

*(Being an appeal arising from the Judgment/Decree and Orders of Hon. J.K. Komingoi, Senior Principal Magistrate*

*delivered on 23<sup>rd</sup> May 2013, in Nakuru CMCC no. 1190 of 2010)*

**JUDGMENT**

1. The appellant was the plaintiff in the trial court suit SPMCC No. 1190 of 2010 Nakuru. He sued the Respondent as owner of motor vehicle registration Number KAM 386D which knocked him down within Nakuru town on the 26<sup>th</sup> July 2010 and sought general and special damages arising out of negligence of the driver. He sustained multiple injuries.

At the hearing of the case, a consent judgment on liability was recorded whereof liability was apportioned at 80:20 in favour of the appellant. The trial court was to assess damages that it did and award the appellant a sum of Kshs.350,000/= for pain and suffering. The appellant was not satisfied with the said award thus preferred this appeal.

2. The only ground of appeal is that the learned Trial Magistrate erred in law and fact in awarding general damages that were inordinately low in total disregard of the severe injuries the appellant suffered in the accident. He seeks review of the award of damages upwards.

3. It is trite that an appellate court will not disturb an award of damages by a trial court unless it is demonstrated that in arriving at the said award, the court failed to take into account a relevant factor or took into account an irrelevant one, or that the award is so low or so high that it represents a wholly erroneous estimate of damages – **See Kemfro Africa t/a Meru Express & Another -vs- A.M. Lubia & Another (1982-88) I KAR 727.**

An appellate court is mandated while faced with an appeal to re-evaluate and reconsider evidence tendered before it and come up with its own findings and conclusion. This was held in the case **Selle -vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123.**

4. I have looked at the Appellants injuries stated in the plaint dated 11<sup>th</sup> October 2010 and the medical records tendered as exhibit. I have seen the Discharge Summary (PEX1) dated 10<sup>th</sup> August 2010 from the Nakuru Provincial Hospital, and another from AIC Kijabe Hospital dated 23<sup>rd</sup> October 2010, and medical

reports dated 18<sup>th</sup> April 2011 prepared by Dr. Welington K. Kiamba. He stated that he perused the two discharge summaries above that assisted him in the preparation of the medical report.

A further medical report dated 6<sup>th</sup> July 2011 was prepared by Dr. M.S. Malik.

According to **Dr. Kiamba's medical report**, the appellant sustained the following injuries:

- ***multiple fractures of the right tibia***
- ***injury to the ligaments of the left knee joint***    ***Perineal tear***
- ***Multiple lacerations on the right forearm***
- ***Multiple bruises on the left leg.***

It is further stated that he was hospitalised at Nakuru Hospital from 26<sup>th</sup> July 2010 to 10<sup>th</sup> August 2010. Surgical toilet was done and wounds sutured plaster of paris cast applied on the right lower limb, and put on antibiotics. He was also admitted at AIC Kijabe Hospital from the 18<sup>th</sup> August 2010 to 23<sup>rd</sup> August 2010 where open reduction and internal fixation were done. At a date of examination, the appellant had a swelling of the right leg knee joint and could not walk without a walking stick, pain in the left knee joint and perineum. It was stated that function of the right lower limb was reduced and X-rays showed displaced multiple fractures of the right tibia in the lower and upper one third. He had a nail inserted.

Dr. Kiamba assessed degree of permanent incapacitation at 20%.

**Dr. M.S. Malik** in his report stated injuries as follows:

- ***Laceration on the right arm***
- ***A cut in the left thigh and perianal area***
- ***Severe pain in the left knee***
- ***abrasions on the left lower leg***
- ***Severe pain in the right lower leg.***

It is stated that the appellant was admitted in the two hospitals Nakuru Provincial Hospital and AIC Kijabe hospital, right leg was immobilised in a leg plastercast, right *tibia* fracture was fixed internally with a sign nail that he recovered well from the operation and mobilised on crutches that he used upto to April 2011. Dr. Malik assessed permanent incapacitation to Nil and temporary incapacitation of a temporary nature for a further period of one month.

5. Based on the above injuries and authorities cited by the parties, the trial court awarded a sum of Kshs.350,000/= damages for pain and suffering.

In the trial court the appellant proposed a sum pf Kshs.1,200,000/= relying on only one authority **Fatuma Abdalla-vs- Tusks Restaurant Ltd & Another Civil Case No. 1727 of 1999** – where general damages of Kshs.600,000/= was awarded on the 18<sup>th</sup> January 2000.

