



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 269 OF 2017

DANIEL ODUOR SHIEUDA.....APPELLANT

-VERSUS-

CHRISTOPHER WAMBUGU.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon.I.W. Gichohi (Mrs) Senior

Resident Magistrate delivered on 26/5/2017 in Nairobi CMCC No. 5489 of 2015)

JUDGMENT

The appellant was involved in a road traffic accident on 2nd September 2015 while riding a motor cycle which collided with motor vehicle KBQ 267W. He filed civil suit number 5489 of 2015 before the Milimani Chief Magistrate's Court in Nairobi. On 21st March 2017 a consent on liability was recorded in court whereby the appellant absorbed 15% liability for the occurrence of the accident and the respondent accept 85% liability. Parties also agreed on special damages of Kshs.65,690, witness expenses of Kshs.6,000 and production of exhibits.

As a result of the consent no witness testified and written submissions on quantum were filed. In its judgment delivered on 26th May 2017 the trial court awarded the appellant Kshs.100,000 for future medical expenses and Kshs.65,690 agreed upon as special damages. This was below the appellant's expectation and he preferred this appeal on the following grounds:-

1. The learned magistrate erred by making an award for general damages for pain, suffering and loss of amenities of life which award;--

(a) Was too low as to represent an erroneous estimate of the loss/damages.

(b) Did not take into account inflation.

(c) Did not take into account the precedents presented to the court.

(d) Did not take into account the nature and extent of injuries.

(e) Amounts to discrimination of the appellant.

2. The award of Shs.450,000/= did not take into account the principles applicable in assessment of damages.

WHEREFORE the appellant prays for orders that;

(a) The appeal be allowed with costs.

(b) This court to reassess the award of Shs.450,000/=, set it aside and enhance the same to such reasonable sum as the court may consider just."

Mr. Kaburu, Counsel for the appellant submitted that it is a cardinal rule that comparable cases should attract comparable injuries. Before the trial court the appellant referred to three cases with similar injuries where general damages varying between Kshs.800,000 to Kshs.1,300,000 were awarded while the respondent referred to a 2012 case where Kshs.400,000 was awarded. It was submitted that the

authority relied upon by the respondent did not involve an operation. The trial court only relied on the respondent's authority.

Mr. Kaburu further submitted that in the case of **BERNARD ELAHALWA ANYOLA –V- JUSTUS NYATUNDO OSURO & ANOTHER, Nairobi CMCC No. 7989 of 2013**, the same trial court awarded Kshs.700,000 for similar injuries involving fracture of tibia and fibula. Counsel contend that the appellant did undergo operations and will have to be operated in future so as to remove the implants. Counsel referred to the case of **CHARLES MWANIA & ANOTHER –V- BATTY HASSAN (2008) EKLR** where the claimant suffered soft tissue injuries and fracture of the tibia and fibula. Kshs.800,000 was awarded as general damages. Further reference was made to the cases of **JACKLINE KAMUNYI KAMAU –V- SIMON KIIRU NJOKI (2018) eKLR** where Kshs.1,200,000 was awarded for fracture of the femur with operation for internal fixation and that of **EDWARD KAMAU & ANOTHER –V- HANNAH MUKUI GICHUKI & ANOTHER (2018) eKLR** where Kshs.850,000 was awarded for fracture of the femur. Counsel urged the court to award the appellant Kshs.1,300,000/-.

Mr. Morara appeared for the respondent. Counsel supports the award of the trial court and referred to the case of **TABRO TRANSPORTERS LIMITED –V- ABSALOM DOVA LUMBASI (2015) eKLR** that was relied upon by the trial court. Kshs.500,000 was awarded for blunt fracture to the back, chest and spinal column, swollen left leg and fracture of the left tibia and fibula. It is also contended that the trial court considered the lapse of time and urged the court not to interfere with the award.

This is a first appeal and the court has to evaluate the record of the trial court before making its own conclusion. No witness testified since parties recorded a consent on liability. The trial in its judgment noted the injuries suffered by the appellant as indicated in the medical report of Dr.W.M. Wokabi to be fractures of the left tibia and fibula. The trial court considered the authorities relied upon by the appellant and the respondent and awarded Kshs.450,000 as general damages.

It is now settled that the award of damages is an exercise of discretion by the judicial officer. Such discretion has to be exercised judiciously and guided by certain established factors such as taking into account inflation, similar past decided cases providing comparable injuries while noting that it is quite difficult to have two similar cases even if the injuries suffered involve similar parts of the body. In the case of **WEST(H) and SONS LTD –V- SHEPHERD (1964) A.C. 326**, Lord Morris held:-

"All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

In the case of **BUTT –V- RENT RESTRICTIONS TRIBUNAL [1982] KLR 417** the court stated the principles to be considered in such an application and states as follows:-

- "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

Additional, in the case of **MOHAMMED MAHMOUD JABANE –V- HIGHSTONE BUTTY TONGOI OLENJA (1986) eKLR**, Kneller, JA stated as follows:-

"The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

- 1. Each case depends on its own facts;**
- 2. Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);**
- 3. Comparable injuries should attract comparable awards.**
- 4. Inflation should be taken into account; and**

5. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”

The appeal is only on quantum. The injuries suffered by the appellant as per the medical report by Dr. Wokabi dated 5th May 2015 are:-

Fracture of the left leg tibia and left fibula.

The appellant was operated on and the fracture was fixed with a metallic K-nail. The accident occurred on 2nd September 2014 and by 5th May 2015 when Dr. Wokabi attended to the appellant, he was still walking with the aid of crutches. Permanent disability was assessed at 12%.

In the case of **GODFREY WAMALWA WAMBA & ANOTHER –V- KYALO WAMBUA (2019) eKLR**, the claimant suffered compound fracture of the right distal tibia/fibula, cut wound on the scalp, cut wound on the chest and lower hip. Kshs.700,000 was awarded as general damages. In the case of **JOSEPH MUSEE MUA –V- JULIUS MBOGO MUGI & 3 OTHERS (2013) eKLR** the plaintiff suffered fractures on the left leg tibia and fibula, two broken upper jaw teeth, chest injury, bruises on the elbow, injuries on the face and chest. Kshs.1,300,000 was awarded as general damages.

Other references include the case of **AKAMBA PUBLIC ROAD SERVICES –V- ABDIKADIR ADAN GALGALO (2016) eKLR** where an award of Kshs.800,000 for fracture of the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle was reduced to Kshs.500,000 on appeal.

It is evident that the courts have been awarding damages ranging between Kshs.450,000 to Kshs.1,300,000 for fractures of tibia and fibular bones. It all depends on the specific case and other injuries suffered by the same claimant in the accident. Considering the injuries suffered by the appellant, I do find that the award of Kshs.450,000 is inordinately low. The case of Tabro Transporters Limited (supra) was decided in 2015. The trial court had awarded Kshs.500,000 in that case that was reduced to Kshs.400,000. Considering that the appellant has not fully recovered and will have to undergo an operation to remove the implants, I do set aside the award of Kshs.450,000 and replace it with Kshs.800,000.

Judgment is entered for the appellant against the respondent as follows:

General damages	-	Kshs. 800,000
Special damages	-	Kshs. 65,000
Future medical expenses	-	<u>Kshs. 100,000</u>
		Kshs. 965,000
Less 15% contribution	-	<u>Kshs. 144,750</u>
		<u>Kshs. 820,250</u>

In the end the appeal is merited and is allowed as hereinabove. Parties shall meet their respective costs of the appeal. The appellant shall have costs and interest as awarded by the trial court.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2021.

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S.J. CHITEMBWE

JUDGE