

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 38 OF 2018

DAVID MUTEMBEI.....APPELLANT

VERSUS

MAURICE OCHIENG ODOYO.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. Jacinta A Owiti,

Principal Magistrate (PM), in Vihiga PMCCC No. 17 of 2014 of 22nd March 2016)

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant, and others, for general and special damages arising from a motor traffic accident involving his motor vehicle and another owned and controlled by the respondents. He sought general and special damages. The appellant entered appearance and filed a defence, in which he denied liability and attributed negligence on the respondent.

2. The issue of liability was settled by consent between the appellant and the respondent at the ratio of 80:20. Judgment on quantum was pronounced on 22nd March 2016. General damages were awarded at Kshs. 1, 600, 000.00, and specials at Kshs. 2,000.00, making a total of Kshs. 1, 602, 000.00, plus costs and interest. After the application of the liability ratio the quantum came down to Kshs. 1, 441, 000.00.

3. The appellant was aggrieved by the award and lodged this appeal. His principal case is that given the nature and extent of the injuries that the respondent suffered the award by the trial court was manifestly high. He argues that the trial court did not appreciate the authorities that were cited before it, hence it arrived at a determination that was against the weight of the evidence tendered.

4. According to the plaint on record, it is pleaded that the appellant had sustained a fracture of the right femur and a proximal fracture of the left tibia. The injuries reflected in the plaint were extracted from medical records that are on the trial court's file. The injuries reflected in the P3 Form, the treatment notes, and the medical report by Dr. Theophilus Wangata, dated 27th September 2013, are the two fractures and a cut wound. The respondent was hospitalized for two months. The fractures are said to have resulted in serious body deformity, which will require future surgery. One leg has shortened, with the resultant difficulty in walking long distances.

5. At the trial court, the respondent sought general damages at Kshs. 2, 500, 000.00. He placed before the court three High Court decisions. *Michael Njagi Karimi vs. Gedion Ndung'u Nguribu & another* (2013) eKLR, *Mwaura Muiruri vs. Suera Flowers Limited & another* (2014) eKLR and *Loise Njoki Kariuki vs. Bendricon Wamboka Waswa & another* (2013) eKLR where awards of Kshs. 2, 000, 000.00, 1, 450, 000.00 and 1, 500, 000.00, together with future medical expenses, were made, respectively. I have noted that the injuries in the cases cited were a lot more serious, but these were decisions made in 2013, as opposed to 2016 when the instant matter was determined.

6. The appellant, on the other hand, urged the court to award Kshs. 800, 000.00. He cited *Mary Pamela Oyioma vs. Yess Holdings Limited* [2011] eKLR, *Robert Gitau Kanyiri vs. Charles R Kahiga & 2 others* [2010] eKLR, *Mark Wanyonyi vs. Samuel Mbugua* [2004] eKLR and *Boniface Mugendi Njiru vs. Ochieng t/a Tohel Agencies & another* [2011] eKLR, where awards of Kshs. 900, 000.00, Kshs. 1, 000, 000.00, Kshs. 750, 000.00, Kshs. 1, 000, 000.00, respectively, were made. I do note though that the injuries in those cases were a lot more serious and extensive, and the decisions themselves were dated. They could not possibly be of any guide to the trial court.

7. On appeal, the appellant has cited the same authorities that were placed before the trial court by himself and the respondent. The only new ones are *Joseph Mwangi Thuita vs. Joyce Mwole* [2018] eKLR, *Alex Wanjala vs. Pwani Oil Products Limited & another* [2019] eKLR, *Tirus Mburu Chege & another vs. JKN (minor suing through the next friend and another DWN & another* [2018] eKLR, *Sammy Mugo Kinyanjui & another vs. Kairo Thuo* [2017] eKLR, *Reuben Mongare Keba vs. LPN* [2016] eKLR, *Ram Gopal Gupta vs. Nairobi Tea Packers Limited & 2 others* [2017] eKLR, among others. I find these decisions to be more relevant, as they are more recent and the injuries suffered closer to those in the instant case. The awards made in them shall, no doubt, influence the eventual decision that I shall make in the matter.

8. I have also considered other recent decisions. In *Vincent Mbogholi vs. Harrison Tunje Chilyalya* [2017] eKLR, the claimant had sustained a fracture of the left tibia leg bone, blunt injury to chest and lower limb and bruises, and was awarded Kshs. 500, 000.00. In *Godfrey Wamalwa Wamba & another vs. Kyalo Wambua* [2018] eKLR, the appellant had sustained a compound fracture of the right distal tibia and fibula, cut wounds on the scalp and chest and a cut on the lower lip. He underwent surgery for repair of the fibula. His leg had shortened just like in the instant case. An award of general damages at Kshs. 700, 000.00 was upheld on appeal.

9. In view of the more recent decisions on similar injuries, I am persuaded that the award by the trial court was on the higher side. I shall accordingly reduce the award on general damages to Kshs. 800, 000.00, subject to contribution. The appeal shall be allowed to that extent.

Each party shall bear their own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019.

W. MUSYOKA

JUDGE