



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 64 OF 2017

FRANCIS NDUNGU WAMBUI.....1ST APPELLANT

DANIEL IRUNGU WAMBUI.....2ND APPELLANT

ISAAC MUTHERERO.....3RD APPELLANT

VERSUS

BENSON GICHURE MAINA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal arises from the judgment of Embu Principal Magistrate in CMCC No. 274 of 2016 in which respondent instituted a suit for general damages against the appellants for fatal injuries sustained to the deceased in a motor vehicle accident. Having settled the issue of liability by consent of the parties at the ratio of 75:25, the court proceeded to award the respondent Kshs. 1,000,000/= less 25% leaving a balance of Kshs. 750,000/= as general damages plus special damages of Kshs. 34,330/=.

2. The appellants were dissatisfied with the trial court's judgement and lodged this appeal based on eight grounds that may be summarised as follows;

a) That the learned magistrate awarded excessive damages on quantum.

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

4. It was submitted that considering the injuries sustained by the respondent an award of Kshs. 350,000/= was reasonable. Reliance was placed on the case of **Kenyatta University v Isaac Karumba Nyuthe Nairobi HCCA No. 193 of 2012** where the plaintiff sustained injuries of the nature of fracture of the right femur, soft tissue injuries to the head, bruises to the right knee and temporary incapacity of 10-20% and proceeded to award general damages of Kshs. 350,000/=.

5. It was also submitted that the special damages awarded were not proven and as such should be disallowed.

C. Respondent's Submission

6. It was submitted that the award of Kshs. 1,000,000/= in general damages was fair. The respondent relied on the case of **Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR** where the court awarded Kshs. 1,500,000/= for general damages for pain and suffering where the respondent suffered segmental fracture of the right femur mid shaft, **P N Mashru Limited v Omar Mwakoro Makenge [2018] eKLR** where the court upheld the trial court's award of Kshs. 1,200,000/= for injuries of loss of consciousness at the time of the accident, fracture of the femur distal third, fracture of the temporal bone with haematoma, head injury to the right frontal parietal bone with brain oedema, left subdural haematoma and the case of **Duncan Kimathi Karagania v Ngugi David & 3 Others [2016] eKLR** where the court awarded general damages of Kshs. 4,000,000/= for injuries of blunt head injury with loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fractures of the maxilla bilaterally at the level 11, compound fracture of the mandible among other injuries.

7. On special damages it was submitted that the respondent produced the necessary receipts.

D. Analysis & Determination

8. As the first appellate court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd [1968] EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**).

9. I have carefully perused the record of and the parties' submissions. The issue of liability was settled by consent and is not an issue in this appeal. As such, the only issue for determination in my view is whether the trial magistrate awarded excessive damages for quantum.

10. The respondent suffered injuries as follows: - lost consciousness for 24 hours, fracture of the right femur which was later fixed with a metallic plate, soft tissue injuries to the head and trunk.

11. Looking at the cases cited by the parties, it is noted that the respondent cited some cases where the injuries were more serious than those in this appeal. The respondent also cited some cases where the awards were comparable to this case. It is also noted that no permanent disability was awarded to the respondent. On the other hand, the authorities relied on by the appellants are in my considered view more comparable to the injuries in this case.

12. In **Ibrahim Kalema Lewa v Estee Company Limited NBI HCCA No. 475 of 2012 [2016] eKLR** the High Court upheld an award of Kshs. 300,000/- on appeal in 2016 where the plaintiff sustained an inter trochanteric fracture of the left femur. He was admitted to hospital for 2 months and his physical disability assessed at 25%. The doctor noted that he would not attain normal functional capacity of his limb. In **Eldoret Steel Mills Limited v Elphas Victor Espila ELD HCCA No. 72 of 2006 [2013] eKLR**, the plaintiff was awarded Kshs. 300,000/= in 2013. He had sustained a sub-trachanteric fracture of the right femur, fracture of the metatarsal bones of the right foot and soft tissue injuries to the right arm, right hip, right thigh and right foot. Permanent disability was assessed at 35%.

13. The plaintiff in **Kenyatta University v Isaac Karumba Nyuthe NRB HCCA No. 193 of 2012[2014] eKLR** was awarded Kshs. 350,000/- in 2014 for sustaining a fracture of the right femur, soft tissue injuries to the head and bruises on the right knee. One year after the accident he was still walking in crutches. He was hospitalised for 2 months where fixation was done. He was awarded 20% permanent incapacity.

14. Also in the case of **T A M (a minor suing through her father next friend JOM) v Richard Kirimi Kinoti & Another NRB HCCA No. 82 of 2008 [2015] eKLR** where the plaintiff sustained a fracture of the left femur, lacerations on the left temple and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded Kshs. 250,000/- in 2015. In the case of **Bhachu Industries Limited v Peter Kariuki Mutura NRB HCCA No. 503 of 2009 [2015] eKLR** the plaintiff suffered an injury on the chest, thigh and a fractured femur which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs. 300,000/- in 2015.

15. The respondent sustained a fracture of the right femur which was fixed by metal plates. The other injuries he sustained were in the nature of soft tissue injuries. The latest examination revealed the fracture had united well and the leg was reasonably rehabilitated. The soft tissue injuries had also healed fully. In this case neither Dr. Mulwa nor Dr. Wokabi found permanent disability on part of the respondent. Considering the nature of the injuries, the decisions cited and submissions of the parties, I am of the view that the sum of **Kshs. 1,000,000/=** was excessive in the circumstances.

16. I therefore set aside the said award and substitute it with one of Kshs. 600,000/= for loss of amenities.

17. Although the appellant states that no receipts were produced to prove special damages, the receipts are contained in the record of appeal and in the original record. The special damages of Kshs. 34,330/= were therefore duly proved and will not be disturbed.

18. The total award is Kshs. 634,330/= less 25% amount to **Kshs. 475,747.50** payable to the respondent by the appellant.

19. The appeal is partly successful.

20. Each party to meet their own costs of this appeal

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthama for Respondent

Ms. Kiai for Omagwa for Respondent