



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**CIVIL APPEAL NO. 106 OF 2017**

**DANIEL NDERITU.....1<sup>ST</sup> APPELLANT**

**PYRAMID AUTOCARE LTD.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**SIMON KURIA KIRUBI.....RESPONDENT**

**JUDGMENT**

1. The Respondent sued the Appellants for damages following injuries he sustained in a road accident involving his motorcycle and the appellants vehicle Reg. No. KAY 942T on the 6<sup>th</sup> May 2014 along Bahati-Majani road in Nakuru.

Upon hearing of the case the trial court awarded the Respondent a sum total of Kshs.1,195,841/36 being general and special damages.

2. The appellants were dissatisfied with the awards. They filed this appeal on grounds that the trial Magistrate erred both in law and fact in awarding excessive damages and disregarding the appellants submissions thus arrived at findings not supported by any evidence.

3. The matter of liability was resolved by the parties when they recorded a consent on liability at 20:80 basis in favour of the Respondent.

4. Two medical reports were prepared and produced by the doctors. Dr. Wellington K. Kiamba report is dated 26<sup>th</sup> May 2014. Relying on the Discharge summary and X-rays from A.I.C Kijabe Hospital, the doctor stated the injuries as

- Comminuted fracture of the right fibia
- Displaced fracture of the right fibula
- Open reduction and internal fixation of the right fibula was done by plating and an external fixation to the right tibia.
- At time of examination the appellants was walking on crutches.
- He opined that the fixations needed to be removed at a cost of Kshs.200,000/= together with physiotherapy and drugs.

5. Dr. Leah Wainaina upon instruction by the Appellants prepared her report on the 4<sup>th</sup> August 2014, and stated her findings as

- Fracture the right tibia and fibula
- Plating and debridement were done
- Walking on crutches
- Pain on the leg on walking

- Restricted movement of the right leg due to pain
- X-rays showed healed fracture and the fixations
- Removal of metal implants cost at Kshs.30,000/= in a public hospital.

6. The Appellants proposed general damages for pain and suffering before the trial court at Kshs.250,000/= and cited a 2004 authority, **Nairobi HCCA No. 335 of 2004 Isaac Mwenda Mucheru -vs- Mugeti Muranga** where Kshs.100,000/= was awarded for fracture of tibia and fibula. I noted that the Record of Appeal does not include the Respondent's submissions before the trial court.

7. I have considered the judgment in the assessment of damages. The trial magistrate not only considered the medical reports, the parties submissions, but also comparative cases with comparable injuries and awarded Kshs.850,000/= for pain and suffering and loss of amenities Kshs.200,000/= for future medical expenses diminished earning capacity Kshs.100,000/= and hospital bills at Kshs.213,301.70/=.

8. This is the first appellate court. It's duty is to re-consider and re-evaluate the evidence adduced before the trial court and come up with its own findings and while doing so, to take into account that it neither saw or heard the parties testify – **Kemfro Africa Ltd t/a Meru Express Service & Another -vs- A.M.M Lubia & Another (1998) e KLR**.

9. An appellate court will be very cautious and slow to disturb an award of damages unless it is shown that the trial magistrate

- Took into account an irrelevant factor or
- Left out of account a relevant one
- The award is inordinately low or high that it must be a wholly erroneous estimate of the damages.

- See **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1982-88)**.

#### 10. Damages for pain and suffering

It is trite that the context in which the compensation must be evaluated is determined by the nature and extent of injuries and comparable awards in the past. The appellants cited an authority that was decided in 2004 yet there were more recent and comparable decisions. The trial court rightfully captured this concern.

The Respondent on the other hand cited a 2014 decision - **Alphonse Muli -vs- Brian Odhuadho (2014) e KLR** where for comparable injuries a sum of Kshs.800,000/= was awarded. In that regard I do not find in what manner the trial magistrate failed to consider or disregarded the appellant's submissions.

11. Further it is on record that the trial magistrate analysed the Respondent's injuries, paragraph by paragraph, the two medical reports from which analysis the awards were arrived at.

12. The Respondent in his plaint dated 27<sup>th</sup> June 2014 pleaded the sub-heads of damages. He was 25 years old and a *boda boda* operator earning some income.

Dr. Kiamba in his medical report assessed permanent disability at 20%. His leg healed with a deformity that incapacitated his work as a *boda boda* rider thus his earning capacity was no doubt diminished.

13. Both doctors agreed that future medical expenses were necessary to remove the implants in the Respondent's leg. While arriving at the sum of Kshs.200,000/= the trial magistrate considered two cost assessments from Kenyatta National Hospital and Tenwek Hospital, and found the sum of Kshs.200,000/= proposed by Dr. Kiamba to have been fair and reasonable. No plausible reasons were adduced to persuade me to depart from the award.

14. **Special Damages** were pleaded. The trial magistrate held that the sum of Kshs.125,000/= was paid to the hospital but an invoice for Kshs.88,301/70 was pending for payment. Citing the case **Thomas Kebaya Ngamiya & 2 Others -vs- David Chepseon (2012) e KLR**, the court held that so long as the sums are pleaded and proof provided, it is not a conditional precedent to claim special damages. There was an invoice issued from AIC Kijabe hospital that had not been paid. There is no reason, in my view and being in agreement with the holding in the **Thomas Kebaya Ngaruiya (Supra)**, why that sum of Kshs.88,301/70 ought not be awarded. It is therefore allowed and upheld.

15. **Loss of earning capacity** is a different head of damages from actual loss of future earnings.

In the case **Butler -vs- Butler (1984) KLR 225** and cited in **Isaac Mworira M'Nabea -vs- David Gikunda (2017) e KLR** it was held that

*“ --- compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas diminution of earning capacity is awarded as part of general damage.*

*While assessing damages for loss of earning capacity several factors ought to be considered: The age and qualifications of the*

*claimant and the remaining length of working life vis-a-vis the disabilities and previous business or engagements.*

16. The respondent testified that he was 25 years old and was earning from his *boda boda* business. Save for the accident and the uncertainties of life, he would have worked up to over the 60 years retirement limitation for civil servants. He testified to have been earning an estimate Kshs.15,000/= per month. His leg had healed with a deformity. As a rider, there is no doubt that his working and earning capacity was diminished.

17. I find the sum of Kshs.100,000/= awarded for the entire period on this sub-head to have been reasonable to the eyes and ears of the trial magistrate who heard and saw the Respondent testify – **Simon Mburu Wanjiku -vs- Charles Wauyu Wamiti (2009) e KLR.**

18. In its totality the appellants have failed to support their assertion that the trial magistrate failed to consider their submissions nor that the awards were inordinately high as to be wholly a wrong erroneous estimate of the damages. This court is not persuaded to interfere with the trial court's awards.

19. The upshot is that the appeal is dismissed with costs to the Respondent.

**Dated, signed and delivered this 9<sup>th</sup> Day of May 2019.**

**J.N. MULWA**

**JUDGE**