



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO.11 OF 2019**

**PAUL GUYO WAQOH.....APPELLANT**

**VERSUS**

**HUSSEIN ABDI HUKA.....1<sup>ST</sup> RESPONDENT**

**HAYER BISHAN SING & SONS LTD.....2<sup>ND</sup> RESPONDENT**

(Being and Appeal from the original Civil Suit No.16 of 2018 of

Principal Magistrate's Court at Marsabit)

**J U D G M E N T**

The 1<sup>st</sup> respondent was involved in a road traffic accident on 18<sup>th</sup> October, 2015. He filed Civil suit number 16 of 2018 before the Marsabit Principal Magistrate's Court seeking damages for pain and suffering. Parties agreed to liability at the ratio of 20:80% in favour of the respondent. The trial court awarded Ksh.2.5million as general damages and Ksh.243,410 as special damages.

The appellants preferred this appeal on the following grounds:-

- 1. The learned trial Magistrate award of general damages for pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the 1<sup>st</sup> respondent.**
- 2. The learned trial magistrate's award of special damages was erroneous as the same was not strictly proved as required by law.**
- 3. The learned trial magistrate erred in both fact and in law by ignoring the defendant's written submissions and authorities cited therein in assessing general damages for pain, suffering and loss of amenities and special damages.**

Mr. Ndegwa appeared for the appellants. Counsel submitted that the respondent suffered bilateral comminuted fractures of both femoral bones. Counsel contends that there are three medical reports and the report by Dr. Sereti gives different injuries. The trial court should have relied on the initial report. The court did not view the scars on the legs of the plaintiff. Dr. Sereti did not indicate which documents he relied on to make his report or whether he examined the plaintiffs.

Counsel for the appellant further submitted that the trial Court relied on the authorities of **CHARLES WANYOIKE –V- JOSEPH MWANGI THUO & 2 OTHERS (2018)eKLR** and that of **PETER MWANGI MUREITHI –V- KIMAMA MBUGUA & 2 OTHERS (2016)eKLR**. These authorities provide far much serious injuries compared to those suffered by the plaintiff. Counsel relies on the case of **FLORENCE NJOKI MWANGI -V- CHEGE MBITIRU (2014)eKLR**, **ELISHA AKELLO RAGA –V- SHAJANAND HOLDINGS & ANOTHER (2016)eKLR** and that of **BHACHU INDUSTRIES LTD –V- PETER KARIUKI MUTURA, Nairobi HCCC No.503 of 2009(205)eKLR**. Counsel maintain that the trend on the injuries suffered by the respondent is that Courts have been awarding damages ranging between Ksh.250,000 to 700,000.

On special damages, Counsel submitted that no stamp duty was paid. Counsel relies on the case of **AGNES WANJIKU NDEGWA –V- KENYA POWER & LIGHTING CO.** where special damages were not awarded since stamp duty had not been paid.

Mr. Orayo appeared for the respondent. Counsel maintain that the award is fair. The receipts for special damages were admitted by consent. They cannot be faulted on account of lack of revenue stamps. Counsel relies on the case of **CHABHADIYA ENTERPRISES LTD &**

**ANOTHER –V- GLADYS MUTENYO BITALI Kakamega Civil Appeal No.10 of 2017.** The Court awarded special damages since the receipts had been produced without objection.

This is a first appeal. The Court has to evaluate the evidence afresh before drawing its own conclusion. Only the respondent testified before the trial Court. The respondent entirely relied on his witness statement dated 3<sup>rd</sup> August 2018. He stated that he was travelling in motor vehicle registration number KBW 788V. The vehicle lost control and overturned. He suffered bilateral comminuted fracture of both femoral bones. He was admitted at St. Theresa Mission hospital, Kiirua between 18<sup>th</sup> October 2015 and 24<sup>th</sup> December 2015. He spent Ksh.243,410 on treatment and transport. By the time he testified he had not properly healed and still had metal infusion. He could not drive. He did not tell the court whether he is a driver.

The appeal only raises the issue of quantum. Counsel for the appellant made reference to the plaint, the P3 form and Dr. Sereti's report in relation to the injuries suffered by the respondent. The P3 form indicate that the respondent sustained injury to the left thigh while the plaint itemized the injuries as bilateral comminuted fracture of both femur bones. The P3 form under "**lower limbs**" indicate that the respondent suffered bilateral comminuted fracture femur. It also indicates that there was incision on both thighs. The submissions by the appellant's counsel seems to suggest that the P3 form indicate that only one leg was affected. That is not the case.

