



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 162 OF 2016

MOI TEACHING AND REFERRAL

HOSPITAL BOARD.....1ST APPELLANT

CHRISTOPHER K. KINYUA.....2ND APPELLANT

VERSUS

LEONARD KIBIWOTT KOSGEI.....RESPONDENT

(Being an appeal from the judgment of the Hon.T.W.Cherere (CM) in CMCC no.8 of 2010 and delivered on the 7th Nov.2016)

JUDGMENT

1. **MOI TEACHING AND REFERRAL HOSPITAL BOARD** (The 1st appellant) and **CHRISTOPHER K. KINYUA** (the 2nd appellant) had been sued by **LEONARD KIBIWOTT KOSGEI** (the respondent) who sought general damages, for injuries sustained on 23.11.2008 when he was travelling as a passenger in motor-vehicle reg. No. KAS 402 U when the driver and or employee of the 1st appellant driving motor-vehicle reg. no. KBB 171S Mini bus caused it to collide with the vehicle he was in therefore sustain an injury. The accident was attributed to the negligence of the appellants.

2. The appellants denied the same by filing their statement of defence denying all the allegations and a Third party who was enjoined also denied liability. They attributed negligence to the appellant and relied on doctrine of *res ipsa loquitor* and the provisions of the Highway code and Traffic Act.

3. The matter proceeded to hearing and judgment was delivered on 7.11.2016 as follows:

i. Liability: was apportioned in favor of the plaintiff as against the defendants jointly and severally at 80%and as against the 3rd party at 20%.

ii. Special damages for Ksh.22.985/=

iii. General damages for Ksh.2.000.000/=

iv. Costs of the suit be paid to the plaintiff at 80% against the defendants jointly and 20% as against the 3rd party.

v. Costs to the plaintiff.

4. The appellants do not contest the issues of liability and special damages. The appeal herein in the premises only challenges the award and assessment of general damages by the trial court. It also ought to be noted that the 3rd party, **WILLIAM KIPCHUMBA**, did not challenge the decision and judgement of the trial court. An appeal was lodged and the grounds are as follows:

i. That the award in general damages that was excessive in the circumstances compared to the injuries sustained by the respondent.

ii. The trial magistrate erred in failing did not take into account the submissions filed by the appellant before arriving at her judgment.

iii. The trial applied the wrong principles of law in her judgment.

iv. That the appeal be allowed and the lower court judgment be set aside and costs of the appeal be awarded to the appellant.

5. The respondent (PW1) testified that when the accident occurred he lost consciousness and only regained when at **Moi Teaching and Referral Hospital(MTRH)** the next day. He sustained fractures on both legs, lost one tooth and a fracture of the jaw. He was discharged after a week. He later went to Kenyatta National Hospital and went for CT scan at MP Shah Hospital. He was further examined by Dr. Aluda.

6. Dr. Joseph Imbenzi's (PW2) evidence was that when the respondent was booked he was semi conscious and was bleeding from many facial cuts he had sustained. He had sustained:

- a) a fracture on the nasal bone indolge Maxilla Upper Jaw,
- b) there was loss of one incisor,
- c) he had sustained a segmental fracture of the tibia of the left leg
- d) a lateral fracture of right tibia.
- e) There were facial wounds which were treated by surgery.

The respondent was referred to Kenyatta National Hospital for specialized treatment to correct the fractures of the nasal bones. Upon review on 4.2.2009 was healing well save for the shortening of the leg.

7. **Dr. Samuel Aluda(PW3)** told the trial court that the respondent was admitted and discharged from **MTRH** on 5.12.2008. Later he went to KNH was discharged on 11.12.2008. He was readmitted to MTRH on 29.1.2009 and discharged on 3.2.2009. He had sustained both soft and hard tissue injuries which included:

i. Head injury and was semi-conscious after accident.

ii. Forehead and face tender and swollen with multiple cut wounds.

iii. Lost one upper jaw tooth

iv. Fractures of nasal bones.

v. Cut wound on nasal ridge.

vi. Fractures of the mandibles and maxilla.

vii. Both legs were swollen and tender bruises with cut wound.

viii. Fracture of right tibia plateau injuries had healed at time of examination though he was complaining of pain.

