



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL APPEAL CASE NO. 50 OF 2017

ALOISE MWANGI KAHARI.....APPELLANT

VERSUS

MARTIN MUITYA.....1ST RESPONDENT

PETER KARIUKI.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Wanyanga Resident Magistrate, delivered on 6th April, 2017 in Molo CMCC No.143 of 2013, Aloise Mwangi Kahari -Vs-.Martin Muitya and Peter Kariuki)

JUDGMENT

1. The respondent/plaintiff filed suit in the lower court seeking general and special damages for the injuries he sustained when he was hit by the defendant's motor vehicle registration number KAX 049N on 5th May 2012 along Mwisho wa Lami –Mau Narok road.
2. The plaintiff availed 3 witnesses. The defendant did not avail any witness. The trial magistrate found the appellant 100% liable and awarded kshs. 300,000 and special damages of kshs. 20,560 making total award kshs. 320,560 plus costs.
3. Being aggrieved by the determination of the trial magistrate the appellant filed this appeal on the following grounds: -
 - i. *That the learned magistrate erred in fact and law by awarding general damages of kshs. 320,560 which was inordinately low for the nature of injuries sustained as to be adequate compensation for the appellant.*
 - ii. *That the learned magistrate erred in fact and law by failing to take into consideration or consider adequately the injuries suffered by the appellant and current awards before assessing quantum.*
 - iii. *That the learned magistrate erred in law in relying upon evidence that had not been tested by cross-examination.*
 - iv. *That the learned magistrate's judgment is a nullity in law.*

4. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that damages awarded were inordinately low. The appellant cited the case of **Eunice Auma Onyango Vs Salin Akinyi Oluoch {2015} eKLR** in support of the argument that appellate court has powers to interfere with award of damages by the trial court if it is based on no evidence at all or on a misapprehension of it or if the court is shown that the trial court acted on wrong principles in reaching the findings. He submitted that in the case of **Mary Pamela Oyioma Vs Tess Holdings Limited HCCC No.186 of 2008**, the plaintiff suffered similar injuries and award of kshs. 900,000 was awarded.

6. The appellant also cited the case of **Florence Njoki Mwangi V Chege Mbitiru Civil Appeal No.102 of 2011** where the court awarded kshs. 800,000 for injuries similar to appellant's. The appellant proposed an award of kshs. 1,200,000.

7. Appellant further submitted that the respondent cross appealed way long after delivery of judgment without the leave of court; he urged court to dismiss the cross appeal with costs to the appellant.

RESPONDENT'S SUBMISSIONS

8. The respondent submitted that it reiterates and wholly rely on submissions dated 8th March 2017 and filed in the lower court on 14th March 2017. Together with authorities attached to the submissions filed in respect of the appeal and urged the court to consider the same.

9. The respondent further submitted that injuries in the appellant's initial treatment note dated 14th March 2017 are as follows: -

- a) Compound fracture of right tibia and fibula,
- b) Bleeding from left lower limb,
- c) Swollen leg.

10. And P3 indicate nature of injuries sustained by the appellant as compound fracture of tibia fibula, right lower limb.

11. Further that the appellant underwent second medical examination by **Dr. Leah Wainaina** on 17th April 2014 as shown by defence exhibit 1 produced by consent of counsels herein; and the said medical report confirmed fracture of the tibia-fibula and soft tissue injuries based on the appellant's history, medical report dated 12th January 2013 by **Dr. Omuyoma** and treatment notes from Nakuru Provincial General Hospital.

12. The respondent submitted that the trial magistrate rightfully found that the appellant suffered compound fracture of the right tibia and fibula and soft tissue injuries; further that the court analyzed written submissions by the parties and proceeded to award kshs. 300,000 as general damages. The respondent quoted page 84 of the record of appeal where the trial court noted that by the time the plaintiff appeared before him, he had fully healed and that plaintiff had submitted for kshs. 1,200,000 and some authorities where **Justice Etyang** had awarded damages of kshs. 500,000 in 2003 and another where **Judge Wendo** had awarded kshs. 500,000 in 2011. That the court noted that the injuries in the cited authorities were more severe.

13. Further that the defendant had submitted for kshs. 200,000 and cited n authority where **Judge Majanja** awarded kshs. 300,000 for fracture of the leg below the knee in the year 2015; and stated that the authority is persuasive and awarded kshs. 300,000.

14. Respondent submitted that the appellant has not demonstrated any error or misdirection on assessment of damages and has not met the threshold for this court to interfere with the trial court judgment.

15. The respondent further submitted that the case of **Mary Pamela Oyiema** is unreported and the appellant failed to attach the said decision and urged this court disregard it; and in the case of **Florence Njeri Mwangi**, the award is kshs. 700,000 not kshs. 800,000 as submitted and further it is distinguishable from this case as the respondent sustained severe injuries; that on appeal, **Justice Wakiaga** held that the award was not inordinately low.

16. Respondent further relied on the case of **Millicent Atieno Ochuonyo Vs Katola Richard [2015] eKLR** where the court held as follows:
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“It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the plaintiff a just amount, so far as money can ever compensate, and entering a realms of very high award, which can only in the end have a deleterious effect.”

17. The respondent listed several authorities and indicated that the injuries suffered are almost comparable and similar.

ANALYSIS AND DETERMINATION

18. The appellant herein is dissatisfied with damages awarded by the trial court. This being an appellant court I am obligated to reevaluate evidence adduced in the lower court and make a determination as to whether the trial magistrate misapprehend the law while assessing damages and awarded are inordinately low.

19. The plaintiff testified that he sustained a fracture on his right leg and right arm and injury to the face and right shoulder. PW2 Health Record Officer at Nakuru General Hospital produced treatment record in respect of the plaintiff/appellant. He confirmed that the plaintiff went to hospital from treatment on 6th May 2012 and that he had a fracture of tibia and fibula. He said he was admitted from 6th May 2012 to 17th May 2012.

20. I note from the discharge summary from Nakuru Provincial General Hospital that final diagnosis was compound fracture of tibia fibula of the right leg. The P3 form indicate laceration on the face and tenderness on the right shoulder and compound fracture on the right tibia and fibula. the doctor stated the following injuries: -

- i. Compound fracture of the right tibia and fibula,
- ii. Severe soft tissue injuries on the face,
- iii. Soft tissue injury on the left shoulder joint.

21. It is evident that **Dr. Kiamba** captured the injuries from the discharge summary and P3 form. He indicated that the bruises on the face had healed. There is no doubt that both records are crucial in determining injuries on the plaintiff. The doctor also did examination on the plaintiff and got history to clarify the injuries sustained. The doctor was also cross examined before the court and the court was able to tell whether his evidence was credible. I have no reason to doubt **Dr. Kiamba's** medical report in respect to injuries sustained.

22. In respect to award granted under general damages for pain and suffering, I have compared the injuries sustained by the respondent herein with injuries suffered in the long list of authorities by the parties herein. I do agree that similar injuries should attract comparable awards. Respondent's counsel indicated that the case cited by applicant is unreported and a copy has not been attached to the submissions. I however note that it is attached to appellant's submissions and its citation is **Mary Pamela Oyioma Vs Yess Holdings Limited [2011] eKLR**. I however note that this authority and the second one cited by the appellant in this appeal were not cited in the submissions filed in the lower court. They were not placed before the trial magistrate for consideration and in my view the court should consider the matter as dealt with by the trial court; reasons that, if different authorities were placed before the trial court, decision would be reached on the basis on the materials placed before the court. I will therefore look at the authorities placed before the trial court to arrive at a finding as to whether the trial magistrate acted on the wrong principles or misapprehended evidence in assessing damages herein.

23. I have compared the injuries suffered by appellant with injuries suffered in the cited authorities and in my view, injuries in the case of **Veronica Mwangeli Kilonzo vs Robert Karume [2003] eKLR** which was cited by the plaintiff in the lower court were more serious in view of the fact that in addition to the fact the victim in that case suffered compound fracture of the tibia and fibula like the respondent herein, he suffered dislocation of the knee and resulted in shortening of the leg. Permanent disability was assessed at 15 %; however, that authority was decided in the year 2003 while this matter was decided in the year 2017 a period of 14 years.

24. In the second authority cited **Peter Ngigi Kamau vs Philip Kamau Njuguna [2011] eKLR**, the plaintiff sustained fracture of the right tibia and fibula and fracture of the left tibia and dislocation of the left ankle and the court after looking at several authorities awarded kshs. 500,000 for pain and suffering. The authority was decided in the year 2011, 6 years after this case.

25. I also note that in the authority relied on by the respondent in the lower court as captured in the judgment, the plaintiff was granted kshs. 300,000 for fracture of the leg below the knee in the year 2015.

26. Whereas I do agree that the injuries were more serious in the 2 authorities cited by the plaintiff in the lower court, it was important to consider the lapse of time. In view of the above, I find the award inordinately low and warrant interference by this court. An award of kshs. 500,000 would be reasonable at the time the judgment was delivered. I therefore enhance the award under general damages for pain and suffering to kshs. 500,000.

27. **FINAL ORDER**

1. **Appeal on quantum is allowed.**
2. **Trial magistrate's award under pain and suffering is set aside.**
3. **The appellant is awarded kshs. 500,000 as general damages for pain and suffering.**
4. **Each party to bear own costs of appeal**

Judgment dated, signed and delivered via zoom at Nakuru This 21st day of May 2020.

RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant- Schola

No appearance for Counsel for Appellant

Ms. Musili holding brief for Kairu McCourt Advocates for Respondents