



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J

CIVIL APPEAL NO. 47 OF 2017

BIOJOULE KENYA LIMITEDAPPELLANT

VERSUS

JOHN NJOROGE KIUMU.....RESPONDENT

(Being an appeal from the judgment and/or decree of Hon Z. Abdul in Naivasha Chief Magistrates Civil Suit No. 1024 of 2016, delivered on 3rd October, 2017.)

JUDGMENT

Background

1. On 7.9.2016 the Respondent was riding a motorcycle registration No. KMCR 285X along Kenyatta Avenue in Naivasha Town. It collided with Motor vehicle KBX 217C at Migwan Junction and the Respondent sustained injuries. He instituted a suit against the defendant/appellant for compensation.
2. During the hearing on 13.06.2017, the parties agreed on apportionment of liability on an 80:20 basis in favour of the plaintiff. The plaintiff availed two witnesses at the hearing; a doctor and himself. The doctor testified that the plaintiff suffered compound comminuted fracture of the right tibia and fibula. The defendant availed no witnesses.
3. At the end of the hearing, the trial magistrate made an award was as follows:

General damages	Kshs. 750,000/=
Special damages	Kshs 25,000/=
Future medical expenses	Kshs <u>100,000/=</u>
	Kshs 875,000/=
Less 20% contribution	Kshs <u>175,000/=</u>
Total	Kshs 800,000/=

4. The appellant's appeal is against the award of quantum. It asserts that the trial magistrate erred in making an inordinately high award representing an erroneous estimate that is excessive and unrealistic in circumstances; that in arriving at the award the trial court applied wrong principles and failed to take into account material facts; and that the trial magistrate erred in disregarding the appellant's submissions and on all points of fact and law.
5. The respondent, on his part, supports the trial court's judgment and asks the court not to interfere with the award.
6. In summary, what this court is required to determine is whether the award of Kshs 750,000/= is in tandem with the injuries sustained, and in accordance with proper legal principles. Further, whether and further the trial court properly considered the appellant's submissions, and if this court interfere with the award accordingly. The appellant urges court to reduce the amount to not more than Kshs. 400,000/=.

7. In this case, the court's role is simply to reassess the evidence availed as to injuries and determine whether the amount awarded is comparable to awards for similar injuries in other cases.

8. Dr. Obed Omuyuma PW1, testified the plaintiff suffered sustained a comminuted fracture of the right tibia and fibula. This is as indicated in the medical report dated 15.10.2016 which was exhibited. The appellant was later taken to theatre for management of the fracture effected by open reduction and internal fixation. A plate was applied and at the time of examination there was still a plate. The Doctor opined that the appellant had suffered a disability of 20%. He classified the degree of injury as grievous harm, and assessed future costs for removing the plate at Kshs.100,000/=. This evidence was not contradicted.

Analysis and determination.

9. **The legal principles binding this court are that it will not interfere with the discretion of a trial court unless it is premised on misapplication of the law or is inordinately high or low. In Butt v Khan Civil Appeal No. 40 of 1997 the court held:**

“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.” (See also **Kemfro Africa Ltd and Another v A.M. Lubia & Another (1982-1988)**)

10. This court is also well guided by the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006]eKLR** where the Court of Appeal stated:

*“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated **H. West & Son Ltd vs. Shephard [1964]AC 326 at page 353-** ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”*

11. The trial court in coming to its award relied on the cases of: **Alphone Nzuki v Brian Charles Ochodho [2014] eKLR** where the court in 2014 affirmed an award of Kshs 800,000/= for compound comminuted fracture right tibia and fibula and degloving injury medial aspect of right leg and foot; and **John Njenga Maina v Humphrey Kinyua Rukeria [2016] eKLR**, where the court in 2016 awarded **Kshs.750,000/- in general damages** for compound fractures of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains.

12. Coming back to the present case, the comparative case of **Zacharia Mwangi Njeru v Joseph Wachira Kanoga (2014) eKLR** a plaintiff who had suffered a fracture of tibia/tibula was awarded general damages of Kshs. 400,000/=. In that case, there was neither shortening of the leg nor incapacity.

13. In **Civicon Limited v Richard Njomo Omwancha & 2 others [2019] eKLR**, the 3rd respondent sustained a single fracture of the right tibia and fibula and fractures of the upper teeth and permanent disability assessed at 30%, was awarded Kshs 500,000/= on appeal from Kshs 1,300,000/=. Here, there was no fixation of a metal plate.

14. In **Beatrice Wairimu Wandurua v C. Dorman Limited [2009] eKLR** the appellant sustained serious injuries to her legs which resulted in compound fractures of the left tibia and dislocation of the left ankle joint. The Court of Appeal awarded Kshs. 550,000/= in 2009.

15. In **Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR**, the plaintiff sustained injuries including; fracture of the left tibia and left fibula, fracture of the left elbow, deep cut wound on the left forehead and consequently suffered 20% disability. The court, on appeal, upheld an award of Kshs. 800,000/= for general damage inclusive of future medical expenses.

Disposition

16. Given the comparative cases cited above, it is my view that taking into account the year of judgment, incapacity, and inflation, the cases cited here all represent a fair comparison with the injuries in the present case and the award is within acceptable range.

17. Accordingly, I find no basis for interfering with the trial court's decision and uphold it. The appeal is therefore dismissed with costs to the respondent.

18. Orders accordingly

Dated and Delivered at Naivasha this 10th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Bosibori holding brief for Juma for the Appellant
2. Mr. Gachie holding brief for Wainaina for the Respondent
3. Court Clerk - Quinter Ogutu