



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIVASHA**

**CORAM; R. MWONGO, J.**

**CIVIL APPEAL NO.96 OF 2015**

**MOHAMEMED YOUNIS QUERESHI.....1<sup>ST</sup> APPELLANT**

**KHAN RIAZ.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHRIS MAINA MATHU.....RESPONDENT**

*(Being an appeal from the judgment and/or decree of Resident Magistrate,*

*Hon S.M Mwinzi in Naivasha in CMCC No. 822 of 2013,*

*delivered on 6<sup>th</sup> October, 2015.)*

**JUDGMENT**

### **Background**

1. This is an appeal challenging only the quantum of damages awarded by the lower court as compensation for injuries sustained in an accident. The appellants expressly abandoned their challenge on liability.

2. Briefly, the respondent was riding a motorcycle KMCU 240A on 12<sup>th</sup> August, 2012, along Kenyatta Avenue Naivasha, when he was knocked down by a motor vehicle registration number KAY 207F. He sustained the following injuries:

Fracture of left tibia;

Bruises on the head, both hands and left leg.

3. The trial magistrate considered the following authorities: **Erastus N Shem v Kenya Ports Authority Msa HCCC No 318 of 1991** where 400,000/= was awarded in 1993 for compound fracture of tibia and fibula with severe loss of skin and bone; **John Kinuthia Kamau v Attorney General Nrb HCCC No 2441 of 1988** where Kshs 200,000/= was awarded for a compound fracture. The defendant cited **Isaac Mwenda Micheni v Mutegi Murango[2004]eKLR** in which Angawa J awarded 100,000/= for fracture of the left tibia and fibula with soft tissue injuries.

4. The trial court found 100% liability against the appellant and awarded damages as follows:

General damages	Kshs	800,000.00
Special damages	Kshs	<u>183,376.00</u>
<b>Total</b>	<b>Kshs</b>	<b>983,376.00</b>

5. Only two witnesses for the plaintiff were called to testify. The defence closed its case without calling any witness to testify.

6. In considering damages, I think it is essential is to clearly assess the evidence adduced on injuries sustained, evaluate them, and then assess the damages that would be fair compensation upon comparing them with injuries of a similar nature in other cases.

7. This being a first appeal, the court is bound by the following three principles: a) this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; b) In reconsidering and re-evaluating the evidence, the court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her, which this court has not had; and c) It is not open to this court to review the findings of the trial court simply because it would have reached a different outcome if it were hearing the matter for the first time. See: **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123**; **Peters v Sunday Post Limited [1958] EA 424** ; and **Butt v Khan (1977) KAR**

### Special Damages

8. The appellants assert that these damages were excessive in addition to not being pleaded or proved. In the amended plaint dated 23<sup>rd</sup> January, 2014, the plaintiff pleaded special damages particularized at paragraph 7 of the plaint as treatment expenses of Kshs 435,000/= and medical report expenses of 5,000/= making a total of 440,000/=, which is what was prayed for.

9. PW1 exhibited the medical report as PExb 5 and receipts as PExbs 6-7(a)-(l). the trial court found that the receipts proved Kshs 183,376/=. The appellant's submissions make no arguments on special damages. Accordingly, I will not interfere with the amount awarded in special damages.

### General Damages

10. Then appellants allege that the soft tissue injuries completely healed, with no post functional deficit and no permanent incapacitation. It is asserted that Dr Ogando Zoga's Medical Report does not specify that the tibia fracture was comminuted. The Oxford Dictionary defines comminuted fracture as a fracture in which the bone has splintered into more than one fragment as a result of high impact trauma.

11. I have perused the Medical Report of Dr Zoga which was made two months after the accident. He identified the injuries sustained as: Bruises in the head; Bruises on both hands; Fracture of Left tibia; and Bruises on left leg. He assessed disability at 20%. The doctor's report indicates that the respondent:

***“sustained fracture of left tibia which is expected to heal although not fully”***

12. I have also perused the P3 Medical Report which indicates that the tibia fracture was “comminuted”; and the Discharge Summary from Nakuru Provincial General Hospital shows a final diagnosis of open fracture of left tibia and degloving i.e. the skin was also torn off. The respondent was hospitalized for just over three weeks. All these reports are in evidence and the information in them must be read together.

13. The trial magistrate did not particularise the nature of the fracture, merely indicating that the injuries included a “*fracture sustained by the Plaintiff coupled with multiple blunt injuries*”. He found that pain, suffering and loss of amenities would be catered for by the award of 800,000/=.

14. The appellant has cited authorities on appeal which he did not cite at trial: **Hassan Noor Mohammed v Tae Youn Ann [2001]eKLR** where the court, in July 2001, awarded Kshs 200,000/= for fracture of tibia, fibula and dislocation of left ankle; and **Johnson Mose Nyaundi Thro Wilfred Wadimbe Nyaundi v Petroleum & Industrial Service Ltd [2014]** where Muchelule, J upheld an award of Kshs 180,000/= made in the lower court in 2007 for general damages, and rejecting authorities cited where awards were made in 1990 and 1991 cases for 350,000/= and 300,000/= for more extensive and serious fractures.

15. Despite these arguments, the appellants have not provided any cases comparing injuries similar to the present case, and awards thereon made in or around 2013- 2015. That is the duty of the appellants. They have not discharged it to show that the present award made in 2015 is manifestly excessive and that this court should therefore interfere with it.

16. This court has come across the following cases: **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** in which the court (Majanja,J) noted injuries as follows:

***“the respondent sustained the following injuries: lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. Dr Ogando Zoga (PW 2) examined the respondent on 28<sup>th</sup> October 2013 and produced the medical report. When PW 2 examined the respondent, he was complaining of severe headache, severe pains on the chest, back, right hand and right leg. He noted that the respondent could not walk without crutches and was still on plaster of paris. The respondent was initially attended to at Kisii Level 5 Hospital then referred to Tenwek Mission Hospital where he was admitted for 3 for treatment including internal fixation which PW 2 noted would cost Kshs. 100,000/- to remove in the future. He also noted that the injuries were yet to heal and permanent disability was anticipated.”***

17. There, the trial court had awarded Kshs. 1,000,000/- court which, on appeal was set aside and substituted with an award of **Kshs. 450,000/-**.

18. In **Naom Momanyi v G4S Security Services Kenya Limited Meru HCCA No. 145 of 2014 [2018] eKLR**, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. He was awarded Kshs. 300,000/- in

2018 while in *Gogni Construction Company Limited v Francis Ojuok Olewe HCCA No. 1 of 2014 Homa Bay [2015] eKLR*, the claimant was awarded Kshs. 350,000/= as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks.

19. Considering the general trend of awards in comparable cases and the need to maintain consistency, I find the award of Kshs 800,000/= by the trial court inordinately high.

**Disposition**

20. In the result, I set aside the award of Kshs 800,000/= for general damages and substitute it with an award of 400,000/- for general damages. The award for special damages of Kshs 183,376/= is hereby upheld. The total award to the respondent shall thus be 583,376/=.

21. In the circumstances of this case, each party will bear its own costs.

22. Orders accordingly

**Dated and Delivered at Naivasha this 13<sup>th</sup> Day of February, 2020**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Kithinji holding brief for Geno for the Appellant
2. Wairegi holding brief for Ochoki for the Respondent
3. Court Clerk - Quinter Ogutu