The medical report by Dr. Steve Sereti dated 21.3.2018 describes the injuries as bilateral comminuted fractures both femoral bones. Where the term **comminuted** is used, the implication is that the fracture is not a simple break of the bone. The concise **Oxford English Dictionary** (12<sup>th</sup> edition) defines the word **comminuted** as follows:-

**“(1) reduced to minute particles or fragments (2) of fracture- producing multiple bone splinters.**

The respondent's two femur (thigh bones) then suffered fractures which led to splinter of the bones. The accident occurred on 18.10.2016, Dr. Sereti examined the claimant over one year later on 12.2.2018. The respondent complained of bilateral pains. The trial Court properly noted that Dr. Sereti did not assess any permanent incapacity. The normal procedure is to state whether the injuries would result to permanent incapacity. This helps the court to determine the damages to award taking into account the extent of permanent incapacity suffered.

In the case of **Charles Wanyoike (Supra)**, the claimant suffered fracture of the right femur and segment fracture of the left femur, fracture of the right tibia lower leg, fracture of the right ankle joint, fracture of the right upper incisor tooth and other soft tissue injuries. There was a 5% chance of the claimant developing epilepsy. Ksh.2 million was awarded on 25.9.2008 by Justice D.K. Maraga. In the **Peter Mwai Mureithi case (Supra)**, the claimant suffered fracture of the neck, fracture of the left femur, multiple fracture of the shaft of the left femur and fracture of the left tibia. Ksh.3 million was awarded.

In the case of Florence Njoki Mwangi (Supra) cited by Counsel for the appellant, the claimant suffered fracture of the right mid shaft femur, fracture of the left mid shaft femur, amputation of the foot behind the ankle and degloring wound on the right tibia fibula due to skin grafting. An award of Ksh.700,000 by the trial Court was upheld by the High Court, (Wakiaga J) on 11.7.2014. In my view the injuries in this case are comparable to those suffered by the respondent in the current case but are not as severe as the respondent's injuries.

In the case of **Elisha Akello Raga (supra)**, the claimant suffered cut wound on the right orbital area, bruises on the right knee and fracture of the femur. Justice Majanja awarded Ksh.450,000 on 20.12.2016. In this case, the claimant suffered fracture of femur on one leg and it was a simple fractures. The claimant was walking without any difficulty.

In the case of **BUTLER –V- BUTLER, 1984, KLR, 225** the Court of Appeal held inter alia.

**8. In awarding damages, a court should consider the general picture and all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts.**

**10. The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.**

I am agreeable with the contention by counsel for the appellant that the **CHARLES WANYOIKE CASE (Supra)** relates to more serious injuries. The case was decided in 2008. Apart from fracture of the left tibia, the **PETER MWAI MURETITHI CASE (Supra)** provided similar injuries of fracture of the femur although the fractures were on the left leg only. The claimant was bed ridden in 2007 and between April and May 2008.

The respondent herein suffered serious injuries. The comminuted fractures on both femurs are not minor injuries. The degree of permanent incapacity was not assessed. When the respondent testified he did not indicate what complications he was experiencing currently. Equally, the respondent's witness statement does not indicate any current problems. The respondent only stated that he cannot drive. It is common knowledge that the respondent will have to undergo further operation in future to remove the implants. The respondent was admitted for over two (2) months.

I do find that the award of ksh.2.5 million a bit excessive. I do set it aside and replace it with Ksh. two million (Ksh.2,000,000). The alleged trend of awards ranging between Ksh.250,000 to Ksh.700,000 by Mr. Ndegwa only involves the authorities produced by the Counsel and cannot be held to be a settle trend by the Courts.

There is the issue of special damages. I have seen the receipts for the special damages. The receipt for Ksh.243,410 from St. Theresa Mission hospital – Kiirua has a revenue stamp of Ksh.2 on the left side. The receipt for Ksh.6,500 from Dr. Sereti also has a revenue stamp. There is also a receipt from St. Theresa hospital dated 25.12.2015 for Ksh.243,410 (receipt No.130718) with a revenue stamp of Ksh.2/=. The other receipt from the hospital for the same amount is the patient's account which gives the details of the bill. Revenue stamps were attached to the bills and there was nothing more the respondent could have done.

A revenue stamp is given by the service provider. It is true that the recipient of the services can as well take the receipts to the collector of stamp duty for assessment. The question is whether it is logical to deny a claimant Ksh.240,000 simply because a stamp of ksh.2/= is not attached to the receipt. The party being called upon to pay can as well deduct the stamp duty and remit it to the tax collector. The receipts were produced by consent and the issue of stamp duty was not raised before the trial Court. I do find that this ground is an afterthought.

In the end, the appeal partly succeeds. The award of Ksh.2.5 million is revised downwards to Ksh.2 million. This award will be subjected to the 20% agreed contribution. Parties shall meet their own costs of this appeal. The respondent shall have the costs awarded by the trial court.

**Dated, Signed and Delivered at Marsabit this 5<sup>th</sup> day of November 2019.**

**S. CHITEMBWE**

**JUDGE**