



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 235 OF 2019**

**SPECIALIZED ALUMINIUM RENOVATORS LIMITED... 1<sup>ST</sup> APPELLANT**

**MANJEET ROOPRA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**STEPHEN MUTUKU MUSYOKA ..... RESPONDENT**

***(This being an appeal from the judgement of Hon. A. N. Makau delivered on 29/3/2019 in Nairobi CMCC No. 5856 of 2016)***

**JUDGEMENT**

1. This appeal arises from the judgement of Hon A. N. Makau in Nairobi CMCC No. 5856 of 2016 in which the learned trial magistrate awarded the respondent Ksh.800,000 and Ksh.3000 as general and special damages respectively arising from a road accident that occurred on 4/8/2015. It is said that the respondent was lawfully walking along enterprise road and was knocked down by motor vehicle registration no. KBU 848 J belonging to the 1<sup>st</sup> appellant.

2. The appellants were aggrieved by the aforesaid judgement, filed this appeal raising the following grounds:

- a. That the learned trial magistrate erred in law and in fact in assessing general damages at Ksh.800,000 for pain, suffering and loss of amenities on account of fracture of the frontal bone extending to the superior orbital wall, fracture of the right nasal bone, right frontal hem sinus and swelling of the right frontal and periorbital injuries which had healed fully without any degree of permanent disability which amount was/is manifestly excessive in the circumstances.**
- b. That the learned trial magistrate erred in law and in fact in basing her findings on irrelevant issues/factors not supported by evidence adduced and/or the applicable law.**
- c. That the learned trial magistrate erred in law and in fact in failing to take into account the appellants submissions on quantum or at all.**
- d. That the learned trial magistrate erred in law and in fact in failing to take into cognizance the fact that the Kenyan economy cannot sustain such huge awards.**

3. On 12/3/2021 this court directed that the appeal be dispensed by way of written submissions.

4. The appellants in their submissions argued that the trial magistrate failed to take into account that the respondent's injury in the right hand i.e., a fracture of the right radius was an injury sustained earlier by the respondent during sports and had nothing to do with the subject road accident a fact that the respondent admitted in his evidence in chief.

5. It is stated by the appellant that Dr Roger H. Kayu in his medical report dated 25/1/2018 indicated that the respondent suffered grievous harm. The doctor further opined that Post traumatic osteo-arthritis is a long-term complication that will require regular orthopedic follow up and medication and will worsen with age. The appellants thus argued that the doctor spoke directly to the fracture to the radius which had nothing to do with the subject accident.

6. The appellants indicated further that by consent both parties agreed to exclude the fracture of the radius from the two medical reports from being admitted into evidence and therefore it was incumbent on the trial magistrate to expressly exclude the said injury from her judgement. It is argued that the trial magistrate arrived at an excessive award when he considered the injuries which were meant to be excluded from the decision.

7. It was the appellants submission that an award of Ksh.400,000 as general damages for pain and suffering was sufficient. They cited the following case;

**a. Anne Nyachomba Gitau & Another v. Paul Muigai Murigi Nairobi HCCA No. 542 of 2016** where the injuries were extreme and severe craniofacial injuries, fracture of the jaw and fractures of facial bones which are much more serious than the instant case and yet the appellate court upheld an award of Ksh.600,000 as general damages.

8. The respondent in his submissions admitted that the parties did indeed consented to withdraw the claim on the fracture of the radius as the respondent sustained the injury before the accident.

9. The respondent is of the opinion that he sustained multiple fractures to the facial bones, orbital wall, fracture of the nasal bones, fracture of the right frontal and periorbital injuries therefore the award of damages was accurate. The respondent cited the case of **Rwaken Investments Limited v Isaac Kiprop Chelunyei & Another [2016] eKLR** where the claimant sustained avulsion wounds on the right side of the face, fracture of the right maxilla and a fracture of the right orbit and was awarded Ksh.800,000.

10. This court notes that the appellant did not appeal against the apportionment of liability of 80:20 in favor of the respondent and therefore it will not make any findings on it

11. The appellate court's power to interfere with an award of damages by a trial court is restricted and not discretionary. In the case of **Butt vs Khan (1978) eKLR** the Court of Appeal held inter alia:

**“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.”**

12. I have re-evaluated the evidence tendered before the trial court. At trial only two witnesses testified. Stephen Mutuku Musyoka (PW 2) told the court that he sustained injuries on the left head frontal bone and a swollen nose. This piece of evidence was confirmed by a medical report prepared by Protection House Surgical Clinic dated 6/3/2017 which listed that the respondent suffered the following injuries;

**i. Fracture of the frontal nasal bones**

**ii. Fracture of nasal bones**

**iii. Fracture of right orbit**

**iv. Frontal lobe hemorrhage contusion**

**v. Bleeding into sinuses**

13. This court notes that the medical report indicated that the respondent had sustained a fracture of the right radius and it is alive to the fact that this particular injury occurred before the subject accident.

14. The trial court on its finding on quantum of Ksh.800,000 for general damages considered the following cases among others

a) **Jecinta Wanjiku v. Samson Mwangi [2006] eKLR** where the plaintiff suffered a head injury with cerebral concussion and a wound on the forehead and scalp, fracture of acetabular rim right hip, fracture of the right knee and post traumatic osteoarthritis right knee and was awarded Ksh.1,000,000 as general damages

b) **Paul Kipsang Koech & another v Titus Osule Osore [2013] eKLR** where the plaintiff was awarded Ksh.200,000 in general damages for bruised lower lip cheek elbow and left knee, fracture of the right upper lateral incisor tooth loosening of the right upper canine tooth, loosening of the right upper medical incisor tooth and blunt injury to the neck and abdomen.

15. I have re-evaluated the manner the learned Principal magistrate arrived at the award made in this case and find that the cases considered featured different injuries than those cited in this case. However, in a recent judgement delivered on 25/2/2021 in **Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR** where the respondent had been awarded general damages of Ksh.700,000 in the lower court and was revised by the High Court to Ksh.500,000 for multiple facial lacerations; depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruise on both knees

16. In consideration of the above this court finds that the trial court made an award which appeared to be excessive after taking into account the fracture to the radius which injury occurred before the subject accident.

17. This court finds this appeal to be meritorious. The same is allowed. Consequently, the award of Ksh.800,000 is set aside and is substituted with an award of Ksh.500,000 and liability is maintained at the ratio of 80:20 in favor of the respondent.

18. For the avoidance of doubt the following orders are made on appeal:

**I. The award of general damages by the trial court in the sum of Ksh.800,000 is hereby set aside and is substituted with an**

award of Ksh.500,000/=.

**II. The amount to be subjected to the ratio of contribution of 80% : 20%..**

**III. Each party shall bear its own costs.**

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 9<sup>th</sup> day of July, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent