REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO. 103 OF 2019

JOHN MWANGI MUNYIRI.....1ST APPELLANT

SAMUEL MURIITHI GITHIGA.....2ND APPELLANT

- V E R S U S -

PAUL WACHIRA NJUGUNA.....RESPONDENT

J U D G M E N T

The two appellants *John Mwangi Munyiri* and *Samuel Muriithi Githiga* who are formerly the 1st and 2nd Defendants in Nyahururu CMCC 197/2014, have appealed against the judgment of *Hon. Wanjala CM*, delivered on 28/04/2017. Judgment was entered in favour of Paul Wachira Njuguna the Respondent formerly the Plaintiff, as follows;

1) Pain and suffering and loss of amenities Kshs.1,800,000/-;

2) Loss of earning capacity Kshs.216,000/-;

3) Special damages of Kshs.111,255/-;

4) Future medical expenses of Kshs.144,000/-;

5) Costs and interest;

All less 30% contribution.

A background of the case is that on 02/11/2013, while the respondent was lawfully travelling as a pillion passenger on motor cycle Reg. No. KMCU 653Y along Nyahururu – Nyeri Road, when near St. Anne's Catholic Institute, the 2nd appellant negligently drove, controlled and managed motor vehicle Reg. No. KBR 618P Toyota Pickup with the 1st Appellant's authority and caused the same to hit the motor cycle as a result of which the respondent sustained serious bodily injuries and was put to great damage and loss.

On 01/03/2017 the parties agreed on the issue of liability at the ratio of 70% - 30% in favour of the respondent. The court only dealt with the issue of quantum.

Being dissatisfied by the court's judgment, the appellants filed this appeal raising six grounds of appeal which are as follows;

1) That the trial court erred and misdirected itself in law and facts by awarding general damages that were manifestly excessive and failed to appreciate the principles applicable in awarding of damages;

2) That the court erred by failing to consider and analyze the submissions made on behalf of the appellants and awarded an unjustifiable award;

3) That the court erred by failing to apply the principles applicable in assessing of damages of comparable awards made for similar injuries;

4) That the court erred by awarding loss of earnings yet the same was not proved to the required standard and that the court relied on conjecture;

5) That the court erred in awarding damages for future medical expenses which were not pleaded;

6) That the court erred by awarding medical expenses yet the respondent conceded that they were paid by NHIF which is unjust enrichment.

The appellants therefore pray that the court do review or set aside the trial Magistrate's judgment and make an appropriate award instead.

Being the first appellate court, I must remind myself of my duty which has been stated in many cases including what the Court of Appeal said in *Abok James Odera T/A A.J. Odera Associates vrs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR "This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate and analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."*

The matter proceeded to hearing with the respondent testifying as PW1. He told the court that soon after the accident, he lost consciousness and found himself in hospital and he had fractured the right leg below the knee, bruises to the right hand and thigh. He was transferred to North Kinangop Catholic Hospital where dressing was done and bone grafting. The wound took an year to heal. He was taken to theatre seven times but was operated upon five times. He produced medical reports for Good Hope Medical Center Nyahururu by Dr. Mburu dated 14/07/2014. By the time he attended court, he was still using crutches.

The defendant did not call any witness save that they produced Dr. M.S. Malik's report dated 27/01/2015 as an exhibit (D-exhibt1).

In summary, I think that the grounds raise two broad issues;

1) Whether the trial court applied the correct legal principles in assessing the damages;

2) Whether the damages awarded were excessively high as to amount to an erroneous estimate and whether the court can interfere.

The appellant is represented by the firm of Murimi Ndumia Advocates who filed written submissions on 16/08/2019. On whether the court misdirected itself; it was submitted that the respondent produced two medical reports prepared by Dr. Mburu who assessed permanent disability at 50% while Dr. Malik who was engaged by the appellants prepared his report on 27/01/2015 and assessed the degree of disability at 30%. It was the appellant's submission that the trial Magistrate failed to take into account the time factor between the two reports and the variation in degrees of incapacity. He relied on the decision *Erick Oting'u Murilla vrs Joseph Muthee Ngure Macharia (2019)* where three medical reports were produced and the court held that the Magistrate had failed to take into account the time factor and the varying degrees of incapacity. The Counsel submitted that the trial court should have considered the time factor between the reports and the varying percentages of incapacity.

