



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MIGORI
CIVIL APPEAL NO. 30 OF 2015
(FORMERLY KISII HCCA NO. 31 OF 2012)
CONSOLIDATED WITH
CIVIL APPEAL NO. 31 OF 2015
(FORMERLY KISII HCCA NO. 20 OF 2012)

BETWEEN

SAMUEL MAINA KABAGO.....APPELLANT

AND

JOHN APANJA ONDIEK.....1ST RESPONDENT

JERAN GENERAL CONTRACTORS.....2ND RESPONDENT

DEBORA AOMO & CO., LTD..... 3RD RESPONDENT

RICHARD ATINGA.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Sambu, PM in Senior Principal's

Magistrates Court in Migori in Civil Case No. 201 of 2010 dated 8th February 2012)

JUDGMENT

1. The two appeals before the court were consolidated because they arise from the same judgment. The issue of liability was settled by consent. The respondents shouldered full liability and liability between them as co-defendants was apportioned with the 3rd and 4th respondents bearing 60% and the 1st and 2nd respondents bearing 40%. The 1st and 2nd respondents did not enter appearance nor file defence. This consolidated appeal is therefore between the appellant and the 3rd and 4th respondents (hereinafter “the respondents”) who have lodged separate appeals against the judgment.

2. This appeal is limited to the issue of the quantum of damages awarded by the subordinate court. The appellant pleaded that he had suffered a compound fracture of the left tibia and fibula, a cerebral

concussion and an injury on the left knee as a result of the accident which occurred on 24th August 2009 along Kisii – Migori Road near Kokuro junction while he was traveling in the respondents' bus.

3. The appellant testified that he sustained a compound fracture of the left tibia and fibula. He did not lose consciousness and was rushed to Awendo Sub-District Hospital and then to St. Joseph's Hospital where he was admitted for one night. He was later transferred to Kikuyu Mission Hospital where he was hospitalized for 5 days and an operation performed on the fractured leg. At the time the suit was heard, his leg had not healed and the plate that had been fixed required removal.

4. The parties agreed to admit the reports of Dr Akidiva Idagiza and Dr Andrew Otieno in evidence by consent. Dr Idagiza examined the appellant on 14th April 2011. He reviewed the patient history and confirmed that he had suffered a compound fracture of the left tibia and fibula and a cut wound on the right shin. He recorded the appellant's complaints as numbness in the left lower limb and inability to carry heavy objects due to pain in the left ankle joint and weakness in the leg and inability to run due to the injuries. He noted there were multiple scars on the left leg, an incision wound where the plates had been inserted and limited movement of the left leg. He was of the opinion that the appellant should undergo an operation to remove the plate and that he requires physiotherapy. He estimated disability to be about 10% of the body.

5. Dr Andrew Otieno examined the appellant on 15th April 2011. He confirmed the injuries sustained by the appellant and noted that he complained of numbness in the left leg and joint pains. He observed that the appellant had multiple scars with no deformity and that he still had the K-nail. He concluded that the appellant sustained serious injuries after a road traffic accident and that although the fracture had healed without any permanent disability, it was necessary to remove the K-nail through surgery.

6. After considering the appellant's testimony, medical reports and cases cited by the parties, the appellant was awarded Kshs. 600,000/- as general damages and Kshs. 66,960/- as special damages. It is the award of general damages that caused the appellant and respondents to lodge their respective appeals.

7. Mr Marwa, counsel for the appellant, submitted that the award was so inordinately low as to amount to an erroneous estimate of damages. He accused the learned magistrate of ignoring comparable awards that had been cited by the appellant in reaching his decision. Mr Kisera, learned counsel for the respondents, submitted that the award was inordinately high in light of the minor injuries sustained by the appellant. He suggested that Kshs. 100,000 would be adequate to compensate him.

8. There is no dispute about the principles applicable in an appeal relating to quantum of damages. Assessment of quantum of damages is a discretionary exercise and such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. The appellate court will only interfere with the exercise of discretion by the trial court if it took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles have been cited and approved in several cases among them; *Kanga v Manyoka* [1961] EA 705, *Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto* [1979] E. A. 414, *Butt v Khan* [1981] KLR 349, *Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another* [1982 – 88] 1 KAR 72 and *Mariga v Musila* [1984] KLR 257.

9. The assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of injuries in relation to awards made by the courts in similar cases so that similar injuries attract a similar award of damages. The court ensures that the body politic is not injured by not making excessively high awards and the claimant is fairly compensated for his or her injuries.

10. The nature and extent of the injuries sustained by the appellant is not really in dispute. He sustained a compound fracture and minor soft tissue injuries. When both doctors examined the appellant, the leg injury had healed although the appellant required surgical removal of the plates.

11. In the court below, the appellant submitted that an award of between Kshs. 800,000/- to Kshs. 1,200,000/- was reasonable in the circumstances. He cited the case of ***Bethwel Mutai v China Road and Bridge Corporation MSA HCCC No. 200 of 2007(UR)*** where the plaintiff, who suffered a fracture of the left clavicle, right femur and humerus and which required nails to fix them, was awarded Kshs. 800,000/- as general damages in 2008. The respondents cited ***Peter Njangara Karanja v George Wainaina Njenga and Another NBI HCCC No. 2348 of 1995 (UR)*** where the plaintiff sustained a fracture of the right tibia and was awarded Kshs. 100,000/- in 2002 and ***Isaac Mwenda Micheni v Mutegi Murango NBI HCCC No. 335 of 2004 (UR)*** where the plaintiff, who sustained a fracture of the left tibia and fibula and soft tissue injuries, was awarded Kshs. 100,000/-.

12. The gulf between the cases cited by the appellant and respondents is wide and the learned magistrate had to make a reasonable award. The advocates did not assist this court or the court below in furnishing a greater variety of decisions to assist the court come up with the appropriate award. In other words, the parties have not demonstrated how the learned magistrate erred in principle to enable this court exercise its appellate jurisdiction. Having regard to the cases cited, I cannot say that the award of Kshs. 600,000/- is inordinately high or low to warrant interference in the manner authorised by the principles I have set out above.

13. I dismiss the appeals with no order as to costs.

DATED and DELIVERED at MIGORI this 17th day of April 2015.

D.S. MAJANJA

JUDGE

Mr Marwa instructed by Kerario Marwa & Company Advocates for the appellants

Mr Kisera instructed by L. G. Menezes & Company Advocates for the respondents.