



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 522 OF 2012

CLEMENT GITAU..... APPELLANT

- V E R S U S -

G KK (Minor suing through

JOSEPH KAMAU NYOKABI as his next friend.....RESPONDENT

(Being an appeal from the judgement of the honourable B. M Nzakyo (SRM) Githunguri on 13th September 2012 in Githunguri Civil Case no. 68 of 2011)

JUDGEMENT

1. The respondent **GKK**, sued the appellant **Clement Gitau** together with **Peter K. Mbaka** for damages following an accident that occurred on 11th September 2010. The 1st respondent claimed that he was suing on behalf of **Joseph Kamau Nyokabi**, a minor who was standing off the road along Kwa-Maiko-Kiambu road when the appellant or his agent negligently drove motor vehicle registration number KAU 899P causing it to knock the minor who suffered serious body injuries.

The appellant filed his defence and denied the respondents claim. **Hon. B. M. Nzakyo** Senior Resident Magistrate, heard and determined the suit. He entered judgment on liability at the ratio of 70:30% in favour of the 1st respondent as consented by the parties and further awarded the 1st respondent a sum of kshs.600,000/= in general damages and ksh.34,950/= in special damages.

2. On appeal, the appellants put forward the following grounds on

the memorandum of appeal.

1. THAT the learned magistrate erred in law and in fact in assessing general damages at an inordinate high sum of Kenya shillings six hundred thousand (Kssh600,000/=) which was not commensurate with injuries sustained.

2. THAT the learned magistrate erred in law and in fact in failing to take into account that the plaintiff only sustained a fracture of the left leg tibia only and minor bruises.

3. THAT the learned magistrate erred in law and in fact in taking into account subsequent injury to the said leg when this had no relation to the suit.

4. THAT the learned magistrate erred in law and in fact in failing to take into account authorities cited by the 1st defendant and filed on 15th August 2012.

5. **THAT the learned magistrate erred in law and in fact in failing to take into account the assessment of the injuries by Dr. Maina Ruga, P3 form and Kikuyu Hospitals which clearly indicated that the plaintiff sustained a fracture of the tibia only.**

6. **THAT the learned magistrate erred in law and in fact in failing to consider or have any or any sufficient regard to the submissions filed on behalf of the 1st defendant.**

3. When the appeal came up for hearing learned counsels recorded a consent order to have the appeal deposited of by written submission. Learned counsels have filed their respective submissions which I have taken into consideration. I have also re-evaluated the case that was before the trial court.

4. The parties consented on liability and what is in contention is

the quantum awarded in which the appellant claims was excessive, especially given that the 1st respondent only suffered a fracture of the left tibia and minor bruises. The appellant claims that an award of ksh.600,000/= as special damages is not commensurate with the injuries suffered.

5. The appellant submitted that **Dr. Maina Ruga's** report

confirmed that the 1st respondent only sustained a fracture of the left tibia mid-shaft and bruises on the neck. He further claimed that the 1st respondent healed without any incapacity. He submitted that an award of ksh.200,000/= is adequate compensation. He relied on the case of **Hassan Noor Mohamoud vs the Youn Ann 2000 (eKLR)** where the plaintiff sustained compound fractures of the left tibia and fibula and fracture of the left clavicle and was awarded ksh.200,000/=. He further cited the case of **Kenya Power Lighting Company Ltd & Another vs Zakayo Saitoti Naingola & Another (2008)eKLR**; where the plaintiff who sustained a fracture of the left femur mid shaft and blunt injuries to the lower jaw and left shoulder was awarded kshs.300,000/= in general damages. He further cited the case of **Zacharia Mwangi Njeru vs Joseph Wachira Kanoga (2014) eKLR** where a plaintiff who had suffered a fracture of tibia/tibula was awarded ksh.400,000/= by the court for general damages.