Whether the trial court failed to consider the principles applicable in assessing of damages, Counsel relied on the decision of *Butt vrs Khan CA.40/1977 (1978) eKLR* which espoused the principles that an appellate court needs to consider in deciding whether or not to disturb the award made by the trial court. Counsel urged that the award of Kshs.1.8 million is too high. He relied on the following decisions where the plaintiffs sustained comparable injuries to those of the respondent in this case and the awards made;

1) S.A.O (minor suing through next friend) M.O.O vrs Registered Trustees, Anglican Church of Kenya Maseno North Parish (2017) eKLR;

2) Mwavita Jonathan vrs Silvia Onunga HCCA 17/217 (2017) eKLR;

3) Civicon Ltd vrs Richard Njomo Omwanche & 2 Others (2019) eKLR.

It was Counsel's view that an award of upto Kshs.450,000/-was sufficient.

Whether the court should have made an award for loss of earnings; Counsel urged that the court made an award of 300/- per day as loss of income and thus abandoned its role as an independent and impartial arbiter and descended into the arena of conflict as was held in *IEBC & Another vrs Stephen Mutinda Mule & 3 Others (2014) eKLR* which cited the case of *Matavi Railways Ltd vrs Nyasulu (1988) MWSC.* Counsel urged that loss of earnings were not proved to the required standard; that *Section 107 of the Evidence Act* requires that he who alleges must prove and the burden lies on he who alleges *(Section 109 Evidence Act)* and that it was upon the respondent to prove that he earned Kshs.600/- per day which he did not do.

Whether the award of special damages was made in error; counsel submitted that the prayers in the plaint did not include Kshs.144,000/- as future medical costs and should not have been awarded. Counsel relied on the case of *Kenya Bus Services Ltd vrs Gituma (2004) EA 91* where the court said that future medical costs is special damages that must be pleaded. See also *Simon Taveta vrs Mercy Gatitu Njeri NKR CA 26/2013.* See also *Catherine Gatwiri vrs Peter Mwenda Karaa (2018) eKLR.*

Whether the court erred in awarding medical expenses that had already been paid for, Counsel urged that the respondent having admitted that Kshs.107,800/- was paid by NHIF, the same could not be awarded in accordance with *Section 42 of NHIF Act.*

On his part, Mr. Waichungo Counsel for the respondent argued that the award of Kshs.1.8 million was reasonable and not excessive and relied on the decision of *Rahima Tayab & Others vrs Anna Mary Kinanu CA 29/1982 (1983) KLR 114* which cited the case of *H West & Co. Ltd vrs Shepherd (1964)* where the court held that money cannot renew a physical frame but that an award is meant to give reasonable compensation to the plaintiff; that the respondent suffered partial incapacity of a permanent nature for six months and when seen by Dr. Mburu on 21/11/2016, three years after the accident, he was still walking on crutches; that Dr. Malik had noted in his report that accurate

assessment of the plaintiff's disability could only be done after he fully recovered from the injury and the tissue was united; that the wound that the respondent suffered also took about three years to heal; that the respondent suffered a severe fracture to the right tibia and fibula which are yet to heal and he still walks with help of crutches.

Counsel relied on the decisions in;

1) *Mwaura Muiruri vrs Suera Flowers Ltd & Another HCCA 189/2009;*

2) *Raphael Muthoka Mailu vrs Earnest Jacob Kisaka HCC 1132/2006;*

3) *CA 60/2004 Denshire Muteti Wambua vrs Kenya Power & Lighting Company.*

Counsel also relied on the decision of *Kenya Tea Development Agency vrs Austine Gori Makori (2014) eKLR* where the court was of the view that an award of general damages is an exercise of discretion by the trial court and must be reasonable but not extravagant or oppressive. The court must also be guided by comparable previous awards.

On the award on loss of earnings, Counsel urged the court not to interfere it because the respondent should be categorized as a casual labourer and it is rare to get documentation or pay slips for such jobs.