8. The parties had agreed to canvass the appeal by way of written submissions.

Appellant's submission

9. The appellant's main contention was that, the award on was in excess of the injuries sustained. Being the first appellant court it was urged to be guided by **Kemfro Africa Ltd t/a Meru Express Services v. AM Lubia & Anor [1987] KLR 27 and Southern Engineering Co. Ltd v. Musingi Mutia[1985] KLR 730**, the court before it disturbs the quantum of damages awarded by the lower court it had to be satisfied that in assessing damages it took into account irrelevant factors or left out a relevant one thus leading to an inordinately low or high amount.

10. The court was referred to various cases with comparable injuries. In **Denshire Muteti Wambua v. Kenya Power & Lightin Co. Ltd [2013] eKLR** the claimant suffered multiple fractures of the right and left femur, left scaphoid bones, dislocation of left lunate bone and bruises parietal scalp. He was awarded Ksh.1.500.000/=, in **Joseph Musee Mua v. Julius Mbogo Mugi & 3 Others [2013] eKLR** the claimant sustained injury to the left leg, left tibia and fibula were fractured, two broken upper jaw teeth(one molar and canine tooth), chest injury bruises on the left shoulder and elbow, shortening of the left leg, the nerves were affected. He was awarded Ksh.1.300.000/=.

11. Also in **Mwaura Muiruri v. Suera Flowers Ltd & Anor [2014] eKLR** the plaintiff sustained multiple lacerations, soft tissue injuries on the chest cage, comminuted fractures of the right humerus upper and lower thirds of the tibia, compound double fractures of the right leg upper and lower third tibia fibula, he was awarded Ksh 1.450.000/=.

12. Counsel urged this court to reduce the award to between Ksh1.200.000 and 1.400.000/=.

Respondent's submission

13. The respondent submitted that the appellant had failed to attach medical reports by Dr, Imbenzi and DrAluda who had testified, thus the appeal was incurably defective. In support of this argument the respondent cited the case of **Tononoka Rolling Mills Ltd v. James To Boso Were [2015] eKLR** where the appellant had failed to attach a medical report for a doctor who had testified. The court dismissed the appeal.

14. The court was urged to be guided by **Penina Waithira Kaburu v. LP [2019] eKLR**, where the duty of the appellate court was demonstrated as follows:

“the role of the appellate court in assessment of general damages is quite limited for the simple reason that ascertainment and award of general damages falls within the discretion of the trial court.”

The court has to observe the principle in deciding whether to disturb quantum of damages awarded by the trial court by assessing whether it took into account relevant or irrelevant factors which led to an inordinate too high or too low award.

15. This court was urged to consider the method of approach in *Arrow Car Ltd v. Bimomo & 2 Ors* [2004] 2 KLR 101 regarding personal injury claims, being that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

16. The respondent’s counsel listed the following injuries as those sustained by the respondent:

i. Fractures of the facial bones, nasal bones, mandible bones and maxillary bones and parapharyngeal

ii. Head injury with contusion

iii. The forehead and face were swollen and tender with multiple cut wounds

iv. Intranasal cut wound

v. Oral cut wounds

vi. Clogged blood in nostrils

vii. Lost one upper jaw premolar tooth

viii. Gap on his right side upper teeth due to loss of a tooth

ix. He sustained a cut wound on the nasal ridge

x. Both legs were swollen and tender with bruises and cut wound

xi. He sustained fracture of the left tibia

xii. He sustained fracture of the right tibia plateau lateral

xiii. Permanent scars and disfigured skin

xiv. Pains of the left legs when he walks a long distance

xv. Inability to chew and eat hard foods

xvi. Occasional nasal bleeding

xvii. Tearing of the eyes in the hot sun

xviii. Shortening of the left leg by 3cm as compared to the right leg.

xix. Walking with a big limp on the left leg.

