



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. 7 OF 2015**  
**(FORMERLY KISII HCCA NO. 86 OF 2012)**

**BETWEEN**

**HARUN MUYOMA BOGE ..... APPELLANT**

**AND**

**DR. DANIEL OTIENO AGULO ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, SRM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 47 of 2011 dated 8<sup>th</sup> June 2011)***

**JUDGMENT**

1. On the August 2010, the appellant was riding his motorcycle along Migori road when at Stella, the defendant lost control of his vehicle and hit the appellant. He pleaded guilty upon being charged with the offence of careless driving. The appellant filed suit claiming damages for negligence. During the proceedings liability was apportioned by consent at 80:20 against the respondent.
2. The only issue left for determination was that of damages. In the plaint, the injuries particularized by the appellant were as follows; blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia and fibula and soft tissue injuries. The appellant prayed for special damages amounting to Kshs. 71,000/- comprising Kshs.68,000/- for medical treatment and Kshs.3,000 for the medical report.
3. The appellant was awarded Kshs. 150,000/- as general damages and the special damages as prayed. The substance of the appeal as encapsulated in the memorandum of appeal and the submissions by Mr Marwa, learned counsel for the appellant, was that the general damages awarded were too low in the circumstances having regard to the nature and extent of the injuries. The respondent did not cross-appeal against the award of special damages and his counsel supported the decision of the subordinate court.
4. Apart from the appellant's testimony, the parties agreed to rely on medical reports prepared by Dr. Akidiva and Dr. J.A.S Kumenda. A summary of the appellant's testimony on the issue of his injuries was as follows;

*I fractured my right leg below the knee. I sustained a deep cut on the right foot and a small cut on my right hand. I sustained chest injury also I was taken to Ombo Hospital Migori*

where I was admitted for 4 days. I was later transferred to Kisii Level 5 Hospital where I was admitted for 3 days. I was later transferred to Moi Teaching and referral Hospital where I was admitted for 23 days. My leg was plastered at Ombo. I got treatment at Kisii. My said leg was operated on at Ombo to see the fracture. I underwent another operation at Moi Referral and my leg was later plastered again ..... My knee joint has not healed. It still pains. My right leg is now shorter and not straight. I am supporting myself with a walking stick. I am unable to stand for long.

5. Dr. A. Akidiva examined the appellant on 9<sup>th</sup> March 2010, he confirmed the injuries sustained. Upon examination his findings were that the appellant was in pain and was walking with the help of two crutches. He had a healed scar at the right interior wrist joint. He noted that there was oozing at fracture site. The flexion of the right knee joint was up to 90° with contusion extension. His opinion was that, *“The patient needs physiotherapy. Has developed post traumatic arthritis of the right knee joint and chronic osteomyelitis that shall require antibiotic cover and subsequent orthopedic surgical review. He sustained a disability estimated 25% his body.”*
6. Dr J.A.S. Kumenda also examined the appellant on 9<sup>th</sup> December 2011. He confirmed that the appellant sustained injuries on the right lower limb. He noted that the appellant walked with the help of a cane and limped with the right leg appearing stiff. His knee could not flex fully at 90° and that there was a somewhat healed scar visible on the interior aspect of the right knee and upper leg and a small wound was discharging pus. His prognosis was, *“He suffered injuries to the right leg with compound fractures that have healed with stiffness of the right knee. The sinus might herald underlying osteomyelitis. He had less than 5% permanent disability”*.
7. In the subordinate court, the appellant submitted that the sum of Kshs. 1,500,000/- was adequate to compensate him. He relied on two cases. In ***Edward Njoroge Gichomo v Patrick Sungu Wekesa ELD HCCC. NO.32 of 1998 (UR)*** the plaintiff suffered fractures on both arms and right leg and rupture of the diaphragm together with soft tissue injuries on the body. He was awarded kshs. 1,600,000 as general damages in 2004. In ***Paul Maina Gatama v John Ngang’a Wanjogu & Another NRB HCCC. No. 355 of 2003(UR)***, the plaintiff sustained a fracture of the left arm, a head injury, spinal cord injury leading to paraplegia. He was awarded Kshs. 1,500,000/- in 2004. The respondent did not furnish the Court with any authorities for guidance.
8. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court 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 were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal 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 court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries. I agree with the observation of the learned magistrate that the cases relied upon by the appellant to guide the court bear no relation to the injuries sustained by the appellant. In those cases, the claimants in those cases sustained multiple injuries and fractures which led to debilitating disabilities.
10. In this case the appellant sustained a compound fracture and although the two medical

practitioners differed on the extent of disability, it is clear that the fracture was serious enough to warrant a period of hospitalization and its effects were permanent. When both doctors examined the appellant, the leg injury had not quite healed.

11. Having regard to the injuries and I am of the view that the sum of Kshs. 150,000/- was inordinately low to warrant interference with the award. I therefore enhance the sum for general damages to Kshs. 300,000/-.

12. In the result the appeal is allowed to the extent that the award of general damages is set aside and substituted with an award of Kshs. 300,000/-. This shall be subject to the agreed apportionment. The appellant shall have costs of the appeal.

**DATED and DELIVERED at MIGORI this 13<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Marwa instructed by Kerario Marwa and Company Advocates for the appellant.

Mr Otieno for O. M. Otieno and Company Advocates for the respondent.