In respect to future medical costs, Counsel argued the same had been assessed by Dr. Mburu in his report dated 21/01/2015 at Kshs.144,000/-; that even Dr. Malik observed that the respondent had not fully recovered and therefore would incur further medical expenses. Counsel relied on the case of *Kenya Wildlife Services vrs Godfrey Kirimi Mumbi CA 12/2017 (2018) eKLR.*

In respect to special damages, Counsel submitted that the hospital bill was Kshs.115,165 and the sum of Kshs.107,800/- was never claimed or awarded and that the receipt was only attached to claim, and Kshs.7,365/- that the receipts produced amounted to Kshs.123,670/- and that the sum claimed should not be disturbed.

I have carefully considered all the submissions of both parties, the applicable law and the case law that was relied upon. The first issue for determination is whether the Magistrate correctly applied the applicable principles of the law in assessing damages payable to the respondent.

In *Ali vrs Nyambu T/A Sisera Stores (1990) KLR 534 at pg. 538*, the court cited with approval the principles that were laid down by the Privy Council in *Nance vrs British Columbia Electric Railways Company Ltd (1951) AC 601* at page 613 to be that;

> "*The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or Jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the Judge, in assessing the damages applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] IKB 354) approved by House of Lords in Davis vrs Powell Duffryn Associated Collievers Ltd [1941] AC 601."*

The same principles were applied in the decision of *Butt vrs Khan (1982 – 88) KAR* where the Court of Appeal said;

> "*An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."*

The principles have been applied repeatedly in many cases i.e. *see Kemfro Africa Ltd T/A Meru Express vrs Lubia and Olive Lubia (1982 – 88) IKAR 727.*

The respondent produced two medical reports prepared by Dr. Mburu dated 14/07/2014 and another dated 21/04/2016. The respondent was also examined by Dr. Malik on 27/01/2015 who was instructed by the Appellant. Dr. Mburu found that the Respondent had suffered a comminuted compound fracture of the right tibia and fibula that was confirmed by X-rays. He had also sustained a wound, fixation was done to the leg on 05/11/2013, dressing of the wound and immobilization of the right lower limb. On 2014 when Dr. Mburu examined the respondent, he noted that he had a plaster of Paris with a window exposing the wound and a plaster of paris was applied on the right lower limb. The wound had not healed and the Doctor indicated that the Respondent needed grafting. He assessed the degree of injury as grievous harm with permanent disfigurement to the leg. When Dr. Mburu examined the respondent again on 21/04/2016, he was still on crutches, an orthopedic boot applied to the right lower limb, a large scar on the right shin to the mid leg 20 x 11cm with a slight deformity. There was no free movement between the fragments. The right limb was significantly shorter than the left limb; a bony protrusion was on right leg; the ankle joint was stiff and a 12cm linear scar over the inguinal region, which is the bone graft donor site; that the respondent still needed a follow up and an orthosis to compensate for the shortening of the leg; that the right ankle which was stiff needed physiotherapy. He estimated future medical cost at Kshs.144,000/- and he assessed degree of injury at 50%.

When Dr. Malik examined the respondent in 2015, the Doctor found that he had suffered a compound comminuted, displaced segmental fractures of his right lower leg bones; was admitted in hospital many times; He has developed osteo myelitis of the tibia and non-union of the fracture due to infection. He still had wounds due to bone infection; segments of the fractured bone move freely and there was a large gap at the tibial fracture site and that the infection would be difficult to treat and would require grafting and inter fixation of the bone and his treatment was far from complete. The Doctor opined that the respondent suffered physical incapacity of a temporary nature for six months

and partial incapacity of a permanent nature upto that date. The doctor estimated the permanent physical disability at 30% and that a more accurate assessment would be done after he fully recovered.

The question is whether the court considered the three medical reports in assessing the damages. In *Erick Oting'u Murilla (supra)* where three reports had been produced with varying assessments, the court said;

> *"From the foregoing, the question is whether the learned trial Magistrate failed to take the time factor between the respective reports into account in addition to the verifying degrees of incapacity. Having stated the impugned judgment and medical reports, I would disagree with the trial Magistrate finding that …..…she ought to have acknowledged the variance between the initial and third medical reports; there is nothing to indicate that she did so. In the premises, I find merit in the above referenced grounds."*

