



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 261 OF 2017**

**MARY MAINA.....APPELLANT**

**-VERSUS-**

**JOSEPH MAINGI WAMBUA.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. C.A Muchoki (RM) in the Senior Magistrate's Court at Tawa, Civil Case No.107 of 2016, delivered on 17<sup>th</sup> July 2017)*

**JUDGMENT**

1. The Respondent filed a suit in the lower court seeking general damages for personal injuries sustained from a road accident on 12/09/2015 along the Machakos-Kitui road. He also prayed for special damages, future medical expenses, costs of the suit and interest.
2. The Respondent filed a statement of defence denying the claim. After the preliminaries, the parties consented on liability in the ratio of 90:10 in favour of the Respondent and the matter proceeded for assessment of damages. Judgment was entered for the following awards.

Special damages.....Kshs.130,150/=

General damages.....Kshs.800,000/=

Future medical expenses.....Kshs.320,000/=

Total.....Kshs.1,250,150/=

**Less**

10% contribution.....Kshs.125,015/=

**Net award.....Kshs.1,125,135/=**

3. Aggrieved by the decision, the Appellant filed this appeal and listed 6 grounds as follows;

a) *The learned Magistrate erred in law and misdirected herself when she failed to consider the applicant's submissions on point of law and facts on liability.*

b) *That the learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles on law and has occasioned a miscarriage of justice.*

c) *The learned Magistrate erred in law and fact in awarding quantum to the applicants at an excessive amount of Kenya shillings 1,250,150/= in the circumstances considering the evidence brought before court and principles of law.*

d) *The learned Magistrate erred in law and fact in awarding an excessive sum of Kshs.800,000/= as general damages compared to the injuries suffered and evidence brought before the honorable court.*

e) *The learned Magistrate erred in law and fact by awarding Kshs.320,000/= as future medical expenses without considering the evidence of the Appellant's doctors. The learned magistrate was biased by considering the Respondent's evidence only.*

f) *The learned Magistrate erred in law and fact by unduly disregarding the judicial authorities cited by the Appellants and by instead relying on authorities cited by the Respondent which were excessive in the circumstances.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellant reiterated her reliance on the submissions filed before the trial court and condensed all the grounds of appeal into one issue *to wit* quantum. Further, she divided the issue of quantum into; general damages and future medical expenses.

6. On general damages, she submits that the evidence adduced by the doctors called by both parties point to fracture of the neck femur and loss of 2 teeth without permanent consequences or incapacities. She cites the case of **Denshire Muteti Wambua –vs- Kenya Power & Lighting Co. Ltd (2013) eKLR** where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

7. She submits that the award of Kshs.800,000/= is inordinately high compared to the injuries suffered and invites the court to consider the following decisions;

a) **Elizabeth Mulwa –vs- Tawfiq Bus Services (2003) eKLR** where the plaintiff was awarded Ksh.250,000/= for fracture of the femur, tibia & fibula and a cut on the right thigh.

b) **Michael Adeka Khaemba & 2 others –vs- Rassangylo Muli Kumuyu (2018) eKLR** where the

Respondent sustained a fracture of the right femur and on appeal, the award of Kshs.600,000/= was reviewed downwards to Kshs.200,000/=.

c) **Zachariah Mwangi Njeru –vs- Joseph Wachira Kanoga (2014) eKLR** where the Respondent sustained fractures of left tibia and fibula. On appeal, the award of Kshs.800,000/= was reviewed downwards to Kshs.400,000/=.

d) **Kenyatta University –vs- Isaac Karumba Nyuthe (2014) eKLR** where the Respondent sustained a fracture of the right femur and underwent surgery for internal fixation, temporary incapacity was assessed at 10-20%, surgery to remove internal fixation was estimated at Kshs.80,000/=. He also sustained soft tissue injuries to the head and bruises on the right knee and temporarily lost consciousness and was admitted for two months. On appeal, the award of Kshs.700,000/= was reviewed downwards to Kshs.350,000/=.

e) **Florence Njoki Mwangi –vs- Peter Chege Mbitiru (2014) eKLR** where the Respondent sustained fracture of the right mid shaft femur, fracture of the left mid shaft femur, two degloving injuries on the right and tibia fibula necessitating skin grafting and multiple cuts on the forehead. The award of Kshs.700,000/= was upheld on appeal. The Appellant submits that the amount in this case was upheld despite the fact that the claimant would need money to remove the k-nails and screws. She contends that in the instant appeal, the award had factored in the removal of k-nails and screws.

