



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 98 of 2004

STEPHEN MUTISYA MUUMBI:::APPELLANT

VERSUS

PETER MUTUKU

KATULI:::RESPONDENT

JUDGMENT

1. The Memorandum of Appeal as Amended and dated 29.11.2004 raises the following grounds of Appeal;-

i. That the learned magistrate erred in law and fact in awarding Kshs. 665,000/= in General Damages which was so inordinately high that it constituted a departure from the well established principles and applicable in the award of damages.

ii. That the learned magistrate erred in law and fact in failing to take into account the submissions by the Appellant's counsel while making the award.

iii. That the learned magistrate erred in law in making an award on quantum which was unsupported by authorities.

2. I have taken into account the submissions made by both Mr. Ombati for the Appellant and Mr.Makau for the Respondent and since the only issue in contention is quantum of damages, I will start by setting out the injuries allegedly suffered by the Appellant. In the Amended Plaintiff dated 1.11.2003 at paragraph 5 thereof, the injuries said to have been suffered by the Respondent are:-

“a. Compound fracture of the left tibia- fibular which has been plated to date.

b) Injuries to the lower limb

c) Persistent pain left lower limb at the ankle joint.

d) Swelling of the left leg

e) Inability to stand for a long time

f) Deformed on the left leg

g) Inability to walk long distances

h) Tenderness and swelling of the leg at the fracture sites.”

3. From the outset, I should state that I agree with Mr. Ombati that in fact the substantive injury sustained was the fracture of the left tibia fibula and the other “*injuries*” set out above are either post-injury complications such as inability to stand for a long time, deformity of the left leg, inability to walk long distances and tenderness at the fracture site or soft tissue injuries such as injuries to the lower limb which in any event are not clearly qualified. That being the case, it is unclear from the rather brief judgment dated 28.10.2004, on what basis the award of Kshs. 800,000/= was given. Having so said, I should restate the law as to the circumstances under which this court can interfere with an award of damages.
4. In Shabani vs City Council of Nairobi [1985] KLR 516 it was held at page 527 as follows:-

“The Court will not interfere with the question of damages awarded by the trial court unless it is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be unferred; Witu v Peake [1913/1914 EALR 17, Chori v Gabbett [1934] 1 EACA 134, Traill v Bowker [1947] 14 EACA 20, Singh v Kumbhar [1948] 15 EACA 21, Marumba v Clark [1952] 119 EACA 60, Obongo v Municipal Council of Kisumu [1971] EA 91 Butt v Khan, Civil Appeal 40 of 1977 (unreported) and Kemfro Africa Ltd v Lubia, Civil Appeal 21 of 1984. The test as to when an appellate court may interfere with an award has therefore held sway for a long time. The assessment of damages is no mean task:

“for there are so many incalculable factors which interpose to make the assessment of a perfect compensation impossible.”

There is no doubt that,

“some degree of uniformity must be sought in the award of damages and the best guide in this respect is ... to have regard to recent awards in comparable cases in the local courts...”

5. In this particular case and following those principles, the authorities placed before the trial magistrate were the following:-

i. Wangui Kindia vs Njoroge Mwangi & Another HCCC

1046/1998- for unclear injuries but which led to serious incapacity on the part of the Plaintiff, Sheikh Amin, J. awarded Kshs. 1.02 million for pain, loss of amenities, future medical costs and diminished earning capacity.

ii. Charles Amusala & Another vs Michael Ndung’u Mbugua & Another HCCC 287/1987- for compound comminuted fracture of the left tibia/fibula and where the Plaintiff was hospitalized for 8 months, Mbogholi, J, awarded Kshs. 600,000.

iii. Andrew Mbuvi Kilonzo vs Anthony Luleyi Madara & Another HCCC 1637/1990 – for fracture of the left tibia and compound fracture of the left fibular Kshs. 230,000 was awarded to the Plaintiff.

6. I also came across the decision of Omollo, J. in Ezekiel Masek Muthongo vs John Kiminja & Another HCCC 1137/1991 where Kshs. 380,000 was awarded for injuries similar to the ones in this case.
7. It can clearly be seen that from the decisions before her and as I have said above the learned magistrate had no basis for awarding Kshs. 800,000/= notwithstanding the aspect of inflation and changing trends of life which in any event she never mentioned as having influenced her decision. It would seem to me therefore that the award was inordinately high and this court can properly intervene and reduce the award to what is reasonable and fair in the circumstances of this case.
8. I have in that regard perused the medical reports filed by Dr. S.M. Musyoka and that by Dr. W.M. Wokambi. Dr. Wokambi was categorical that upon surgery, he would “***expect very little disability to arise out of these injuries.***” Dr. Musyoka on the other hand stated that the Respondent “***will***

not be able to function to his full capacity at all.” She gave no indication as to the level of expected incapacity.

9. Taking all these matters into account and noting the authorities cited, the time that has lapsed since they were handed down, inflation and the high cost of living, it seems to me that a global award of Kshs. 600,000/= for pain and loss of amenities is sufficient to compensate the Respondent. Special damages were proved at Kshs. 73,577/= which are not contested. Parties also agreed that liability would be settled as 95% - 5% in favour of the Respondent and therefore the sum of Kshs. 600,000/= shall be reduced by 5% to Kshs. 570,000/= and the total award shall be;

i. General damages – Kshs. 570,000/=

ii. Special damages – Kshs. 73,577/=

Total- **Kshs. 643,577/=**

10. The Respondent shall have costs of the lower court but the

Appellant shall have ½ costs of this Appeal since he has only partly succeeded.

11. The appeal is allowed in those terms.

12. Orders accordingly.

Dated and delivered at Machakos this **11th** day of **November 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Musyoka h/b for Mr. Ombati for Appellant

Mr. S.A. Makau h/b for Mr. O.N. Makau for Respondent.

Isaac Lenaola

Judge