



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 141 OF 2011

ALPHONCE MULI NZUKIAPPELLANT

-V E R S U S-

BRIAN CHARLES OCHUODHO RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Mombasa before Hon. T. Ole Tanchu – SRM in SRMCC No. 1608 of 2007 on the 15th July 2011)

JUDGMENT

1. By the lower Court's judgment of 4th November 2011 the Respondent was awarded Kshs. 800,000/- as general damages for injuries suffered in an accident, which accident the lower Court found Appellant to be wholly to blame. Appellant being aggrieved by that award has filed this appeal.
2. I need to remind myself of my duty as the first Appellate Court which was stated by the Court of Appeal in the case **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** as follows-

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of KENYA PORTS AUTHORITY v KUSTON (KENYA) LIMITED (2009)2EA 212 wherein the Court of Appeal held inter alia that-

‘On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.’”

APPELLANT'S SUBMISSIONS

3. Appellant submitted that the trial Court erred to have awarded Kshs. 800,000/- in general damages. Appellant termed the award as excessive and erroneous estimate of the damages payable. Before going further it is important to note that Appellant's Learned Counsel was in

error to say that the medical report of Dr. Udayan Sheth was submitted in evidence by consent. I have perused the lower Court's proceedings and there is no record thereof of such consent. It follows therefore that the only medical report that will guide this Court will be the one produced by Dr. Gordon Ondera as Plaintiff's Exhibit No. 4.

4. Appellant further submitted that the trial Court failed in applying the awards made in the cases cited by the Respondent. Appellant was of the view that the injuries suffered in those cases were more severe than those suffered by Respondent.

RESPONDENT'S SUBMISSIONS

5. Respondent's Learned Counsel submitted that Respondent sustained the following injuries-

- **Compound comminuted fracture right tibia and fibula.**
- **Degloving injury medial aspect of right leg and foot**

That he underwent three operations and was hospitalized for 42 days. That he yet had to have an implant removed in a future operation. That it followed the authorities relied upon by Respondent were comparative to those injuries rather than those relied upon by Appellant.

6. Respondent cited the cases in support of its submissions and one of them was **KHAMBI AND ANOTHER –Vs- MAHITHU AND ANOTHER [1969]EA 70** where Court of Appeal held-

“An apportionment of liability made by a trial Judge will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.”

COURTS ANALYSIS AND DETERMINATION

7. Appellant's appeal solely relates to the trial Court's award in general damages. Although Appellant stressed that Respondent by the time the trial took place had recovered, it is important to note that Respondent suffered the injuries summarized by his learned Counsel above but it is more important to note that Respondent was due to undergo future operation to remove the implant.
8. Appellant's authorities were all decided in the years 1990's. It follows the awards in those cases could not have been of much assistance to the trial Court when it decided the case in the year 2011. More importantly I have looked at the injuries of the parties in these cases and fully agree with the learned Trial Magistrate when he stated in his considered judgment where he stated-

“Authorities cited by the 1st Defendant (Appellant herein) have far less severe injuries than those in the instance (sic) case and therefore they are not comparable.”

9. It is also worth recalling the principles upon which the Appellate Court will interfere with an award of damages as set out in the case **KHAMBI AND ANOTHER –Vs- MAHITHU AND ANOTHER** (supra). Further the Court of Appeal, on that principle in the case **COAST BUS SERVICE LTD –Vs- SISCO E. MURANGA NDANYI & 2 OTHERS CIVIL APPEAL CASE NO. 192 OF 1992** stated thus-

“Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-

‘An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded “on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low

....”

10. As I consider this appeal I am also well guided by the case **KIMATU MBUVI T/A KIMATU MBUVI & BROS –Vs- AUGUSTINE MUNYAO KIOKO [2006]eKLR** where the Court of Appeal stated-

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964]AC 326 at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”

11. In my considered view the trial Court cannot be faulted in making

the award it made in general damages. In my view in considering the Respondent’s authorities the Court clearly was right to note that the injuries stated in those cases were comparable to Respondent’s injuries.

12. The cases the trial Court considered relevant to the case were-

- **KOMBO AMANI –Vs- ATTORNEY GENERAL & 2 OTHERS W HCCC NO. 298 OF 1989 MBSA** – where Plaintiff suffered fracture shaft tibia/fibula legs, head injury, severe contusion chest and soft injuries on the abdomen and back.
- **TEREZA NYAMBURA KIMORU –Vs- MICHAEL KYALO KIILU HCCC NO. 718 OF 1990 MBSA**. The Plaintiff suffered compound fracture of the left tibia/fibula and right tibia/fibula.
- **AHMED MOHAMED –Vs- ABDULHAFIDH MOHAMED BANRAGAH HCCC NO. 319 OF 2001**. Plaintiff suffered fracture left femur subtrochanteric and comminuted compound fracture left tibia and fibula.

13. Considering the injuries suffered by Respondent and those evident in the above cases I would echo the words used by Justice L. Kimaru in the case **DAVID KIPLANGAT SANG –Vs- RICHARD KIPKOECH LANGAT & ANOTHER (2006)eKLR** where the learned Judge stated-

“I have considered the said submissions and also the injuries the Plaintiff sustained. In my considered view, the authorities quoted are relevant to this case in so far as the Plaintiff sustained some of the injuries that the Plaintiffs suffered in the said two cases ...”

14. I too find and hold that the trial Court was right and it cannot be faulted for having made the award it made because the authorities of the Respondent bore some injuries which Respondent suffered. To say that a Court cannot rely on an authority because the injuries in that authority do not exactly compare to the case before the Court would be in error. There cannot always be a case that matches another exactly in terms of injuries suffered. Authorities are used by Court as a

guide in the awards to make. The trial Court rightly used the above authorities as a guide. There is therefore, no basis for this Court to interfere with the lower Court's award.

15. In conclusion I find that there is no merit in the appeal and the appeal is hereby dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE