



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 16 OF 2017.

PHILIP KIPRONO.....APPELLANT

VERSUS.

ISAYA AURA ODEKE.....RESPONDENT

[An appeal from the Judgment and decree in original Bungoma CM CC 289/2015 delivered on 12/4/2017 by W.K. Chepseba – SPM].

JUDGMENT.

The Respondent Isaya Aura Odeke filed a suit against the Appellant Philip Kiprono in the Magistrates Court seeking;

- (a) General damages.***
- (b) Special damages for Kshs.749,367.30/=***
- (c) Interest on (a) and (b) above.***
- (d) Costs of the suit.***

The basis of his claim was that;

1. THAT on or about the 20th day of July 2014, along Eldoret – Webuye road at Kipkaren area, the Plaintiff was lawfully standing off the road at Kipkaren market, when the Defendant by himself, his agent and or authorized driver negligently, carelessly and recklessly controlled and or drove Motor Vehicle Registration Number KBQ 198R RENAULT PRIME MOVER and trailer number ZE6008 that the same lost control, veered of the road and hit the Plaintiff causing him to sustain serious bodily injuries and has thus suffered loss and damage.

The appellant (defendant) in his statement of defence dated 12.8.2015 denied the claim and any negligence.

By consent dated 31.10.2016 and adopted by court in 1.12.2016 the parties agreed;

- 1. Judgment on liability be entered in the ratio of 80.20 in favour of the plaintiff.*
- 2. That the P3 Form, the Police Abstract, Discharge Summary from Moi Teaching and referral Hospital dated 03/11/2014, Invoice for Kshs.103,500/= from Moi Teaching and Referral Hospital dated 04/09/2014, Medical Report by DR. LODRICK NODRIBALL MUMOKI dated 09/02/2015 and receipt for Kshs.2,000/= from DR. LODRICK NODRIBALL MUMOKI be produced as Plaintiff's Exhibits 1,2,3(a), 3(b), 3(c) 4(a) and 4(b) respectively, and the Plaintiff's case be marked as closed.*
- 3. That the Medical Report by Doctor V.V. LODIA be produced as defence exhibit No.1 and the defence case be marked as closed.*
- 4. That the parties do file submissions on quantum in 14 days.*
- 5. That the matter be mentioned confirm the filing of submissions.*

Both Counsel filed written submission on quantum. By Judgment dated 12.4.2017 the trial magistrate stated; Judgment will therefore be entered for the Plaintiff against the defendant as follows.

General damages	Kshs.2,500,000/=
Special damages and Future medical expenses	Kshs.638,200/=
	Kshs.3,138,200/=
Less 20% contribution	Kshs.627,640/=
Total	Kshs.2,510,560/=

Dissatisfied with the assessment on quantum, the appellant filed this appeal on the following grounds;

1. *THAT the learned trial Magistrate misdirected himself by failing to apply or applying wrong principles on the assessment of quantum on damages awarded to the respondents thus awarding damages which were manifestly excessive in the circumstances.*
2. *THAT the learned trial Magistrate erred in Law and in fact by failing to consider the evidence of the Appellants.*
3. *THAT the learned trial Magistrate erred in law and in fact by taking into account irrelevant facts and failing to take into account relevant facts thereby arriving at an erroneous judgment.*
4. *THAT the learned trial Magistrate erred in law and fact in failing to consider relevant authorities and submissions by the appellants.*

By consent the parties filed this appeal was to be disposed of by way of written submissions. Both parties filed their respective submissions.

M/s Kamau Lagat the Advocate for the appellant submitted that the Kshs.2,500,000/= general damages awarded by the trial magistrate was inordinately high as to amount to erroneous estimate of the damage suffered by the Respondent. He submitted that an award of Kshs.1,500,000/= would have been adequate. He referred this court to the decision in;

(1) *Frodak Cleaning Services & Another Vs. Daniel Meshack Shikanga [2017] eKLR*

(2) *Bayusuf Freighters Limited Vs. Patrick Mbatha Kyengo [2014] eKLR*

M/s Mumalasi for the Respondent opposed the appeal. Counsel for Respondent submitted that the trial magistrate considered the injuries sustained by the Respondent as per the medical report admitted in evidence. The trial magistrate assessed permanent incapacity at 70%. The trial magistrate considered the nature of injuries sustained, and made a correct assessment. Counsel submitted that in comparable cases the courts have awarded similar quantum of damages. Counsel relied on the decision in Bungoma Hcc. 29/2013. Joseph Wechifusi Vs. Patel Mitulkumar & Another where a plaintiff who sustained comparable injuries was awarded Kshs.2,500,000/= general damages.

The liability having been agreed by consent in the ratio of 80:20 in favour of the plaintiff, the only issue for determination on quantum of general damages awarded. According to the Medical report by Dr. Lodrick the Respondent sustained a compound fracture of the right tibia and fibula amputation of the right lower limb was done leaving the patelia intact. His present complaints were loss of right lower limb. He assessed permanent incapacity at 70%. Dr. Lodrick who also examined the Respondent found the Respondent sustained a compound fracture of right tibia and fibula, amputation of right leg was done at the knee joint. He assessed permanent disability at 60%.

The trial Magistrate in this Judgment stated that he considered the injuries sustained and was guided by the authorities cited and awarded Kshs.2,500,000/= as general damages. Counsel for the appellant opines that a sum of Kshs.1,600,000/= would have been adequate under this head. This appeal faults the trial magistrate on the assessment.

It is now settled that the assessment of damages is at the discretion of the trial courts, which had the opportunity of hearing the witnesses. The principles upon which an appellate court will disturb or interfere this discretion were well stated in Meru Express Service.

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum or damages awarded by a trial Judge.....be that it must be satisfied that either that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the same is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages.”

There is no doubt that the Plaintiff/Respondent suffered serious injuries leading to amputation of the right leg. Generally permanent incapacity would be assessed at 60 – 70% which is a high percentage with profound effect on pain, suffering and loss of aminations. The appellant submits that the assessment of general damages was erroneous. However, Appellant has not demonstrated that the trial magistrate took into account irrelevant fact or did not take into account a relevant one. From the comparable authorities cited in particular Bungoma Hcc. 29/2013, where the injuries sustained by appellant were comparable, I do not find that the amount is so inordinately high to be an erroneous estimate of the damages.

In the result I find no merit in this appeal which is hereby dismissed with costs.

Dated and Signed at Bungoma this 13th day of February, 2019.

S.N. RIECHI

JUDGE