



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

**CIVIL APPEAL NO. 21 OF 2020**

**ERICK FRANCIS WAFULA .....APPELLANT**

**VERSUS**

**BENJAMIN SAKWA OKOMBA.....RESPONDENT**

**(Being an appeal from the original judgment and decree of Hon. TA Odera, Senior Principal Magistrate, of 3<sup>rd</sup> April 2020, in Mumias PMCCC No. 187 of 2018)**

**JUDGMENT**

1. The suit at the primary court, in Mumias PMCCC No. 187 of 2018, was initiated by the respondent herein against the appellant, for general and special damages, arising from a road traffic accident on 9<sup>th</sup> June 2015, where a motor vehicle, belonging to the appellant, KBV 565V, hit the respondent, who was riding on a motorcycle KMCP 444 TVS, along the Kakamega-Mumias Road, causing on the respondent serious injuries. The respondent attributed negligence on the part of the appellant. The appellant filed a defence, in which he denied liability and accused the respondent of being the sole cause of the accident or having contributed to it.

2. At the oral hearing 3 witnesses testified for the respondent. PW1, a traffic police officer, attributed the accident wholly to the appellant. PW2, the medical officer, prepared the medico-legal report for the respondent, described the injuries suffered by the respondent as a fracture to his right femur, compound fracture of the right tibia and a cut wound on the right thigh. As a consequence of his injuries, his right lower leg shortened by 10 centimetres, the right ankle joint stiffened, he had a scar in the lower anterior aspect of the right leg and surgical scars on his right thigh. Disability was described at 25%. PW3, was the respondent, he described how the accident occurred, how he incurred a medical bill of Kshs. 320, 000.00, among other expenses, and how he was due for further surgery. The appellant did not adduce any evidence, but the parties settled liability by consent at 25% and to put in a second medical report by Dr. Oketch, dated 11<sup>th</sup> September 2019 on record, by consent.

3. After reviewing the evidence adduced at the trial, and other material on record, the trial court found the appellant liable, and awarded damages as follows:

a. General damages .... Kshs. 3, 000, 000.00;

b. Special damages.....Kshs. 4, 550.00;

TOTAL Kshs. 3, 004, 550.00

Less 25% contribution

NET TOTAL Kshs. 2, 253, 412.00

4. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 24<sup>th</sup> April 2020, is that the trial court disregarded his evidence and submissions, ignored the principles applicable in awarding damages and the relevant case law, and awarded a figure that was inordinately high.

5. Directions were taken on 26<sup>th</sup> January 2021, for disposal of the appeal by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

6. The appellant's written submissions are dated 18<sup>th</sup> February 2021. On the principles for interference with award of damages, the appellant

cites *Kemfro Africa Ltd t/a Meru Express Services 1976 & Gathogo Kanini vs. AM Lubia & Olive Lubia* [1982-1988] 1 KAR 727 (Kneller JA), and *Kigaragari vs. Aya* [1982-88] 1 KAR 768 (Hancox, Nyaranga JJA & Platt Ag JA), to argue that his written submissions were disregarded. On quantum of general damages, he reiterates the injuries suffered by the respondent, and narrates the contents of the medical reports placed before the trial court, reiterates that the award of Kshs. 3, 000, 000.00 was inordinately high and to adopt the submissions that he had made at the trial. On assessment of damages, he submits that an award of Kshs. 450, 000.00 would be adequate compensation, and cites *James Muriithi Ireri vs. Cyprian Mugendi Ingonya & 2 others* [2016] eKLR (Mabeya J), *Harun Muyoma Boge vs. Daniel Otieno Agulo* [2015] eKLR (Majanja J), *Zachariah Mwangi Njeru vs. Joseph Wachira Kanoga* [2014] eKLR (Wakiaga J) and *Amritlal S. Shah Wholesalers Ltd & another vs. Joshua Ekeno* [2012] eKLR (Azangalala). He has attached to his written submissions copies of decisions in *Ndungu Dennis vs. Ann Wangari Ndirangu & another* [2018] eKLR (J Ngugi J), *Daniel Kosgei Ngelechei vs. Catholic Trustee Registered Diocese of Eldoret & another* [2013] eKLR (Ngenye-Macharia J).