17. The court was called to refer to **Penina Waithira Kaburu v. LP [2019] eKLR** where the court upheld the lower courts decision on Ksh2,000,000/= for the injuries sustained. Reference was also made to **Mwaura Muiruri v. Suera Flowers Ltd & Anor[2014] eKLR** the court made an award of Ksh 1,900,000/= for the injuries sustained. Lastly the court was referred to **New Origin Investments Co. Ltd v. Bernard Kimatu Muia [2019]eKLR** where the plaintiff had sustained the following injuries: blunt chest injury, fracture of 3 left dust ribs, contusion of the right forearm, fracture of right radius, blunt injury right lower limb, fracture of right tibia distal and blunt injury left forearm and he was awarded Ksh.2,000,000.

18. Counsel urged that the appeal dismissed for being misconceived, baseless and lacking in merit.

Analysis and determination.

19. The following issues for determination:

- i. Whether failure to attach the medical report was fatal for the appeal***
- ii. Whether the court made an award that was too high compared to the injuries sustained.***

20. This is a court of the first appeal, and the court had a duty to reconsider the evidence, evaluate it itself and draw its own conclusion though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance and further the responsibility of the court was to rule on the evidence on record and to introduce extraneous matters not dealt with by the parties in the evidence, this was held in **Peters v Sunday Post Ltd (1958) EA 424, as decision of the Court of Appeal for Eastern Africa**, where Sir Kenneth O'Connor, P said at p 429:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.”

21. The respondent raised an issue on failure to attach a medical report. In **Tononoka Rolling Mills Ltd (supra)** the appellant had sought leave of the court to file a supplementary record of appeal to include the certified copy of decree. However upon filing the same it was discovered that there was no medical report. The court went ahead and referred to the medical report relied upon to prepare the missing report that was not attached. This court shall rely on the enclosed medical report Moi Teaching and Referral Hospital, the report from Kenyatta Nation Hospital, report from Diagnostic centre and shall go through the entire evidence on record. The respondent was initially treated at MTRH and later referred to KNH and thus they are crucial documents. Article 159 of the Constitution requires the court to administer justice without undue regard to technicalities procedure.

22. On whether the amount was excess in the circumstances, this court is guided by **Kemfro Africa Ltd t/a Meru Express Service & Anor' v. A.M Lubia & Anor(supra)** to the effect that this court can only interfere with the amount awarded if the trial court took into consideration wrong principles or misapprehended the evidence on record.

23. The respondent had pleaded the following injuries in his amended plaint.

- i. Head injury-semi-conscious after accident
- ii. The forehead and face were swollen and tender with multiple cut wounds.
- iii. He lost one upper jaw tooth
- iv. He sustained fractures of the nasal bone
- v. He sustained a cut wound on the nasal ridge
- vi. He sustained fractures of the mandible and maxilla
- vii. Both legs were swollen and tender with bruises and cut wounds
- viii. He sustained a fracture of the left tibia
- ix. He sustained fracture of the right tibia plateau lateral

24. The parties both relied on **Mwaura Muiruri v. Suera Flowers Ltd & Anor (supra)**, the respondent quoted the court made an award for Ksh1.900.000/= whereas the appellant quoted Ksh 1.450.000/=. The right position is that on general damages the court made an award for Ksh.1.450.000/= and the 1.900.000/= comes in addition to loss of amenities and loss of earning capacity, it was not on general damages for the injuries only.

25. The treatment and discharge document from MTRH indicates the following injury:

- i. Injury to right and left lower limbs**
- ii. Fracture of tibia**
- iii. Fracture of maxillary and mandible**

26. The report from KNH shows the same injuries. In submissions, the appellant has pleaded more injuries than what is contained in the amended plaint. The report indicates the respondent underwent various surgeries and was even referred to KNH for specialized treatment.

Guided by the authorities, relied upon by parties, the rate of inflation and the diminishing value of the Kenyan shilling, I find that the sum

awarded was adequate compensation, and not excessive as to warrant any interference by this court. The trial court's decision is upheld, and the appeal is dismissed with costs to the respondent

Delivered and dated this 4th day of February 2020 at Eldoret

H.A. OMONDI

JUDGE