6. The 1st respondent on his part submitted that as per the

medical reports produced in court by **Dr. Wangata** and that of **Dr. Maina Ruga** who opined that the 1st respondent suffered a comminuted fracture of the left distal tibia and fibula, bruises on the neck, blood loss, physical and psychological pains, with the former assessing the degree of incapacity at 20% and the later assessing that the 1st respondent did not suffer any permanent incapacity. He further submitted that in the case of **Sarco Stores Ltd vs David Mwangi Kimotho, Machakos HCCA no 12 of 2005, Lady Justice R. N. Sitati in 2000**, awarded a sum of ksh.800,000/= as general damages for a respondent who had suffered fractures to the left tibia and fibula with non-union fracture of the left ulna resulting in restriction in movement, deep laceration on the forehead with a resultant severance of sensory nerves. In the same case, the 1st respondent argued that **Dr. Wokabi** at the time assessed permanent incapacity at 20% and **Dr. Wambugu** assessed permanent incapacity at 12%. The 1st respondent in comparison to the above cited case argued that he suffered similar injuries and that given that the case was decided in 2005 which is more than 7 years from the time of the accident, then rate of inflation should be taken into consideration.

He further referred to the case of **Hassan Noor Mohmoud (Supra)** which he argued did not contain the degree of incapacity suffered by the plaintiff and as such it should not be taken into consideration. He concluded by that the general damages awarded were not excessive since the two doctors in this case agreed on the nature of the injuries sustained.

7. I have considered the arguments of the parties as presented in

the trial court and before this court. I have also considered the evidence tendered by the parties in respect of their respective positions. According to the medical report by **Dr. Maina Ruga** admitted in evidence,

the 1st respondent is said to have sustained a fracture of the left tibia-midshaft and the bruises on the neck. **Dr. Theophilous Wangata** in his report stated that 1st respondent suffered comminuted fracture of the left distal tibia and fibula, bruises on the neck, blood loss, physical and psychological pains. I have compared the two reports. The two doctors are in agreement that the 1st respondent suffered a fracture of the left tibia and bruises on the neck. However Dr. Theophilus Wangata in addition to those injuries upon examining the 1st respondent also concluded that he suffered a fracture of the fibula, blood loss, physical and psychological pains, which he referred to as grievous harm. Indeed as averred by the 1st respondent, he estimated the incapacity at 20%.

8. While this court may not trash the decision of one doctor

against the other, a middle ground has to be struck for purposes of addressing the interests of both parties. I have looked at the cases cited by the appellant. In the case of **Zacharia Mwangi Njeru Supra**, the plaintiff who sustained both a fracture of tibia/fibula was on appeal awarded a sum of kshs.400,000/= as general damages and in the case of **Hassan Noor Mohamoud Supra** where the plaintiff suffered fractures of the left tibia and fibula and fracture of the left clavicle was awarded a sum of kshs.200,000/=. I have also considered the attached cited authority by the 1st respondent of **Savco Stores Ltd Supra** where the plaintiff who suffered fractures of left tibia and fibula with non-union, fracture of the left ulna, deep laceration on the forehead with resultant severance of sensory of nerves was awarded kshs.800,000/=

9. The sum of kshs.800,000/= awarded in this case was awarded

as a result of major injuries that were suffered. The authority cannot apply in this case since the only major injuries suffered by the 1st respondent in this case were fracture of the tibia and possibly the fibula and bruises on the neck. Consequently, I am inclined to rely on the cases cited by the appellants which cover and are most accurately similar to the injuries suffered by the 1st respondent where sums of ksh.300,000/= and 400,000/= were awarded in the respective cases. I am of the view that the sum of kshs 600,000/= is not inordinately high taking into consideration the changing trend of inflation. The Appellant has not challenged the award on special damages and I will not disturb the same.

10. In the end, I will not disturb the decision of the trial court. I

uphold the decision of the Magistrate and dismiss the appeal with costs of the appeal and the suit given to the Respondent.

Dated, Signed and Delivered in open court this 28th day of October 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent