



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

### HIGH COURT CIVIL APPEAL NO. 44 OF 2016

**BERNARD MUSUU JOHN.....APPELLANT**

**-VERSUS-**

**JESMAN DISTRIBUTORS LIMITED.....1<sup>ST</sup> RESPONDENT**

**PAUL MWANIKI MATAYA.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. SK. Ngii SRM delivered on 15/09/2017 in Mutomo PMCC no. 64 of 2011).*

### **JUDGMENT**

1. The Appellant who was the Plaintiff in the lower court sued the Respondents for general and special damages for injuries he suffered as a result of an accident involving his motorbike registration No. KMDJ 366D and the 1<sup>st</sup> Respondent's motor vehicle registration No. KBX 450Y which was driven by the 2<sup>nd</sup> Respondent. This was on 26<sup>th</sup> May, 2015.

2. The Respondents in their joint defence denied the claim. After the preliminaries, the parties entered into a written consent for entry of judgment on liability in the ratio of 85:15 in favour of the Appellant. They also agreed to have the Appellant's documents admitted without calling their makers.

3. The trial court assessed damages and made an award of Kshs.325,000/= as general damages and Kshs.12,470/= as special damages. The Appellant was not satisfied and filed this appeal on the following grounds: -

- a) **That**, the learned Magistrate took into account irrelevant issues and arrived at a wrong conclusion on quantum.
- b) **That**, the learned trial Magistrate's finding on quantum in particular considering the injuries sustained by the Plaintiff was very low in that an erroneous estimate of damages without due regards to the injuries sustained by the Plaintiff and comparable cases.
- c) **That**, the learned Magistrate misdirected himself in both law and fact and arrived at a wrong conclusion in awarding damages which were against the weight of evidence adduced.
- d) **That**, the learned Magistrate failed to consider future medical expenses by failing to consider the nature of injuries the Plaintiff sustained hence failing to reward future medical expenses.
- e) **That** the learned Magistrate failed to consider the submissions and authorities cited by the Plaintiff's advocate hence awarded quantum which was too low and failing to award future medical expenses.
- f) **That** the learned Magistrate erred in both law and fact and arrived at an award of quantum which is very low and failed to pronounce himself on future medical expenses.

4. The particulars of injuries were pleaded at paragraph 6 of the plaint. These were: -

- Deformed and immobile left lower limb with an open wound around left knee area. X-ray showed he had:
  - a) Open fracture and distal femur
  - b) Open fracture of patellar

5. The cited injuries were lifted from the P3 form dated 26<sup>th</sup> November, 2015, medical report by Dr. P.N. Mutuku dated 25<sup>th</sup> November, 2015 and the admission/discharge summary dated 31<sup>st</sup> August 2015 which are some of the documents admitted by consent. Other documents were receipts for payments made by the Appellant.

6. The medical report states that the Appellant was likely to develop oesteo – arthritis of the left knee joint and will always walk with a limp. He indicated the cost for future surgery to correct the deformity as roughly Kshs.150,000/=.

7. Counsel for the parties agreed to dispose of the appeal by way of written submissions.

8. Mr. Musili Mbiti for the Appellant submits that the award of Kshs.325,000/= was not commensurate with the injuries sustained. He relied on the cases of **Dorcas Wangithi Mwaura –vs- Samuel Kiburu Mwaura & Anor (2015) eKLR Kirinjit Singh Magon –vs- Bonanza Rice Millers (2014) eKLR and Charles Mathenge Wahome –vs- Mark Mboya Likanga & Others (2011) eKLR** to support his case for a higher award. He submits that the injuries in the cited cases were similar to the ones suffered by the Appellant.

9. It is his submission that the trial court did not make provision for future medical expenses for the Appellant. He specifically refers to the report by Doctor P.N. Mutuku and the P3 form which refer to the Appellant’s deformed and immobile left lower limb with an open wound on the left knee area. Counsel referred to the judgment where the learned trial Magistrate states:

***“Unfortunately the alleged deformity is not apparent on the treatment documents and the medical report on record. In the premises, I find the doctor’s opinion the Plaintiff will require Kshs.150,000/= to correct a deformity which has not been sufficiently demonstrated and/or identified unconvincing.”***

10. It’s his submission that future medical expenses was pleaded and is supported by the medical evidence and should have been awarded. To support this, he cited the cases of:

***i. Charles Musau Munguti –vs- Doshi & Co.(H) Ltd (2997) eKLR***

***ii. Tracom Ltd & Anor Hassan Mohammed Adan (2009) eKLR (Court of Appeal Nakuru)***

11. Mr. Michuki for the Respondents submits that the award by the trial court was commensurate to the injuries suffered. He cites the case of **Jitan Nagra –vs- Abidnego Nyandusi Oigo (2018) eKLR** where an award of Kshs.450,000/= was made for more serious injuries. In the above case one of the injuries the Plaintiff suffered was a compound fracture.

12. He further relies on the case of **Gogni Rajope Construction Company Ltd –vs- Francis Ojuok Olewe (2015) eKLR** where an award of Kshs.350,000/= was made for more serious injuries of two fractures; dislocation of the left elbow and hospitalization for two weeks.

13. On future medical expenses he submits that Dr. P.N. Mutuku’s report did not state the exact deformity that was to be corrected.

