



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCCA NO.135 OF 2015

JAMES MBUGUA.....1ST APPELLANT

NICHOLAS MWANGI KIHUNGU.....2ND APPELLANT

-VERSUS-

JOHN MBUGUA MBURU.....RESPONDENT

JUDGMENT

BACKGROUND

1. This appeal arose from suit filed in the lower court by the plaintiff/respondent against the defendant seeking general and special damages for the injuries he sustained on 22nd November 2014 while travelling as a passenger in the defendant's motor vehicle registration number KAU 607H Toyota Matatu.

2. Parties recorded consent on liability at 30:70 in favour of the plaintiff. The court assessed damages as follows: -

- a. Pain and suffering.....kshs 2,300,000**
- b. Cost of further treatment.....kshs 500,000**
- c. Special damages.....kshs 433,000**
- d.Total.....kshs 3,233,846**
- e. Less 70%.....kshs 2,263,692.20**

3. Judgment was entered for plaintiff against the defendant for kshs.2,263,692.20.

4. The appellant/defendant being dissatisfied by the court's assessment of damages filed this appeal on the following grounds: -

- i. That the learned magistrate erred in law and fact in disregarding the evidence adduced by appellant thereby arriving at a wrong decision as to quantum payable to the respondent.*
- ii. That the learned magistrate erred in law and fact in awarding a sum of kshs 2,263,693 as damages for fracture injuries, which award is manifestly excessive in the circumstances of the case.*

5. The parties herein agreed to proceed with this appeal by way of written submissions.

APPELLANT'S SUBMISSIONS

6. The appellant started by giving summary of facts and evidence adduced in the lower court. In respect to **Dr. Kiamba's** medical report, the appellant submitted that the report was incorrect as there was no mention of loss of teeth in the initial treatment notes. Appellant submitted that **Dr. Leah Wainaina's** medical report found that the respondent sustained comminuted fracture of the left femur, right acetabulum and dislocation of the right hip joint and argued that if indeed the respondent sustained loss of teeth and fracture of the right inferior rami the

same was not as a result of the accident on 22nd November, 2014 as treatment notes produced do not indicate the same injuries.

7. The appellant principles under which the appellate court can exercise its discretion to interfere with assessment of damages by the trial court as set out in the case of **Kanga Vs Manyoka [1961] EA 705, 709, 713** and submitted that the trial court failed to exercise its discretion judiciously by taking into account irrelevant factors and awarding quantum of kshs.2,263,693.00 which is inordinately high and expensive.

8. The appellant cited three cases in support of the above argument which include **Kennedy Ooko Ouma Dachi Vs Joseph Maina Kamau & Another [2018] eKLR** where the plaintiff sustained fracture of the left acetabulum, fracture of left iliac crest, fracture to superior ramus and interior ramus pubic bone, dislocation fracture of the left knee, degloving injury that left tibia and fibula bare; court awarded kshs.1,400,000; appellant submitted that the plaintiff herein sustained only one fracture. Awards under the other 2 authorities were kshs.500,000 and kshs.1,350,000. Appellant urged court to award between kshs.600,000 and kshs.1,000,000.

9. The defendants/appellants further submitted the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act No.50 of 2013** being an **Act of Parliament** is superior to case law and should apply in this case with regard to compensation of plaintiff; that the Act came into force on 28th January 2014 and paragraphs 35(a), (b), (c) of the schedule places compensation for pelvic injury at 10% of kshs.3,000,000.

10. Further, the defendants/appellants submitted that there is no initial documentation of loss of teeth and if he sustained loss of teeth, the same was not as a result of the accident; for that reason, the defendants proposed kshs.300,000 as general damages.

11. In respect to future medical expenses, the appellant submitted that the trial magistrate disregarded the cost of kshs.110,000 submitted by the appellant and awarded kshs.500,000; and submitted that there is no justification for awarding a high cost of treatment when a cheaper option is available; further that the respondent's future medical costs are unwarranted, unjustifiable, grossly and manifestly exaggerated and only seek to unjustly enrich the respondent from the claim.

12. The appellant concluded that the trial magistrate's judgment was erroneous, unfair and based on misapprehension of the law and fact placed before it and urged the court to set aside the trial court's decision and allow this appeal in its entirety.

RESPONDENT'S SUBMISSIONS

13. The respondent on his introduction submitted on principles of law applicable in the first appeal citing the case of **Peters Vs Sunday Post Limited [1958] EA 424** where the court held that the first appellate court has jurisdiction to review the record of evidence in the lower court to determine whether the decision reached upon that evidence should stand but the jurisdiction has to be exercised with caution..

14. And in **Judicial Hints on Civil Procedure** by **R. Kuloba** page 256 in summary he stated that the appellate court should only interfere with assessment of damages if the appellate court comes to a conclusion that the trial court took an erroneous view of evidence as to the damage suffered by the plaintiff or made some mistake in giving weight to evidence that ought not to have affected his mind or leaving out of consideration something that ought to have affected his mind; that the appellate court should be convinced that either that the judge at the trial acted upon some wrong principles of law or the amount was extremely high or low as to make it in the judgment of the appellate court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

15. As to whether the trial magistrate failed to consider the appellant's evidence, the respondent urged the court to look at the judgment at page 51 which show that the trial magistrate not only considered defendant evidence but went ahead and isolated disputed issues and resolved each of them as required by law; that the trial magistrate gave due regard to all materials on record including evidence and submissions.

16. In respect to whether kshs.2,263,693 is excessive, the respondent submitted that it is the total sum awarded to the respondent in various heads; as concern loss of teeth respondent submitted that dispute on injuries is not one of the grounds of appeal and should not be raised in submissions; he cited the case of **In Re estate of Muturi Kirieri(Deceased)[2009] eKLR** among other authorities in support of that argument; further, the trial magistrate who had the advantage of hearing this matter and seeing all witnesses testify found **Dr. Kiamba's** evidence more credible than that of **Dr. Kahuthu** in respect of the injuries that the respondent suffered and her finding in the circumstances is unassailable as was held in the case of **Jonas Akuo O'kubau V Republic[2000] eKLR** .

17. Further, the respondent submitted that the injuries being disputed by the appellant appear in the P3 filled at Nakuru PGH where the respondent underwent treatment as shown by treatment notes and discharge summaries and one cannot isolate either documents when determining injuries suffered by the respondent herein; respondent further submitted that in the judgment the court noted that **Dr. Kahuthu** opines that the plaintiff did not sustain injury to the teeth but in her cross examination, she said there are incisors missing and 3 upper incisors are broken; further that the court indicated having considered the two medical reports and noted that the injury to the mouth may not have been captured in the discharge summary but it appears in the P3 forms which confirms it must have been in the treatment record.

18. Respondent cited the case of **BB (A minor suing through his next friend and father GON) Vs Rague Kamau Kanja [2019] eKLR** where the court of appeal held that as follows: -

“The trial court in evaluating the injuries sustained for purposes of ascertaining the general damages relied upon the P3 filled after the accident. The learned judge in his evaluation of the injuries sustained by the appellant focused on the medical report prepared by Dr. Kinuthia. The judge correctly discounted this report. However, the judge did not address his mind, as the trial magistrate did, to the injuries sustained by the appellant as disclosed in the P3 form. For these reason, we are satisfied that the judge erred in setting aside and reducing the general damages awarded because he, inter alia, did not take into account the P3 form which was a relevant document in assessing damages.”

19. Respondent submitted that treatment notes may sometimes have accidental errors/omissions or injuries as highlighted in **The Casebook on measure of damages for bodily injuries by Richard Kuloba at page 3-5** quoted as follows: -

“ there are many ways of proving injuries sustained in an accident, that medical report by the doctor who examined the victim is not mandatory and primary source of information about injuries sustained in an accident if at all is by the victim himself...”

20. And submitted that it would be unfair to visit the accidental/excusable mistake/error of the hospital on the respondent; that the medical report by **Dr. Kahuthu** which the appellant relies on cannot be said to be conclusive for reason that she never relied on contents of P3 and its contradictory in regard to the disputed injuries more so loss of teeth; that in view of the above, the trial magistrate cannot be faulted for upholding **Dr. Kiamba's** medical report.

21. The respondent submitted that the trial magistrate considered all evidence on record, parties' submissions and applicable principles of the law for award of damages before arriving at her award in general damages; that the respondent suffered life threatening injuries which resulted in permanent disability assessed at 50% by **Dr. Kiamba**.

22. Respondent further submitted that apart from the authorities relied on by the appellant having not been presented before the trial magistrate, they are distinguishable as injuries suffered are much less serious/severe than those suffered by the respondent. Further that in **Edwin Otieno Japaso Vs East Coach Bus Ltd [2016] eKLR**, the victim who suffered 25 % disability was awarded kshs.1,500,000 which was enhanced to kshs.2,000,000 and cannot be compared to this case where respondent sustained 50% disability and in **Fred Ogada Azere & Another Vs Ezekiel Kiarie Njugune** kshs.1,350,000 was awarded for pain and suffering where no permanent disability was sustained.

23. On future treatment expenses respondent submitted that there were two conflicting opinions by the doctors and the trial magistrate was duty bound to consider the said evidence and decide one way or the other; and the trial magistrate cannot be faulted in any way having carried out her duty as required by law; respondent added that, **Dr. Kahuthu** unlike **Dr. Kiamba** never availed documents to support her opinion.

24. Respondent concluded by stating that the appellant has made complaints but have not demonstrated reasons for saying the trial magistrate erred; submitted that the trial magistrate did not err and prayed for dismissal of the appeal with costs to the respondent.

ANALYSIS AND DETERMINATION

25. Parties agreed on liability and evidence was adduced on assessment of quantum. The appellant's argument is that the trial magistrate disregarded evidence adduced and arrived at an award, which is manifestly excessive.

26. I note from **Dr. Wellington Kiamba's** medical report that the respondent sustained the following injuries: -

- a) Loss of 2 upper incisors teeth with fracture of the teeth,
- b) Deep cut wound on the lower lip and chin,
- c) Comminuted fracture of the left femur,
- d) Comminuted fracture of the right acetabulum and dislocation of the right hip joint,
- e) Fracture of the right inferior ramus of pelvis.

27. From the report, open and internal fixation of fractures of right acetabulum and left femur was done and he was put on skin traction; he was discharged on wheel chair to be followed up in surgical outpatient clinic; that the nail broke and he had another operation in 2015 to replace the nail. At the time of preparing the report on 22nd March 2016, he was still being followed up at orthopedic clinic. At the time, he still complained of severe backache, pain, and weakness of the lower limbs.

28. On examination, the doctor found prominent disfiguration on the lower lip and a prominent scar on the chin; the two upper teeth had been fitted with artificial dentures and that he had fractures of upper incisors, canine and premolars. Right hip joint was tender and all movements at the right hip joint were restricted; the pelvis was tilted to the left. The fracture of pelvis had been fixed internally but the hip joint was still out of position; that it tilted to the left.

29. He opined that the pelvis will eventually develop post traumatic osteoarthritis of the left hip joint and he will require hip replacement in future at a cost of kshs. 500,000 at Tenwek Hospital and kshs. 850,000 at Karen Hospital; he further observed scars on the lateral aspect of the left thigh and movements at the hip and knee joint could be executed; there was shortening of the left lower limb by 3cm. The doctor classified the degree of injury as grievous harm and assessed permanent disability at 50% and that he is unlikely to resume his usual duties.

30. I note from **Dr. Kahuthu's** medical report that the respondent loss 2 upper incisors, broken 3 upper molars, 1 canine tooth and 2 lower molars, scar on lower lip suture line scars on the right gluteal region 8cm, restricted movement of the right hip joint, shortening of the right leg approximately 4 cm, 4 suture line scars on the left leg and movement of left hip and knee joint present. She indicated that there no mention of loss of teeth in the initial treatment notes but on cross examination she confirmed there were teeth missing. This therefore confirm that the P3 correctly captured the respondent's injuries. From the foregoing, I agree with the finding by trial magistrate that the respondent

suffered loss of upper incisors as captured in the P3 form.

31. I note from the submissions in the lower court that the plaintiff cited the case of **Charles Niaumenge Wachama Vs Melek Ukongo [2011] eKLR** where the plaintiff suffered a fracture of the femur and soft tissue injuries with permanent disability of 25% and was awarded kshs 1.5Million and the case of **Edward Katana Vs CMC Ltd [2006] eKLR** where the court awarded kshs.2Million for 30% permanent disability. There is no doubt that the plaintiff in this case sustained more severe injuries leading to disability of 50%. In my view award of ksh.2,300,000 for pain and suffering to the respondent herein was reasonable. I will not therefore interfere with the said award.

32. On award for future treatment in respect to hip replacement appellant/had submitted that upon reexamination of plaintiff by **Dr. Jenipher Kahuthu** on 19th May 2015 hip replacement had been done on 9th March 2015 and the same was confirmed by discharge summary of 12th March 2015 and further the estimated costs by **Dr. Kahuthu** is not supported by any document from the mentioned institutions. Defendants submitted that the respondent/plaintiff had all along been treated at Nakuru PGH; expense so far proved is kshs.57,100, and it was outrageous to suggest a figure of kshs.200,000. I have perused the record and confirm that the plaintiff/respondent was treated at Nakuru Provincial General Hospital which is a government facility.

33. **Dr Kahuthu** gave estimates for treatment at a government institution as kshs. 80,000 for replacement of 2 lost teeth and 6 broken teeth and removal of small plate and screws at kshs. 30,000 making a total of kshs. 110,000. **Dr Kiamba** on the other hand indicated that the estimate he gave of kshs. 500,000 is for a Mission Hospital. He has not explained the future treatment should be at a Mission Hospital and not government facility as per the initial treatment. No evidence was adduced to challenge estimates given by **Dr. Kahuthu** as costs charged by Government institution. In my view two conflicting costs having been given, the trial court should have taking into consideration the fact that the respondent had been treated in a government facility and if not changed as wrong estimate award given estimated cost. I find appeal in respect to estimated cost for future treatment merited.

34. **FINAL ORDERS**

1. The sum awarded under general damages for pain and suffering is upheld.
2. Award on cost for future treatment is set aside.
3. Kshs 110,000 awarded as costs for future treatment.
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

Ms. Musili Advocates for Appellants

J. Njuguna Advocate for Respondent