



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 65 OF 2010

JULIUS EDWIN MURIUKI1ST APPELLANT/DEFENDANT

ASHFORD NJERU NAI2ND APPELLANT/DEFENDANT

VERSUS

GEORGE KITHINJI MWIANDIRESPONDENT/PLAINTIFF

J U D G M E N T

An Appeal from the Judgment of HON. M. WACHIRA – CM

sitting at EMBU in SPMCC CASE NO. 179 OF 2004 delivered on 8/6/2010).

1. The appeal herein arises out of a judgment delivered by the Chief Magistrate at Embu on 8/6/2010. The appeal is only on the award on quantum of damages the parties having recorded a consent on liability in the lower court .

SUMMARY OF FACTS IN THE LOWER COURT

2. The plaintiff (who is now the respondent) filed a plaint dated 26/7/2004 following a road traffic accident that occurred on 13/11/2002. The defendant thereafter filed a memorandum of appearance and a statement of defence dated 1/9/2004. On 9/11/2010, the court adopted a consent dated 9/11/2010 filed by the parties. The terms of the consent were that judgment on liability be entered in the ratio of 90:10 in favour of the plaintiff . Parties also agreed to put in the medical reports by Dr. Ndiba Wairioko and by Dr. P.N Mutuku without calling the makers and to file written submissions on quantum thereafter.
3. The plaintiff filed his submissions on 17/11/09. In his submissions the plaintiff stated that he sustained a dislocation of the left hip with acetabular fracture (central fracture dislocation of the left hip joint). The plaintiff also stated that the left leg became shorter than the right leg by 5 centimeters and that the plaintiff walks with a limp. The plaintiff must also use the support of a walking stick while walking and uses a raised sole on his shoe since his leg cannot bear his weight. The plaintiff is permanently disabled and cannot walk for long or do manual work.
4. According to the medical report by the plaintiff's Doctor Ndiba Wairoko, the plaintiff suffered 30% permanent disability. The plaintiff also submitted that the defendant's Doctor P.N Mutuku confirmed that the plaintiff experienced pain while walking and that he was bound to have stiffness of the left hip joint and severe pain as well. The plaintiff prayed for an award of ksh.650,000.00 as compensation for the injuries and permanent disability he had suffered. The plaintiff relied on the cases of **ELIJAH MWANGI –VS- KENYA TEA DEVELOPMENT**

AUTHORITY where the plaintiff was awarded kshs.800,000.00 after sustaining similar injuries, **MUKO TIKOL MUKO -VS- THE ATTORNEY GENERAL** where the plaintiff was awarded ksh.300,000.00 for similar injuries and **FIDELIS JOSEPH MAKULO VS ALEX NJAU MUMBI** where the plaintiff was awarded ksh.400,000.00 for similar injuries. The plaintiff stated that the cases had been filed 8 years ago.

5. The defendants in their submissions stated that the plaintiff had suffered central acetabular fracture, pain and shortening of the leg. They relied on two authorities in which the plaintiffs had been awarded ksh.150, 000 in each case. They urged the court to grant the plaintiff a similar award of ksh.150, 000.00.

SUBMISSIONS BY THE APPELLANT

6. The appellants submitted that the award by the lower court was excessively high considering the injuries the plaintiff had sustained. They further stated that the lower court was wrong in its estimation since two of the authorities relied on by the plaintiff in the lower court were for awards of ksh.360,000.00 and ksh.400,000.00. They relied on the case of **WAMUYU CHILDREN DEV FUND VS MICHAEL MUTUKU** in which the judge referring to two other cases held that a court can only interfere with the award made by the court if the court proceeded on the wrong principles or if the learned trial magistrate misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

They further stated that they appealed because the lower court award was inordinately high and urged the court to replace the lower court award with an award of ksh.300000.

SUBMISSIONS BY THE RESPONDENT

7. The respondent in his submission stated that both doctors were in agreement that he had suffered serious injuries. He stated that he would live with the inconveniences caused by the injuries for the rest of his life and that ksh.800000 awarded would never compensate him adequately. He relied on the case of **KENYA BUS SERVICES VS HUMPHREY (2003) KLR** in which the circumstances under which the Appellate court can interfere with the quantum awarded by the lower court were outlined. They are;
 - a. Where the trial court in assessing damages took into account irrelevant factors
 - b. Where the lower court in assessing damages left out relevant factors
 - c. Where the lower court proceeds on the wrong principles or misapprehends the evidence as to arrive at a figure that is inordinately high or low.