8. Accordingly, the Appellant submits that an award of not more than kshs 350,000/= is fair, reasonable, just and adequate.

9. On future medical expenses, the Appellant submits that the pleaded amount of Kshs.300,000/= for removal of inserted implant was disputed by DW1 for the reason that *“...the implants in this case form part of the hip joint. The procedure done was total hip replacement (bipolar hermiarthroplasty cemented). The implants are never removed as they are now part of the joint.”*

10. The Appellant contends that the assessment by the Respondent’s doctor (PW1), which was relied on by the trial magistrate, was erroneous and calculated to enable the Respondent steal a march and justify a higher award and costs. It is also the Appellant’s contention that removal of the implants cannot be more costly than insertion and as such, the award of Kshs.300,000/= is unwarranted and unjustified.

11. She has relied on the case of **Adeka Khaemba (supra)** where the court held that even though the medical expert opinion is meant to assist a court in making its determination, the same is not binding on the face of it and ought to be considered in addition to the other evidence adduced before the court.

12. On future medical expenses, the Respondent submits that the advise on removal of the metal implants at a cost of kshs 300,000/= was given at A.I.C Kijabe hospital where he was examined by a specialist. He contends that the Appellant’s doctor (DW1) is a general practitioner but she disregarded the opinion of specialists and gave an unsigned medical report full of contradictions. He also contends that DW1 did not come to court to justify why he (Respondent) would not need a further operation.

13. He submits that the P3 form gave the degree of injury as grievous harm which is defined as *‘any harm which amounts to maim or endangers life or seriously or permanently injures health or which is likely to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ.’* Accordingly, he submits that the injuries sustained were severe, extensive and life threatening.

14. Relying on his submissions before the trial court, the Respondent submits that the award of Kshs.800,000/= as general damages was commensurate to the injuries sustained. He relied on the following decisions before the trial court;

a) **Msa HCCA No. 550 of 2000; Hussein Abdi Hashi –vs- Hassan Noor** where the plaintiff was awarded Kshs. 800,000/=.

b) **Nairobi Civil Appeal No. 1045 OF 2004**; Kiru Tea Factory & Anor –vs- Peterson Watheka Wanjohi where the plaintiff was awarded Kshs.800,000/=.

### **Analysis and determination**

15. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor. –vs- Associated Motor Boat Company Limited & Others**.

16. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issue for determination is whether the quantum of damages should be disturbed.

17. Award of damages is largely a question of discretion and the principles which should guide an appellate Court in deciding whether to interfere with such an award are well settled. The appellate Court should be satisfied that in assessing the damages, the trial magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

18. The injuries sustained by the Respondent were pleaded as follows;

- a) Blunt injury to the lower jaw.
- b) Blunt injury to the right thigh.
- c) Comminuted right parasymphyseal fracture and fracture of left condylar.
- d) Two missing teeth.
- e) Cracked teeth.

19. The Respondent testified as **PW2** and said that when the accident happened, he lost consciousness and found himself at Machakos level 5 hospital where he was admitted and then referred to Kijabe as his leg was seriously injured. He stated his injuries as being on the leg, teeth and loss of two teeth. He denied having healed and said he could not walk properly. It was also his evidence that the metallic plate needed to be replaced after 10 years and that his legs were not the same height.

20. **PW1** was **Dr. Kimuyu Judith** who testified that she examined the Respondent on 22/03/2016. Her opinion was that he suffered serious bone and soft tissue injuries and would require a further operation to correct the gaits. She produced her medical report as exhibit 2.

21. On cross examination, she said that she examined the Respondent personally and relied on x-ray forms from Machakos level 5. That the procedure carried out was not hip replacement and it would be necessary to remove the metal as it was a foreign body. She did not rely on documents from Kijabe hospital as she did not see them. She had no quotation of Kshs.300,000/= as it was an estimate which she consulted from an orthopedic hospital.

22. **Dr. Leah Wainaina (DW1)** produced the medical report prepared by her colleague Dr. Kahuthu who was on maternity leave. She disputed the amount of Kshs.300,000/= quoted by PW1 and said that the procedure done on the Respondent was

total hip replacement and the implant did not require removal as it formed part of the joint.

