



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 110 of 2009

FRANCIS OUMA ORANJA.....APPELLANT

VERSUS

HARUN MURITHI WAWERU.....1<sup>ST</sup> RESPONDENT

DAVID KARIUKI.....2<sup>ND</sup> RESPONDENT

JUDGMENT

This Appeal arises from the decision of the Honourable N. SHIUNDU Senior Resident Magistrate delivered on the 29<sup>th</sup> June, 2009 in Eldoret CMCC No. 461 of 2008.

FACTS

The accident occurred on the 31<sup>st</sup> day of March, 2008 along the Old Uganda Road in Eldoret.

The Appellant was a pillion passenger and sustained severe bodily injuries occasioned by the Respondent who negligently drove motor vehicle registration number KAP 889 B.

The trial magistrate awarded the Appellant the sum of Kshs 200,000/= as general damages and Kshs 41,715/= as special damages.

The amount was subjected to 15% contributory negligence which had been agreed to “BY CONSENT”.

The Appellant being aggrieved by the award preferred this appeal and listed three (3) Grounds of Appeal in his Memorandum of Appeal which grounds are as listed hereunder;

- 1) **The learned trial magistrate erred in law and fact in the exercise of his judicial discretion on the assessment of damages as to amount to abuse and wrong application of principles on award/assessment of damages.**
- 2) **The learned trial magistrate erred in law and fact in awarding damages that were inordinately low as to amount to gross underestimation of the injuries sustained by the Appellant.**
- 3) **The learned trial magistrate erred in law and fact in failing to appreciate the medical evidence.**

Both Counsels chose to argue the appeal by putting in Written Submissions.

Counsel prayed that the Appeal be allowed and that the award be enhanced and prayed for costs of the appeal together with interest, thereon.

The Appeal was opposed by the Respondent and submitted that the Appellant that an award of Kshs 150,000/= could suffice as adequate compensation. The Respondents referred the court to three (3) authorities as set out in the Written Submissions dated the 28<sup>th</sup> November, 2011.

Counsel submitted that the award made by the trial magistrate was reasonable and fair in view of the injuries sustained and that in making the award the trial magistrate did not apply wrong principles.

It was the Respondent's prayer that the Appeal be dismissed with costs.

### **ISSUES FOR DETERMINATION**

Upon reading the Written submissions of both Counsel and upon perusing the Record of Appeal, this court finds the following issues for determination;

- i) Quantum – was the amount awarded inordinately low.
- ii) Did the trial magistrate use wrong principles in assessing the general damages?
- iii) Enhancement of the Award for general damages.

### **ANALYSIS**

The Appellant pleaded that he had sustained the following injuries from the accident;

- a) The chin and left cheek were swollen and tender with bruises and lacerations.
- b) Left thigh swollen and tender with a cut wound.
- c) Right thigh swollen and tender.
- d) Fracture of the mid shaft right femur.

The Appellant produced several exhibits in evidence. The Discharge Summary Form from Moi Teaching and Referral Hospital (**PMF1 1**) confirms that the Appellant sustained a fracture of the right femur which is the major injury.

The P3 form marked as “**MF14**” produced in evidence by the Appellant also confirms the fracture to the right femur.

The Appellant was examined by DR. S.I Aluda and the medical report was produced as evidence by the Appellant and it was marked as “**MF1 7**”.

Upon examination the Doctor confirmed that the Appellant sustained severe injuries and the same are listed hereunder;

- a) Tenderness in the chin, left cheek and both thighs.
- b) Scars on the above named regions.
- c) Fracture of the right femur.

The Appellant went for a further medical examination by a doctor of the Respondent's advocates choice, a MR. Z. GAYA. The said doctor confirmed that the injuries sustained by the Appellant and his medical

report as produced and marked as “ DMF 1”.

The injuries that Mr. Z. Gaya confirms in his medical report are as set out hereunder;

- 1) Soft tissue injuries to the chin and left cheek with swelling and bruises.
- 2) Cut wound to the left thigh
- 3) Fracture of the right femur

Upon perusing all the documents produced in court as exhibits, the court finds that the injuries sustained by the Appellant are not in dispute.

The dispute arises in the award for general damages made by the trial magistrate.

The principles for revising and interfering with an award are well laid down in the case of **ARROW CAR LTD –VS- BIMOMO & 2 OTHERS C.A 344 OF 2001.**

The principles set down in the above case that need to be observed are as set out hereunder;

- a) **an irrelevant factor was taken into account or;**
- b) **A relevant factor was left out**
- c) **The amount awarded is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimate.....**

Counsel for the Appellant argued that the Learned Trial Magistrate had made an award for damages that was inordinately low and that the assessment of damages was based on wrong principles.

Counsel urged the court to re-evaluate the evidence assess it and arrive at an independent conclusion based on comparable awards for comparable injuries.

Counsel referred the court to two authorities which had comparable injuries. The authorities referred to are;

- a) **NAIROBI HCCC NO. 817 OF 1983 MAHINDER SEMBI –VS- THE HONOURABLE ATTORNEY GENERAL**

The Plaintiff in this case sustained a broken right thigh bone (femur) and was awarded general damages of Kshs 500,000/= in 2000.

- b) **MACHAKOS HCCC NO. 172 OF 2001**

**JACKSON MUSYOKA NDUNDA –VS- LOCHAB TRANSPORT LTD**

The Plaintiff sustained a fracture of the femur and was awarded Kshs 400,000/=

This court will apply the same principles and also adds the principle set down hereunder;

**“...that an award for damages must be within limits of decided cases....” (Ringera J)**

The court finds that the Appellant sustained a fracture of the right femur. The court has perused the authorities referred to and cited by both the Counsel for the Appellant and the Respondents.

This court has also made reference to the authorities cited hereunder;

c) **CECILA MWANGI –VS RUTH W. MWANGI** Osiemo J awarded the sum of Kshs 450,000/= for a fracture of the femur.

d) **BARBARA FENWICK –VS- BERNARD NGIGI – HCCC NO. 742 OF 1997** Angawa J awarded the sum of Kshs 500,000/= for a fracture of the femur in the year 2000.

Taking into account the above comparable decisions on fractures of the femur, this court finds that there is need to interfere with the award of Kshs 200,000/= for general damages as the amount is inordinately low and was based on the wrong principles.

The amount awarded should have been in the region of Kshs 450,000/=

This court therefore finds that the Appeal has merit and the same is hereby allowed.

The judgment of the lower court is hereby set aside. In its place this court enters judgment in favour of the Appellant in the sum of Kshs 450,000/= for general damages together with costs and interest. The amount shall be subjected to contributory negligence of 15 % as had been agreed upon.

The interest shall be computed from the initial date of judgment. The special damages awarded by the trial court to remain the same. Each party shall bear their own costs of the Appeal.

It is so ordered.

Dated and delivered on 11th day of October 2012.

**A.MSHILA  
JUDGE**