

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 589 OF 2016

PETER MUTUKU MAKAU.APPELLANT

VERSUS

AMOS NZIOKI WAMBUA.RESPONDENT

(Being an appeal from the judgment in Milimani Chief Magistrate's Court Civil Case No. 4409 of 2012, delivered by Hon. P Muholi on 17th August, 2016)

J U D G M E N T

The respondent was injured in a road traffic accident that took place on 16th March, 2008 along Kangundo-Tala road involving motor vehicle registration KAR 350D said to be owned by the appellant herein. He brought the suit against the appellant for damages and blamed the appellant for the injuries he sustained. The Appellant denied the respondent's claim.

In the trial before the lower liability was agreed at the ratio of 90% against the appellant and 10% on the part of the respondent. Two medical reports were also admitted in evidence without calling the makers. After the filing of the submissions, the lower court made an award of Ksh.1,750,000/- in favour of the respondent for pain and suffering. No award was made in regard to special damages which the lower court correctly observed were not pleaded. It is that judgment that aggrieved the appellant leading to the present appeal.

In the Memorandum of appeal dated and filed on 15th September, 2016, the appellant complained that the award of general damages was excessive for the injuries suffered by the respondent and that, in making the said award there was no comparison with the current awards for similar injuries, going by the authorities cited by the appellant in his submissions.

I am required to evaluate the evidence presented in the lower court so as to arrive at independent conclusions.

There is no dispute that the Respondent sustained a fracture base of the skull, brain concussion, brain edema and intracerebral hematoma (blood clot within the substance of the brain). The report by Dr. Wokabi assessed the total permanent disability at 18%. The respondent was left with neurological problems associated with the injuries he sustained which cannot be underestimated.

This court may not interfere with an award made by the trial court unless it is so inordinately high or too low as to represent an entirely erroneous estimate. It must also be shown that the lower court proceeded on wrong principles which lead to an erroneous estimate.

(See also **BUTT VS KHAN, (1981)** KLR 349 Both parties have filed submissions herein and cited some authorities which I have considered. The lower court in its judgment considered the authorities cited by the parties. In so doing the court said as follows: -

“I have considered the injuries, the submissions, the authorities and the inflation. The plaintiff sustained severe brain injury that attracted 18% disability. The doctor has confirmed that and the defendant did not counter the findings.”

I am persuaded that the lower court correctly applied its mind to the facts, the medical report and the authorities cited to arrive at the final judgement. I do not believe that the award was inordinately too high to attract any interference by this court.

I therefore uphold the sum of kshs. 1,750,000/- general damages for pain and suffering as awarded by the lower. I note, however, that the lower court did not make provisions for the 10% contributory negligence on the part of the respondent. When this is done the balance comes to Ksh.1,575,000/- which shall be paid to the respondent by the appellant.

The end result is that this appeal is dismissed but each party shall bear their own costs of the appeal.

Dated, signed and delivered at Nairobi this 17th day of October, 2019.

A MBOGHOLI MSAGHA

JUDGE