



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.49 OF 2010

GEOFREY IKENYE MACHARIA.....APPELLANT

VERSUS

JAMES NJUKI.....1ST RESPONDENT

JOHN KAGO NDUNGU.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. E.Kelly RM in Nakuru CMCC No.27 of 2014 delivered on 7th April 2017)

JUDGMENT

INTRODUCTION

1. This appeal arise from judgment in suit filed by the appellant in the lower court seeking damages for the injuries he sustained on the 4th day of July 2013 while travelling as a pillion passenger in KMCQ 685W from accident along Geoffrey Kamau road.
2. Parties recorded consent on liability. They agreed that the respondent/defendants do shoulder 95% liability and the plaintiff 5% liability. After hearing the parties, the trial magistrate assessed general damages at kshs 300,000 and special damages at kshs 55,298; the sums were subjected to 5% contribution and judgment entered for the appellant/plaintiff against the defendants/respondents for kshs 340,298 plus costs and interest.
3. The appellant being dissatisfied with assessment of damages filed this appeal on the following grounds
 - i. That the trial magistrate erred in fact and law by awarding damages of kshs 300,000 which was inordinately low for the nature of injuries sustained.
 - ii. That the trail magistrate erred in fact and law by failing to take into consideration or consider adequately the injuries suffered by the appellant and authorities cited before assessing damages.
4. Parties proceeded by way of written submissions.

APPELLANT'S SUBMISSIONS

5. Appellant submitted that the trial magistrate misapprehended medical evidence tendered before the court and failed to consider that the plaintiff suffered major injuries which are fracture of mid-shaft femur and deep cut wound on the occipital region of the scalp with a scar of 3 cm as highlighted by Doctor Omuyoma. Permanent liability having been assessed at 30% and cases with such injuries attract awards of kshs 1,200,000.
6. Appellant cited authorities which include **HCCA NO.18 of 2018** where court upheld award of kshs 630,000 for similar injuries, **HCCA No.149 of 2012** where the court awarded kshs 700,000 for fracture of the femur and **P.N Mashru limited Vs Omar Mwakoro Makenge[2018]Eklr Voi HCCA No.9 of 2017** where the court awarded damages of kshs 1,200,000 for similar injuries resulting to permanent disability of 30%.
7. Appellant urged this court to award damages of kshs 1,000,000.

RESPONDENT'S SUBMISSIONS

8. The respondent submitted that the appellant suffered a single fracture of the femur and that he did not have permanent disability and his

leg did not shorten; that kshs 300,000 awarded is not inordinately low to warrant interference by this court.

9. Respondent submitted that the principle for awarded damages is that the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases as held in the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd[2013]eKLR** and in **Kigaraari vs Aya[1982-1988]1KAR768** where the court held as follows:-

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

10. Respondent cited authorities which include **Kenyatta University vs Isaac Nyuthe NRB HCCA No.193 of 2012[2104] eKLR** where the court awarded kshs 350,000 for fracture of right femur, soft tissue injuries to the head and bruises on the right knee. Percentage of incapacity being 20% and claimant walking with crutches for one year after the accident.

DETERMINATION AND ANALYSIS

11. This being the first appellant court, I am obligated to analyse evidence adduced in the trial court and arrive at an independent determination.

12. The parties having agreed on liability, I will consider the injuries sustained and consider whether the award is comparable to awards in cases with similar injuries sustained by claimants. While doing so, I will also consider the lapse in time from the time of determination of the decided cases.

13. I note from Doctor Omuyoma's medical report that the plaintiff sustained the following injuries:-

- a. Fracture of mid-shaft right femur.
- b. Deep cut wound on the occipital region of the scalp with scar of 3cm.
- c. Deep cut wound on the Gluteal region right.

14. At the time of medical examination, the appellant had pain in the right leg. The doctor assessed permanent disability at 30%.

15. Record show that, at the time he testified on 22nd May 2015, the plaintiff was still in crutches. He said he was still going to Kinangop Catholic Hospital for treatment.

16. The respondent availed Doctor Leah Wainaina who testified that at the time he examined the appellant, he was still on crutches and that he needed second surgery as the implant was displaced. She said there was no shortening of the bones; and that the x-ray showed it was healing without complications.

17. On perusal of the trial magistrate judgment at page 5, he cited two cases where claimant suffered comparable injuries. In the two authorities, the claimants were awarded 600,000 and 500,000 respectively. The reason he has given for awarding kshs 300,000 in this case is that there was no residual complications. I note that Doctor Leah Wainaina who examined plaintiff confirmed that the implant was displaced and the plaintiff was still in crutches at the time of the examination. She confirmed that the bones had to be drilled again to fix the fracture. She added that he would completely healed and added that there was no shortening of the bone.

18. Whereas I agree with the trial magistrate that the plaintiff may heal with no residual complication after the second surgery, the healing and pain suffered is prolonged due to misplaced bones. I also note that judgment was delivered in the year 2017. It also note that injuries sustained by claimant in **VOI HCCA No. 3 of 2016** cited are more serious compared to injuries sustained by appellant herein. The court declined to reduce award of kshs 1,200,000. I also note that at the time Doctor Omuyoma assessed degree of permanent disability at 30% in this matter, the appellant was still undergoing treatment. I therefore find the award of kshs 1, 200,000 appellant is asking on the higher side. On the other hand having compared awards granted for similar injuries I find award of kshs 300,000 inordinately low in the circumstance having in mind that similar injuries attracted awards of between kshs 500,000 and kshs 600,000 at the time.

19. From the foregoing, I am inclined to interfere with the award and award kshs 500,000 as general damages. Less 5%(25,000) comes up to 475,000.

20. Appeal herein is therefore allowed.

FINAL ORDER

1. Judgment delivered on 7th April 2017 is set aside.
2. Judgment is hereby entered for plaintiff against the defendant for kshs 475,000
3. Costs of Appeal and trial court to be paid to the appellant.

Judgment dated, signed and delivered at Nakuru this 17th day of September 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jenifer - Court Assistant

No appearance for Counsel for Appellant

No appearance for Counsel for Respondent