23. Further, she testified that at the time of examination, an x-ray was repeated and it confirmed the implant to be in good position. She referred to the implant as cemented hip replacement requiring no removal. According to her, it was probable that PW1 was not aware that the procedure had been done.

24. In cross examination, she agreed that the medical report had not been signed by the maker and that the signature appearing was hers. That the hip replacement was done at Kijabe hospital and the discharge summary indicates the bipolar cemented. She never examined the Respondent.

25. On general damages there was no much dispute about the injuries sustained save that Dr. Kahuthu's medical report indicates the nature of injuries as '*single fracture*' yet her colleague's evidence (DW1) was that there were two fractures around the hip joint. After looking at the medical evidence produced, I am convinced that the injuries sustained were as pleaded.

26. I have perused all the authorities relied on by the parties in light of the injuries sustained by the Respondent. The decisions cited by the Respondent were decided more than 10 years ago and it is evident that the injuries sustained by the plaintiffs in those cases were more severe.

27. In the **Abdi Hashi case (supra)**, the plaintiff had multiple fractures, was admitted for 18 days and who had certified temporary incapacity for one year and permanent incapacity was assessed at 20%. In the **Kiru Tea Factory case (supra)**, the plaintiff was crushed against a wall by a reversing lorry.

28. He had multiple fractures, soft tissue injuries on the chest and a degloving injury on the right hand with extensive skin and muscle loss on

the forearm. Treatment involved surgical toilet of the wound, skin grafting and plating of fractures. He was admitted for about 3 ½ months and endured a long course of painful treatment which left the affected arm very stiff and more or less function-less.

29. In the instant case, there was no indication from any of the doctors on whether the Respondent had suffered any permanent incapacity. Further, the discharge summary (*exh 5*) shows that the Respondent was admitted for 10 days. It is therefore my considered view that the authorities cited by the Respondent are not comparable.

30. On the other hand, I find the authorities cited by the Appellant to be more relevant and providing a better guide on what a reasonable award of general damages should be in this case. It is therefore my considered view that the award of Kshs.800,000/= as general damages was inordinately high and should be reviewed downwards to Kshs.400,000/=.

31. On future medical expenses the main dispute here is in the differing opinions of the two doctors. According to the Respondent's doctor (PW1), there was need to remove the metal implant at an estimated cost of Kshs.300,000/=. On the other hand, the Appellant's doctor (DW1) opined that the metal implant had been cemented and required no removal as it formed part of the hip joint.

32. In her testimony, Dr. Kimuyu (PW1) testified that she has a degree in medicine from Nairobi University. In her medical report, she signed off as 'Senior Medical Officer' and no other credentials are indicated. On the other hand, Dr. Leah Wainaina (DW1) testified that she has a degree in medicine and surgery from Moi University. She only produced the medical report prepared by Dr. Kahuthu and agreed that she never examined the Respondent.

33. The medical report only indicates that she (Dr. Kahuthu) is a medical doctor and does not give any other credentials. From the evidence therefore, none of the two doctors is a specialist in orthopedia and as such, none of the evidence can be said to be weightier than the other.

34. This court is a 'layman' in matters which are medical and is faced with two conflicting opinions on whether the Respondent is entitled to future medical expenses of Kshs.300,000/= for removal of metal implant or whether the implant should not be removed. Now, in light of the standard of proof in civil cases and the fact that the existence of the metal implant is not in dispute, the probability, as is common in similar cases, is that the metal implant will be removed or will require some sort of maintenance. It is therefore my considered view that the award of Kshs.300,000/= should not be disturbed.

35. There was no contest on the future medical expenses for dental surgery (20,000/=) and special damages (130,150/=) and they should also not be disturbed.

36. The award will therefore be as follows: -

Special damages.....	Kshs.130,150/=
General damages.....	Kshs.400,000/=
Future medical expenses.....	Kshs.320,000/=
Total.....	Kshs.850,150/=
<b>Less</b>	
10% contribution.....	Kshs.85,015/=
<b>Net award.....</b>	<b>Kshs. 765,135/=</b>

37. I therefore set aside the judgment of Kshs.1,125,135/= and substitute it with a judgment for seven hundred and sixty five thousand, one hundred and thirty five shillings (Kshs.765,135/=) with costs and interest. Half costs of the appeal to the Appellant.

Delivered, signed & dated this 14<sup>th</sup> day of February, 2020 in open court at Makueni.

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Hon. H. I. Ong'udi

Judge