7. The respondent filed written submissions dated 22<sup>nd</sup> March 2021. He largely reiterated the seriousness of the injuries that he sustained, and cites and *Kiwanjani Hardware Ltd & another vs. Nicholas Mule Mutinda* [2008] eKLR (Lenaola J) to argue that the appellate court would interfere with the award by the trial court only in cases where the said court took into account irrelevant factors, or left out relevant factors or made an award that was so inordinately high or low as to amount to a wholly erroneous estimate. He reiterates the submissions made at the trial court, inclusive of the authorities that were cited there: *Rebecca Mumbua Musembi vs. Lucy K. Kinyua* [2014] eKLR (Ougo J) He invites me to enhance the award to Kshs. 4, 000, 000.00 for general damages for pain and suffering, future medical expenses by Kshs. 350, 000.00 and loss of earning capacity by Kshs. 350, 000.00.

8. On the first issue, on the disregard of the appellant's defence and written submissions, I have noted that the appellant did not adduce any evidence. The only bit of evidence from him was the second medical opinion that was placed on record by consent, at the conclusion of the respondent's case. Since no evidence was adduced by the appellant to support his defence, it cannot be said that his defence was disregarded. I note that the trial court considered the second medical opinion, by Dr. Oketch. In fact, the finding that the respondent's disability was at 50%, which the court adopted, was from the report by Dr Oketch, the respondent's own doctor had assessed disability at 25%. The trial court saw the respondent in court as he testified, and heard medical evidence. From that interaction, the trial court was better placed to assess disability, and exercise discretion based on the available evidence. I did not have that benefit, and I cannot interfere with the finding of the trial court. The fact that the trial court considered the second medical report is testimony that the court did consider the appellant's case, scanty as it was, at the trial court. On his written submissions, the trial court indicated that none were before it at the time it wrote the judgment. I would have no basis for interfering, as it was the trial court which had the file before it at the material time, and I cannot, one way or the other, determine whether the said written submissions were on record.

9. On the trial court ignoring the principles applicable in award of general damages, I can only say that the appellant has cited to me decisions where such principles were stated by the courts. He made no effort to demonstrate that the trial court did not apply those principles. I believe that the trial court applied itself correctly and followed the applicable principles.

10. This is what the court said before it assessed damages:

“I have carefully considered the injuries sustained by the plaintiff herein as found by Doctors Andai and Oketch, the injuries in the cited cases and the awards. Both doctors agreed that the plaintiff herein sustained serious injuries of multiple fractures. He was admitted in hospital for 13 months and healed with deformity of the right leg. He is also now permanently on armpit crutches which aid him to walk. He has ugly permanent scars of the limbs too. This means his life will never be the same again. Dr. Oketch who saw him in September 2019 found that his incapacity was 50%. The injuries in the cited cases save for the Mumias Sugar case are comparable to the ones sustained by the plaintiff herein. I am also alive to the fact that damages cannot renew a fractured body part or restore the same. I have taken into account the inflation factor, the ages of the said authorities and all the relevant factors too and I find that general damages in the sum of KSH 3,000,000/= would be adequate herein.”

11. On the award of Kshs. 3, 000, 000.00 being inordinately high, I have considered the authorities that the appellant has placed before me, and noted that they are dated, and relate to fairly less serious injuries. The authorities cited by the respondent are closer and comparable to the injuries sustained. I believe the award measured to the seriousness of the injuries suffered, and was made after taking into account all the other factors. The respondent has asked me to enhance the same. That I cannot do, for he did not cross-appeal.

12. In the end, it is my finding and holding that the appeal before me is not merited, and I do hereby dismiss the same, with costs to the respondent.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**W. MUSYOKA**

**JUDGE**