



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 31 OF 2016**

**MUHORO KOMU.....APPELLANT**

**VERSUS**

**MERCY WANDEGI NDEGWA.....RESPONDENT**

***[Appeal from the judgment of E. Wambo, Resident Magistrate,***

***in Murang'a CMCC No. 447 of 2014 delivered on 20<sup>th</sup> April 2016]***

**JUDGMENT**

1. This appeal is on *quantum of damages* only.
2. The respondent was injured in a road traffic accident on 27<sup>th</sup> December 2011. On 30<sup>th</sup> October 2015 the disputants recorded consent on liability in the ratio of 90% to 10% in favour of the respondent.
3. The learned trial magistrate assessed general damages for *pain, suffering and loss of amenities* at Kshs 1,500,000; and, *special damages* at Kshs 171,451. The respondent was also granted interest and costs.
4. The appellant is aggrieved. The *memorandum of appeal* raises four grounds. I will compress them into *one*: That the learned trial magistrate employed wrong *principles* in assessing damages.
5. Learned counsel for the appellant, *Mr. Kariuki*, relied on the written submissions filed on 27<sup>th</sup> May 2019. He submitted that in view of the injuries suffered by the respondent, the award was *so high* as to disclose an *error of principle*.
6. The appeal is contested by the respondent. The respondent's submissions were filed on 7<sup>th</sup> June 2019. In a synopsis, learned counsel, *Mr. Mwangi*, contended that the award was commensurate with the injuries suffered by the respondent. In his view, there is no basis for the appellate court to interfere with the *discretion* of the learned trial magistrate.
7. This is a first appeal to the High Court. It is an appeal on both *facts* and the *law*. I have *re-evaluated* the evidence and reached independent conclusions. I am cognizant that I neither saw nor heard the sole witness. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.
8. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. ***Butt v Khan*** [1982-88] KAR 1, ***Arkay Industries Ltd v Amani*** [1990] KLR 309.
9. The respondent suffered serious injuries in the road traffic accident. At paragraph 6 of the *plaint*, he itemized them as follows:
  - a) Fracture of right distal ulna bone
  - b) Fracture of the right proximal ulna (olecranon)
  - c) Fracture of the right humerus
  - d) Bruises on the forehead
  - e) Blunt injuries on the neck

- f) Cut wound on the dorsal
- g) Soft tissue injuries on the abdominal wall right side (bruises)
- h) Cut wound in the dorsum of the foot (5 cms long)

10. Those injuries were confirmed in a *medical report* prepared by *Dr. Kanyi Gitau* on 10<sup>th</sup> April 2013 and a *discharge summary* dated 27<sup>th</sup> March 2012. The record shows that the documents were produced without objection by the appellant’s counsel. When she took to the stand, the respondent (plaintiff) re-affirmed the injuries; and, said that she needed further surgery. In cross examination, she stated:

*I was taken to Murang’a Hospital. I was admitted for 21 days. Now I don’t go to the hospital as there is no money. My hand is stuck the way it is. They [sic] are in need of further surgery*

11. The fracture to her hand was treated by “*an open reduction internal fixation on the right ulna*”. According to the medical report above, the implant was to be removed; and, there was need for therapy for a year. The victim was also left with some permanent scars. The cost of future medical expenses was placed at Kshs 50,000.

12. Clearly, the respondent suffered grave injuries. While I agree with the respondents that there was no permanent disability, there is no doubt that the respondent’s right-hand’s function was considerably reduced. The appellant did not call evidence in rebuttal. Like I stated, the original medical report was admitted without objection. Although the appellant had procured a second medical report attached to its documents, it was never produced. The evidence of the respondent was thus uncontroverted and I accept it.

13. The learned trial magistrate largely relied on the decision in ***Antony Mwendu Maina v Samuel Gitau***, Nairobi High Court Civil Case 1150 of 2001 [2006] eKLR. There, the plaintiff sustained head injuries, a compound fracture of the ulna and radius of the left arm, fracture of the olecranon process of the left elbow, impacted fracture of the surgical neck on the left humerus bone and fracture of the acromion process of the left clavicle and on the blade of the scapula bone. The High Court assessed general damages at Ksh 1,200,000.

14. The nature of injuries in that case was *slightly more* severe than those suffered by the respondent. Furthermore, the learned trial magistrate in the impugned judgment considered the rate of inflation and enhanced the damages to Kshs 1,500,000.

15. That said the authorities now relied upon by the appellant deal with *less* severe injuries than those of the respondent. For instance, in ***Paul Karimi Kithinji v Joseph Mutai Kereria***, Meru High Court Civil Appeal 75 of 2017 [2018] eKLR, the plaintiff suffered minor lacerations on the face, and a segmental fracture of the right proximal ulna. The High Court reduced the award to Kshs 150,000.

16. The same may be said of the facts in ***Agroline Hauliers v Edna Ochieng*** Migori High Court Civil Appeal 1 of 2014 [2015] eKLR. The respondent there suffered a concussion, contused neck and chest, a fracture of the mandible, and a fracture on the left humerus. Disability was assessed at 10%. The High Court reviewed the award downwards to Kshs 450,000.

17. As stated correctly by *Majanja J* in the ***Agroline Hauliers*** case [supra], assessment of damages is not an exact science. An award should fairly compensate the claimant while ensuring “*that the body politic is not injured by making excessively high awards*”.

18. I find that the decision in ***Antony Mwendu Maina v Samuel Gitau*** [supra] was a good guide. As I observed earlier, the nature of the injuries suffered by the claimant in that case was *slightly more* severe. Doing the best that I can, and applying the principles I set out at the beginning, I will reduce the award of general damages for pain and suffering to Kshs 1,000,000.

19. The special damages were *specifically* pleaded; and, *strictly* proved. I concur with the learned trial magistrate that the appellant *proved* the sum of Kshs 121,451 being *medical expenses* and the *cost* of the *medical report*. I also uphold the award of Kshs 50,000 as *future medical expenses*.

20. The upshot is that this appeal *partially* succeeds. The judgment and the decree of the lower court are *set aside*. There shall now be judgment in favour of the *respondent* against the *appellant* in the following terms-

- a) General damages for *pain and suffering*: Kshs 1,000,000.
- b) Special damages: Kshs 121, 451.
- c) Future medical expenses for *removal* of metal implants: Kshs 50,000.

Subtotal.....Kshs 1,171,451.00

Less 10% contributory negligence.....Kshs 117,145.10

Net Award .....Kshs 1,054,305.90

21. Costs follow the event and are at the *discretion* of the court. I grant the *respondent* costs and interest in the *lower court*. In the interests of justice, I order that each party shall bear its *own* costs in the *appeal*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A** this 16<sup>th</sup> day of April 2020.

**KANYI KIMONDO**

**JUDGE**

**ORDER**

In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties by electronic mail. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in chambers in the presence of:-**

Ms. Dorcas, Court Assistant.