I have looked at the injuries of the plaintiff in the above cases. They are stated as:

- ***Multiple bruises and lacerations to the face***
- ***Segment fracture of the right superior public ramus***
- ***Multiple bruises to the left thigh***
- ***Laceration anterior aspect of the calf on the right leg.***
- ***Operation on the fractured tibia***
- ***Used crutches for 3 months***
- ***Recovered after 4-5months.***

6. The Respondent on its part had suggested General damages in the sum of Kshs.130,000/= and relied on the case **Ruth Kadide Mwakuwanda -vs- Danida/Piv Project And Another Hccc No. 64 of 1993**

**Mombasa.** A digest of the case was provided that showed a comminuted fracture of the lower right *tibia*, hospitalization for 16 days and discharged on crutches. A sum of Kshs.130,000/= was awarded in 1994.

7. In his judgment, the trial magistrate as I can discern considered the two medical reports and the authorities presented to him and upon evaluation he awarded damages in the sum of Kshs.350,000/= for pain and suffering and loss of amenities and special damages of Kshs.236,878/55 less 20% contribution.

8. For the appellant to succeed in the appeal, he has to satisfy the court that:

**1. That the trial court in assessing the damages failed to take into account some relevant factor or took into account an irrelevant factor or that**

**2. The award is so low as to present a wholly erroneous estimate of damages -See Kemfro Africa case above.**

In an attempt to meet the above criteria, the appellant in his submission states that the trial Magistrate failed to take into account the gravity of the injuries and the degree of permanent incapacitation at 20%. Three authorities were cited to support the above.

In **Samuel Muthama -vs- Kenneth Maundu Muindi (2009) e KLR** injuries sustained were less severe and a sum of Kshs.380,000/=: while in **Charles Mwanja and Another -vs- Safina Alysingila (2008) e KLR C.A No. 106 of 2003**, the court upheld an award of Kshs.800,000/= for injuries – bruises on forehead, wound on right thumb and left wrist joint, and second finger, fracture of right *tibia* and *fibula* with a wound on the right knee. This was in May 2008.

He urged the court to set aside the award of Kshs.350,000/= and enhance it to Kshs.1,200,000/=.

9. The Respondent opposed the appeal and submitted that the trial court rightly awarded the damages after considering decisions tendered before it. It was his submission that the only authority tendered by the appellant general damages were awarded at Kshs.350,000/= and therefore the court using the same authority awarded the appellant the same.

He cited **Mumias Sugar Co. Ltd -vs- Henry Khatolwa Amukoja (2015) e KLR** where Sitati J upheld the trial courts award of Kshs.350,000/= for similar injuries.

10. I have considered the rival submissions by both counsel.

Monetary compensation cannot review a physical frame that has been shattered. All that judges and Courts can do is to award sums which must be regarded as giving reasonable compensation with some uniformity in the general method of approach, with comparable injuries compensated with comparable awards. The above is quoted from a speech of **Lord Morris of Borth-y-Gest** in the case of **West (H) & Sons Ltd -vs- Shepherd (1964) Ac 326** and quoted in the case **Cicilia Mwangi & Another -vs- Ruth Mwangi (1997) e KLR**.

Thus damages ought to be assessed so as to compensate reasonably the injured party, not to punish the wrong doer.

11. During the hearing and submissions in the trial court, the appellant placed before it only one case stated above. The court was told to look at the said authority, where general damages were Kshs.350,000/= disregard the said sum, and award Kshs.1,200,000/=without any comparable decision with comparable injuries. The appellant ought to have provided the court with comparable decisions from which it could make an award of more than Kshs.350,000/=.

I find no fault with the trial Magistrates decision in arriving at the decision it did.

12. Before me, the appellant has one authority where injuries were less severe, and where awards of

Kshs.380,000/= were made for injuries not comparable nor similar to the appellants injuries.

With respect to the appellants Advocate, these authorities are of no assistance to the court. What he ought to do is cite authorities with comparable injuries and where the court may have awarded close to the amount he submits of and I have found none, Kshs.1,200,000/=. There being none it is obvious that the submission is exaggerated, unreasonable and unsubstantiated.

13. I have considered submission by the respondent, and authorities cited.

The case of **Mumias Sugar Co. Ltd -vs- Henry Khatowla Amukoya(2015) e KLR** is relevant. The court upheld an award of Kshs.350,000/= for close to similar injuries in September 2015.

Having stated above I find that the appellant has failed to demonstrate any relevant factor that the trial court may have left out or considered in arriving at the offensive award. Likewise the court has not been shown that the award is too low as to call for this court's interference with the trial court's discretion in its assessment of the damages. It is not an erroneous estimate of damages. I find that the sum of Kshs.350,000/= awarded to be reasonable and comparable to awards in respect of comparable injuries during the period.

14. In the premises, the appeal lacks merit. It is dismissed with costs to the respondent.

Orders accordingly.

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of September 2016**

**JANET MULWA**

**JUDGE**