



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 13 OF 2018

BETWEEN

JOHN MULI KASIKE ..... 1<sup>ST</sup> APPELLANT

MUTUA JANE ..... 2<sup>ND</sup> APPELLANT

AND

SAMUEL GITAU WAWERU ..... RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. B. N. Ireri, PM dated 30<sup>th</sup> September 2016 at the Thika Magistrates Court in Civil Case No.838 of 2013)*

JUDGMENT

1. The appellants are dissatisfied with the award of Kshs. 1,400,000 as general damages awarded to the respondent following a road accident that took place on 18<sup>th</sup> October 2013. The respondent was hit by motor vehicle registration number KBF 603H owned by the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant along the Garissa – Thika road near Magongoni area. The parties agreed on the issue of liability in the ratio 80:20 against the appellants leaving the issue of damages for determination by the court. It is the award of general damages that has triggered this appeal.
2. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reasons, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see *Butt v Khan [1982-88]1KAR 1* and *Mariqa v Musila [1982-88] 1 KAR 507*).
3. The appellants’ case is set out in the memorandum of appeal dated 13<sup>th</sup> October 2016. In addition, counsel for the appellants reiterated those grounds in the oral and written submissions. The thrust of the appeal is that the trial magistrate erred in making an award that was excessive and not commensurate with the nature of injuries sustained by the respondent. That the trial magistrate ignored the medical reports presented which showed that the respondent sustained injuries that were not extremely severe and that he failed to take into account the fact that the respondent’s fractures had completely healed and united. Further, that the trial magistrate failed to take into account the fact that the respondent did not suffer any residual disability. The appellants contended that the trial magistrate failed to consider past authorities in relation to comparable injuries and ignored the appellants’ submissions.
4. Counsel for the respondent supported the judgment and urged the court to uphold the award of the trial court as the appellants had not established any basis for the appellate court to interfere with the award. He urged that the award of general damages was reasonable given the serious injuries sustained. He pointed out that the authorities cited were relevant and that the trial court took into account the passage of time and rate of inflation.
5. According to the plaint, the respondent sustained the following injuries; a fracture of the left subtrochanteric bone, multiple bruises. The parties relied primarily on two medical reports. The first report was that of Dr Karanja dated 17<sup>th</sup> February 2012 produced by the respondent and which was the basis of the particulars in the plaint. According to the report, the respondent was admitted to Thika Level 5 Hospital from 13<sup>th</sup> November 2011 to 30<sup>th</sup> December 2011. X-rays confirmed the fractures which were managed by plaster of paris cast on the right leg while the fracture on the left femur was managed by traction. At the time the respondent was examined he did not have any complaint and he was in good general condition apart from scars on the face and forearm. The doctor concluded in his prognosis that although the respondent sustained grievous harm, the injuries had healed and there was no permanent disability anticipated.

6. The report prepared by Dr P. M. Wambugu was dated 11<sup>th</sup> May 2015. Dr Wambugu confirmed that the respondent sustained closed fractures on the right and left femur. The respondent did not present any complaints at the time. He recorded that his gait was normal and he walked unaided and that there was no shortening of both limbs. He stated that the knee and hip joints were intact. In his prognosis, he did not anticipate any complication and noted that no total permanent incapacitation occurred.

7. Before the trial court, the respondent proposed Kshs. 2,000,000/- as general damages. His counsel relied on several decisions. In **Mary Nzomo v Headmistress Machakos Girls and Others MKS HCCC No. 55 of 2001 [2003] eKLR** where the plaintiff suffered a fracture of both the radius ulna of the lower third and the court awarded Kshs. 1,250,000/- as general damages in 2003. **Robson Ngowa Masha v Summit Cove Line Ltd MSA HCCC No. 270 of 2010 [2013] eKLR** where the plaintiff sustained a fracture of the tibia and fibula, crush injury of both right and left lower limb amongst other injuries and was awarded Kshs. 1,600,000/- as general damages. In **Abdi Salaan Nuron v Kenya Tea Development Authority KRC HCCC No. 26 of 1999 (UR)** in which the plaintiff suffered a fracture of the right tibia and fibula and the court awarded Kshs. 800,000/- in 2002 while in **Savco Stores Ltd v David Mwangi Kimotho** where the plaintiff sustained a fracture of the tibia and fibula and was awarded Kshs. 800,000/- in 2004.

8. The appellants submitted that an award of Kshs. 150,000/- was reasonable in light of the decision in **Peter Mthiringi v James Wachira NBI HCCC No. 2118 of 1992 [1999] eKLR** where the court awarded Kshs. 150,000/- in 1992 for the plaintiff's fracture of the femur.

9. After considering the evidence and parties' submissions, the trial magistrate came to the following conclusion that the cases cited by the respondent were more relevant as the claimants in those cases cited comparable injuries and taking into account the rate of inflation, the amount of Kshs. 1,400,000/- was reasonable in the circumstances.

10. The nature and extent of the respondent's injuries is not in issue. In fact, both doctors, whose reports were relied upon, were consistent to the respondent's suffered fractures and soft tissue injuries and that he had healed without any disability. The issue to be decided is whether in light of the cases cited, the trial magistrate can be said to have erred in light of the principle in **Butt v Khan (Supra)**.

11. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exact (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**). I would also add what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that:

*The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.*

12. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Kigaraari v Aya [1982-88] 1 KAR 768 Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

13. I have carefully studied the cases cited by both parties to guide the trial magistrate. The case cited by the appellants was rather outdated and not reflective of the current trend of awards. Counsel who fail to cite a range of cases reflective of the current trend do a disservice to their clients and court as the court is expected to be guided by those cases and they can hardly complain if the court does not follow their lead.

14. On the respondent's part, I also find that the cases cited were on the higher side and the injuries on close scrutiny were far from what the respondent sustained in this case. In the **Mary Nzomo Case (Supra)**, the plaintiff had a fracture of the left radius and ulna and a compound fracture of the leg. She had serious disability as she could not fold her leg and could not do heavy work. In that case the court assessed disability at 42%. In **Robson Ngowa Masha (Supra)** the plaintiff suffered fractures of the left and right tibia and fibula and a crush injury on both left and right limbs. He suffered permanent disability on both lower limbs which were badly scarred and disfigured and disability assessed at 40%. In **Savco Stores Limited (Supra)**, the plaintiff suffered a fracture of the left tibia and fibula and disability was assessed at between 12% to 20%.

15. From the summary I have given, it is clear that the cases cited were hardly helpful in the circumstances as the injuries were way more serious and the claimants in those cases suffered disability. It is inappropriate for counsel to thrust upon the trial court, decisions that may not be useful in the hope that the trial magistrate comes up with an appropriate award. I would also adopt what Ngaah J., stated in **Penina Waithira Kaburu v LP NYR HCCA 59 of 2016 [2019] eKLR** as follows:

*While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.*

16. Considering the cases cited and given the more serious nature of the injuries as I have stated, I find the award of Kshs. 1,400,000.00 on the higher side and indeed excessive. I would award a sum of Kshs. 800,000/- as general damages.

17. I allow the appeal, set aside the award of general damages by the subordinate court and substitute it with an award of Kshs. 800,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

18. This appeal would have been avoided if both counsel for the parties had been diligent in citing appropriate cases. I therefore decline to award costs.

**DATED and DELIVERED at KIAMBU this 8<sup>th</sup> day of JANUARY 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Mwaura instructed by Wagaki Murage and Company Advocates for the appellants.

Mr Wachira instructed by Waiganjo and Wachira and Company Advocates for the respondent.