He agrees with the trial court’s finding on this. He prayed for the appeal to be dismissed with costs.

### **Analysis and determination**

14. It is now settled that the duty of a first appellate court is to analyse 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 & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123**.

15. Having considered the grounds of appeal, the rival submissions and the entire record, I find the following issues to fall for determination:

i. Whether the award of Kshs.325,000/= should be interfered with.

ii. Whether the request for future medical expenses ought to have been granted.

### **Issue no. (i) Whether the award of Kshs.325,000/= should be interfered with.**

16. From the submissions made, there is no dispute on the nature of injuries sustained. They are as pleaded and supported by the medical reports. They are:

i. Open fracture and distal femur

ii. Open fracture of patellar

The injuries were assessed as **grievous harm**.

17. The Appellant's counsel has referred to the same authorities he referred in the lower court. In the **Kirinjit Singh Magon** case (*supra*) the Plaintiff suffered two gunshot wounds. One was removed. The other penetrated the left leg in the region of the knee, shattering the lower end of the left femur and destroyed the knee ligaments.

18. The fractures were operated on but broken fragments of the bone could not be secured. He finally underwent a total knee replacement surgery, in India. Permanent functional disability was assessed at 35% of the total person. He was awarded Kshs.2,000,000/= for general damages.

19. In the case of **Dorcas Wangithi Nderi** (*supra*) the Appellant suffered a fracture to the radius/ulna (left), compound fractures to the right and left tibia/fibula, plus other multiple soft injuries. An award of Kshs.2,000,000/= was made for general damages. In the **Charles Mathenge Wahome** case (*supra*) the Plaintiff sustained a fracture of the right femur, followed by a complication of pulmonary embolism sending him to the Intensive Care Unit (ICU) for several days. The rest were minor injuries on the back and head. The fracture united and healed well. This resulted in the shortening of the right leg by 2.5 centimeters. He was awarded Kshs.1,500,000/=.

20. In the **Gogni Rajoje Construction Company** case the Respondent sustained a fracture of the radius and ulna and a dislocation of the elbow joint and minor soft tissue injuries. He was awarded Kshs.350,000/= less 30% liability. Further in **Jitan Nagra** (*supra*) the Respondent suffered lacerations on the occipital area, deep cut wound on 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. He was awarded Kshs.450,000/=.

21. The fractures sustained by the Appellant herein were not compound fractures which are more serious. Besides the two fractures he had no other injuries.

22. After considering all the authorities cited by the parties, I agree with the learned trial Magistrate that the decisions cited by counsel for the Appellant are on the higher side and they refer to very serious injuries. Besides the injuries, I have considered that the Appellant was admitted and was placed on skeletal traction for ten (10) weeks. He was then sent home on a P.O.P for six (6) weeks. He was left walking with a limp. The walk with the limp was as a result of the accident.

23. It is agreed that it is not easy to find a case that is similar to another on all fours. I have considered all decisions cited; the nature of injuries involved and the awards made. I have also considered the cases of:

- i. **Eldoret Steel Mills Ltd –vs- Eliphias Victor Esiphia Eld Court of Appeal No. 72 of 2006** where Ngenye J. awarded Kshs.300,000/= in 2013 for relatively similar injuries.
- ii. **David Kimathi Kaburu –vs- Dionisius Mburugu Itirai Meru High Court Civil appeal No. 18/2016 (2017) eKLR** where Gikonyo J. confirmed the award of Kshs.630,000/= made by the lower court.

24. In the instant case I find the award of Kshs.325,000/= to have been on the lower side when all is considered. I set it aside and substitute it with an award of Kshs.450,000/=.

**Issue no. (ii) Whether the request for future medical expenses ought to have been granted.**

25. The Appellant pleaded for future medical expenses of Kshs.150,000/= at paragraph 7 and prayer c of the plaint. The P3 form and the medical report by Dr. P. N. Mutuku show that the Appellant suffered a deformed and immobile left lower limb with an open wound around the left knee area. He would always walk with a limp.

26. The Court of Appeal in the case of **Tracom ltd & Anor** (*supra*) stated as follows on this issue:

*“The award of future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 ears was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya bus services ltd –vs- Gituma (2004) 1 EA 91, this court stated: -*

*“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which*

*the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded.”*

*We understand that to mean that once the Plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the Plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”*

27. I find the Appellant's pleadings and medical report to satisfy the said requirements as set out in the above case of **Tracom Ltd & Another**. I therefore award him the Kshs.150,000/= as per the doctor's report.

28. The upshot is that the appeal succeeds. The judgment by the trial court is set aside and substituted as follows: -

- General damages - Kshs.450,000/=

- Special damages - Kshs.150,000+Kshs.12,470/=

**Total** - **Kshs.612,470/=**

Less 15% contribution - Kshs.91,870.50/=

**Balance** - **Kshs.520,599/50/=**

29. I enter judgment for the Appellant against the Respondents jointly and severally for the sum of Kshs.520,599/50/= plus costs and interest. Interest from date of judgment in the lower court. The Appellant will get the costs for the appeal.

Orders accordingly.

**Delivered, signed & dated this 7<sup>th</sup> day of May 2020, at Makueni High Court.**

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**H. I. Ong'udi**

**Judge**