I have looked at the trial court's judgment and I note that the court did set out the findings of the two doctors. Dr. Mburu's first report was dated 14/07/2014 about nine months after the accident. Dr. Malik's report is dated 27/01/2015 about two years after the accident. The 3rd report by Dr. Mburu is dated 21/04/2016, three years after the accident. Both Doctors found that the respondent had sustained very serious injuries. When examined on 21/04/2016 is when most of the treatment including grafting had been done and the wound had just healed. Even though Dr. Mburu and Dr. Malik estimated the permanent disability at 50% and 30% respectively, yet both appreciated the serious injuries that the respondent had sustained, had undergone several admissions and operations and took very long for the wound to heal; the right leg had shortened and he was still on crutches even in 2016, about a year after Dr. Malik saw the respondent and three years after the accident. He had not fully healed in 2016.

Mr. Waichungo relied on the decision of *Mwaura Muiruri (Supra)* where the plaintiff sustained multiple lacerations on the face, soft tissue injuries to the chest cage, comminuted fractures of the right humerus and lower thirds of the tibia and compound double fractures to the right upper leg and lower 1/3 of the fibula, the court awarded his damages for pain and suffering of 1,450,000/- in 2014. In *Raphael Muthoka Mailu (supra)* the plaintiff sustained substantial head injury which still manifests in limb tremors; compound fracture of the left femur leading to shortening of the left leg; fracture of left femur, dislocation of the left shoulder, deep laceration of the perineum, abdominal injuries to the intestines and inequality of limbs would lead to onset of early oesteo arthritis and the several operations in intestines would lead to intestinal obstruction. The Doctor observed that the injuries were near fatal. An award of Kshs.1,600,000/- in general damages was made in 2009.

In *Denshire Muteti's case*, the plaintiff sustained multiple fractures of the right femur, left femur and left scaphoid bones, dislocation of left elbow, fracture of radial head, dislocation of left lunate bone and bruises of parietal scalp.

On their part, the appellants relied on the following;

S.A.O. case supra, the plaintiff suffered head injury with brain concussion, damage of right lower mandible and left cheek, blunt chest injury, multiple friction lacerations, fracture of right tibia/fibula at midshaft regions; compound fractures left tibia/fibula, multiple cut wounds on fracture of left ankle joint involving malleolus bones and dislocation of right ankle joint and an award of Kshs.600,000/- was made in 2017.

In *Mwavita Jonathan (Supra)* the plaintiff sustained a left hip comminuted fracture, blunt chest injury, dislocated right knee joint; sprains at the cervical spine and neck, and lumber secural spine, deep wound on the left lower leg, an award of Kshs.400,000/- was made in 2017.

In *Civicon Ltd (supra)* the Plaintiff sustained a wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on left hand, cut wound on the left foreleg, fracture and dislocation of left hip joint. The doctor assessed permanent injury at 30% and an award of Kshs.450,000/- in damages in 2019.

In awarding of damages, the court must bear in mind that the respondent cannot be put back in the exact shoes he was in before the accident. This was sanctily stated in the case of *Rahima Tayab & Others vrs Anna Mary Kinanu CA 29/1982 (1983) KLR 114* where the court cited the decision of *H. West and Son Ltd vrs Shepherd 1964* which held *"Money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation."*

Again in *Mwaura Muiruri case*, the court quoted *Halsburry's Laws of England 4th Edition Vol. 12 (1) pg. 348* where the author said *"pain and suffering; damages are awarded for the physical and mental distress caused to the plaintiff both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate."*

I have considered the above cited authorities. The plaintiff's in the cases cited by the respondent suffered much more serious injuries than in the cases cited by the appellant. I find that the most comparable decision with the respondent's is the case of *Civicon Ltd*. The respondent has had to go to theatre severally, operated on five times, and the leg which had just started healing after three years, and that leg had shortened. I find the award of Kshs.1,800,000/- was on the higher side taking into account comparable awards. I find an award of Kshs.900,000/- will be fair compensation for the pain, suffering and loss.

Whether the respondent proved that he was entitled to loss of earnings;

The respondent testified that he worked at a car wash earning Kshs.600/- per day. He did not produce any evidence to support that averment. I am alive to the fact that in Kenya, most people employed in the informal sector do not have any evidence of proof of earnings like a payslip. A person working at a car wash as a casual worker is not expected to have any documentary evidence of his earnings. In my view, it is not a requirement that proof of earnings be by way of documentary evidence. If the court were to adopt that mode of proof, then many workers in the informal sector would suffer injustice.

In *Jacob Ayiga Maraja and Francis Karani vrs Simeon Obonyo (suing as the administrator of the estate of Thomas Ndenga Obonyo CA*

167/2002), the court of appeal stated *"In our view, there was more than sufficient material on record from which the learned Judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs.4,000/- per month; We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.*

In this case, the evidence of the respondent and the widow coupled with the production of several reports were sufficient material to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail. On ground two, we know of no law or any other requirements that a self-employed compensator must retire at age 55."

In *Mwaura Muiruri case*, the court cited the case of *Mumias Sugar Co. Ltd vrs Francis Wanalo (2007) eKLR* where the court said;

"The award for loss of earning capacity can be made both when the Plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the Plaintiff has suffered as a result of disability."

Bearing the above authorities in mind, in the instant case, the respondent was aged 44 years old must have been doing some work that earned him a living. He said he worked at a car wash. The court awarded the plaintiff Kshs.300/- per day which in my view was reasonable. The respondent had not been to work for 29 months. The sum awarded of Kshs.216,000/- was reasonable and I find no reason to disturb the award.

Whether the court erred in awarding future medical expenses;

The court made an award of Kshs.144,000/- as future medical expenses. It is Dr. Mburu who in his report indicated that the respondent would need further treatment which would cost Kshs.144,000/-. I have seen the amended plaint where at prayer (a), the respondent generally claimed general damages for pain and suffering, loss of amenities and loss of earning capacity and future medical expenses. Nowhere in the plaint was it indicated that an amount of Kshs.144,000/- was claimed. The same being special damages, they should have been specifically pleaded and proved. In *Kenya Bus Ltd vrs Luthana (2004) EA 91,* the Court of Appeal 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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person's legal rights should be pleaded."

In *Simon Taveta vrs Mercy Mutitu Njeri CA 26/2013,* the trial Judge awarded Kshs.4,00,000/- as general damages for pain and suffering and included future medical expenses and for eventualities but the Court of Appeal set aside the award on the ground that it was a misdirection, as the claim for future medical expenses was not pleaded and could not be part of an award of general damages.

See *Catherine Gatwiri's case (supra).*

Having not specifically pleaded future medical expenses, the trial court erred in making the award and hereby set aside the award of Kshs.144,000/-.

Whether the respondent was entitled to the special damages of Kshs.111,255/-. In the plaint, the respondent claimed special damages of Kshs.111,455 and further medical expenses of Kshs.12,215/-. I agree with counsels submission that the Respondent having admitted that Kshs.107,800/- which he incurred in medical expenses for treatment and admission, were paid by NHIF, just like any monies paid by any insurance, the respondent could not be compensated for it again. *Section 43 of NHIF Act provides as follows*

"Recovery of compensation or damages where a contributor to the Fund is entitled, whether under the Workmen's Compensation Act (Cap.236) or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages have been recovered, be repaid to the Board: Provided that the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages."

It follows that if any sums paid by the Fund to the hospital were again paid to the respondent as compensation, then it is recoverable by the Fund. The respondent was therefore not entitled to claim the Kshs.107,800/- which had been paid to the Hospital by NHIF. It would amount to unjust enrichment to claim it. From the documents produced in court, the Respondent proved the following special damages; doctor's fees Kshs.6,000/-, cost of medicines from the chemist, Kshs.40,200 (P-Exhibit 5b), and Kshs.200 (Exhibit 10a) for court proceedings in the traffic case. The respondent is only entitled to Kshs.46,400/- as proved special damages.

In the end, I find that the appeal has merit and succeeds in part. The respondent will have judgment as follows;

1. Pain and suffering and loss of amenities Kshs.900,000/-

2. Loss of earning capacity Kshs.216,000/-

3. Special damages Kshs.46,400/-

Total Kshs.1,162,400/-

Less 30% contribution

The appellant will have a quarter of the costs of the appeal.

Dated, signed and Delivered at Nyahururu this 16th day of July, 2020.

.....

R.V.P. Wendoh

JUDGE

PRESENT:

Mr. Karanja for appellant

Ms. Wanjiru Muriithi for respondent

Eric- Court Assistant