



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 88 OF 2012

1. **GEORGE KIBET OWINO**
2. **ALICE WANYONYI.....APPELLANTS**

-VERSUS-

SIMON MUIYARESPONDENT

JUDGMENT

1. As a result of a road traffic accident on 18th July, 2004 involving the Respondent wherein, SIMON MUIYA who was a pedal cyclist and the motor vehicle registration number KAG 346T owned by second Appellant herein, ALICE WANYONYI and which was driven by the first Appellant herein, GEORGE KIBET OWINO, the Respondent instituted the Chief Magistrate's Civil Suit No. 234 of 2015 at Kakamega (hereinafter referred to as "*the suit*") claiming *inter alia* damages.
2. On 14/02/2005, the parties in the suit who were both represented by Counsels recorded a settlement on the liability aspect of the accident at 80%:20% in favour of the Respondent herein.
3. The suit then proceeded on for the assessment of damages.
4. Three medical reports were produced during the assessment which aided the trial court to pronounce itself in a judgment delivered on 10/09/2012 where general damages for pain, suffering and loss of amenities were assessed at Kshs. 1,200,000/= subject to the agreed liability.
5. It is the said finding and judgment that prompted the Appellants into preferring the appeal subject of this judgment.
6. This court has seen the Memorandum of Appeal which raises six grounds challenging the award on general damages as excessive and not supported by evidence and which was arrived at upon taking into account extreme and irrelevant matters.
7. Counsels for the parties in this appeal filed their respective written submissions upon directions of the court. They likewise referred to several decided cases in a bid to convince this court on their opposing positions.
8. Whereas the Appellants prayed for the award on general damages to be reduced to Kshs. 400,000/= in this appeal, the prayers in their Memorandum of Appeal instead sought for the setting aside of the judgment of the trial court and the dismissal of the suit with costs.
9. The Respondent on the other hand opposed the appeal and indeed prayed for an enhancement of

the award on general damages and relied on the provision of Order 7 Rule 7 of the Civil Procedure Rules, 2010 for the submission.

10. From the record and the Appellants' submissions, it is clear that the appeal was only on the aspect of the assessment of damages and not on both liability and quantum of damages.
11. This court remains aware that an assessment of general damages in an act of exercise of discretion on part of a court and an appellate Court is always called upon to exercise restraint in the interference of such exercise of discretion unless on well settled and clear principles. The Court of Appeal in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI vs A.M.M. LUBIA & ANO. (1982-88)1 KAR 777** laid down the principles in the following words:-

‘...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.’

12. This position was restated by the Court of Appeal in the case of **ARROW CAR LIMITED -vs- BIMOMO & 2 OTHERS (2004) 2 KLR 101** and so recently in the case of **DENSHIRE MUTETI WAMBUA -vs- KENYA POWER & LIGHTING CO. LTD (2013)eKLR.**
13. I have carefully perused the three medical reports on record. The first one was prepared by Dr. Charles M. Andai, MB Ch B (Nrb) on 27/04/2010 upon examining the Respondent on the same day. The report clearly enumerates the injuries sustained by the Respondent and concludes that he suffered a permanent physical impairment of the left limb as a result of an un-united fracture of the left femur. The permanent disability was assessed at 40%.
14. On 07/10/2012 Dr. Surendra R. Patel, MBBS also examined the Respondent and prepared a report. It confirmed the injuries sustained by the Respondent as enumerated by Dr. Andai. Permanent disability was assessed at 20%.
15. A third medical examination was prepared by a specialist consultant Orthopedic/Trauma Surgeon, one Dr. C. A. Nyakinda. It was on 08/12/2010. The report was dated 08/08/2011. While agreeing with his colleague doctors on the injuries sustained by the Respondent, he gave his professional specialist assessment of the Respondent as follows:-

“..... He will benefit from total hip arthroplasty. The disability arising from this injury is valued at the loss of use of the affected limb at the hip joint.”

16. As the three medical examinations reveal a concurrence on the injuries sustained by the Respondent, the variance arose on the issue of the resultant effect thereof. It is worth noting that the whereas the third report was by a specialist, the first and second reports were by general practitioners of medicine. Further the second and third reports were at the instance of the Appellants and were produced by the consent of the Counsels without calling their makers. The maker of the first report testified before the trial court.
17. The report by the specialist therefore gave an incisive examination and more reliable assessment of the injuries and their effect compared to the others.
18. Be that as it may, as from 28/01/2014, the guiding document on assessment of damages arising out of road accidents in Kenya is **the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013** which came into force on the said date. The said Act introduces a structured compensation through a Schedule which guides on the award of damages with a cap on the highest possible compensation at Kshs. 3,000,000/=.
19. Under the said Act and the Schedule thereunder, the injuries sustained by the Respondent herein fall under **category 34(b)(1)**. The compensation under that category is pegged at 60% of the total possible compensation which translates to Kshs. 1,800,000/=.

20. By however taking into account the variance in the two other medical reports on the resultant effect of the injuries on the Respondent and the age of the Respondent, this Court finds that the award of Kshs. 1,200,000/= made by the trial court remains both reasonable and adequate compensation. I am therefore unable to find that the trial court erred in such a manner to invite this court to exercise its jurisdiction in favour of the Appellants.

21. On the Respondent's plea for enhancement of the award on general damages, I find that the same is unmerited as the Respondent never filed a cross-appeal to the judgment of the trial court. Bringing such a serious plea in the submissions is a late-hour-attempt to steal a match from the Appellants an act which is not legally sustainable. That plea is hence rejected.

22. The upshot is that the appeal is unsuccessful and is hereby dismissed with costs.

23. In the event the 50% of the decretal sum in the suit was deposited in the joint interest earning account of both Counsels as ordered by this Court on 05/12/2012, the said amount together with the accrued interest shall be forthwith released to the Respondent's Counsel herein.

24. Orders accordingly.

DATED and SIGNED at MIGORI this 6th day of November, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 30th day of November, 2015.

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JUDGE