He submitted that none of the above circumstances had been proved by the appellant. The respondent further submitted that an award of ksh.800,000.00 cannot be said to be inordinately high as the court in **NAIROBI HCCC NO.2732 OF 1998** awarded the plaintiff ksh.800,000.00 for similar injuries in the year 2001.

8. UNDISPUTED FACTS

- a. That the plaintiff suffered dislocation of the left hip with acetabular fracture.
- b. That the plaintiff suffered shortening of the leg
- c. The plaintiff cannot do any manual work

9. DISPUTED FACTS

- a. The award of ksh.800,000.00 was inordinately high
- b. The trial court did not consider the guiding principles in assessing the damages

10. ISSUES FOR DETERMINATION

- i. Whether the trial court considered the guiding principles in assessing the damages
- ii. Whether the appellant has demonstrated that the trial court misapprehended the evidence so as to arrive at a figure that is inordinately high or low.
- iii. Whether the trial court took into account irrelevant factors in assessing damages.
- iv. Whether the trial court left out relevant factors in assessing damages

11. ISSUE NO (i)

In the case of ***SOFIA YUSUF KANYARE –VS- ALI ABDI SABRE & ANOR NAIROBI HCC NO. 478/07*** the court listed the principles that the court must bear in mind when assessing damages. They include;

- *An award of damages is a matter of discretion on the part of the court that is seized of the matter.*
- *The award should not be too high or too low.*
- *The award is not meant to enrich the victim but to try as much as possible to restore him/her in the position they were before the accident.*
- *Awards in past decisions are meant to be mere guidelines and each case should be mere guidelines.*
- *Where awards in past cases are taken into considerations, their age, rate of inflation as well as the value and power of the Kenyan shilling should be taken into consideration.*

In assessing whether the award was too high or too low I am going to look at two authorities for comparison bearing in mind the seriousness of the injuries suffered by the respondent.

In the case of ***JECINTA WANJIKU VS SAMSON MWANGI NAKURU HCC NO. 166/09*** the plaintiff suffered a head injury with cerebral concussion, fracture of acetabular rim right hip, fracture of right knee and post traumatic osteoarthritis. The court awarded the plaintiff ksh.1,000,000.00 in 2006. It is worth noting that the injuries were almost similar to the current ones and that the same were awarded four years before the current one.

12. In the case of ***ORION HAULIERS LTD VS MICHAEL ESIKHATI CIVIL APPEAL NO. 55/10 COURT OF APPEAL MOMBASA*** the plaintiff sustained fracture of the left femur and a shortened left leg. The appellate court upheld the award of ksh.800,000.00 which was awarded in 2010. The appellate court held that the trial court appreciated the authorities cited by each side and the submissions. The court also held that it had not been demonstrated that the trial magistrate took into account the wrong principles in arriving at the award or that he had misapprehended the evidence, or that the figure awarded was so high as to constitute an erroneous estimate ending in failure of justice. Considering the awards made in the above authorities and the injuries suffered by the Respondent I would not say the award is too high.

13. ISSUES ii - iv

On whether the trial court left out relevant factors in assessing damages, a perusal of the lower court judgment indicates that the Magistrate took into consideration the findings in the medical reports by both the plaintiff and the defendant's doctor. It is also clear that the magistrate appreciated the authorities provided by both the appellants and the respondent. The Magistrate also considered the inflation trends in the country at the time of judgment before making her decision.

14. I am not losing sight of the fact that the respondent suffered a permanent injury especially to the left leg, which has been shortened by 5cm. He has to wear a raised left shoe to be able to carry his weight. He must walk around with a walking stick. No amount of damages can place him back in his former position physically.
15. In my view the learned trial Magistrate considered all the relevant factors in this case in arriving at her decision. These factors are the expert opinion by the doctors, the authorities in which awards for similar injuries were granted and the inflation rate in the Country at the time of delivering the

judgment. I find the appeal to be without merit. Its dismissed with costs.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH
DAY OF JULY 2014.**

H.I. ONG'UDI

J U D G E

In the presence of:-

Respondent

Njue – C/c