



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 126 OF 2018

ESTON MWIRIGI NDEGE.....1ST APPELLANT

PAUL KIRIMI KITHINJI.....2ND APPELLANT

VERSUS

JOSEPH MACHARIA KAWIRA.....RESPONDENT

(Being an appeal from the Judgment and decree made on 29/11/2017

by the Hon. C.A. Mayamba, SRM in Githongo SRMCC No.10 of 2016)

J U D G M E N T

1. On 19/3/2015, a road traffic accident occurred near Ngonyi area along Meru-Nkubu road involving motor vehicle registration number as KBX 058J and KBX 953K. Motor vehicle registration no. KBX 058J was at the time being driven or was under the control of the 1st appellant while the respondent was a fare paying passenger in motor vehicle registration no. KBX 953K owned by the 2nd appellant.
2. As a result of that accident, the respondent sustained injuries for which he sued the appellants vide a Complaint dated 1/2/2017 which was subsequently amended. In the Amended Complaint, the respondent blamed the appellants for the accident and claimed both general and special damages as well as future medical expense.
3. The parties recorded a consent on liability on the basis of 85% and 15% against the 1st and 2nd appellants, respectively. The suit was then tried on the issue of quantum only. In its judgment made on 29/11/2017, the trial Court assessed general damages at Kshs. 650,000/- and awarded Kshs. 47,650/- as special damages.
4. Aggrieved by the said judgment, the appellants preferred this appeal raising three grounds. These were that; *the sum of Kshs. 650,000/- awarded as general damages was excessive, the trial Court failed to consider the appellant's submissions and authorities and that the decision was against the law and weight of evidence on record.*
5. As a first appellate Court, this Court is enjoined to re-evaluate and consider the evidence afresh with a view of making its own findings and conclusions having regard to the fact that it did not see the witnesses testify. (**See *Selle v. Associated Motor Boat Co. Ltd [1968] EA 123.***)
6. In his Amended Complaint, the respondent pleaded that he suffered fractures on the right femur, right arm, right forearm and soft tissue injuries all over the body. At the trial, he testified and produced a medical report by Dr. Nicholas Koome MBChB dated 12/11/2015 which confirmed the injuries. The report indicated that, as a result of the injuries, the respondent was admitted for 3 months and underwent 2 major operative procedures. There was considerable limb shortening and he was assessed to have suffered 15% disability. The respondent would require surgery in future to remove the K.nail and plate at a cost approximated at Kshs. 80,000/-.
7. It was submitted for the appellants that the amount awarded in general damages was excessive. The cases of **Kinyanjui Wanyoike v. Jonathan Muturi Choga [2004]** (where the court awarded Kshs. 100,000/- for a fracture of the right femur and pelvic), **Simon Mutisya Kavii v. Simon Kigutu Mwangi [2013] eKLR** (where the Court awarded Kshs.200,000/- for a permanent incapacity and shortening of 1 cm) and **Francis Mwangi Muchine v. Francis Kimani Mbugua [2001]** (where the Court awarded Kshs.100,000/- for fracture of the left humerus and left tibia and fibula). The appellants proposed an award of Kshs. 300,000/-. The respondent did not file any submissions.
8. The general rule is that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous

estimate of the damages, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

9. The main issue in this appeal is the award of general damages which the appellants contend was excessive. In **Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR**, it was held that:

“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”

10. I have considered the cases cited by the appellant. They are not only very old, the injuries are not comparable. In **Naomi Momanyi v G4S Security Services Kenya Limited [2018] eKLR**, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. He was awarded Kshs. 300,000/- in 2018. In **Gogni Construction Company Limited v Francis Ojuok Olewe [2015] eKLR**, the claimant was awarded Kshs. 350,000/= as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalized for 6 weeks.

11. In the present case, the respondent suffered fracture of the right femur, right arm, right forearm and was admitted for 3 months. He was assessed to have suffered 15% incapacity. In view of the forgoing, I take the view that Kshs.650,000/- was excessive in the circumstances. I will assess the general damages at Kshs.500,000/ which shall attract interest from the date of judgment of the subordinate court.

12. The court noted that although the consent on liability was recorded at 85% and 15% as against the 1st and 2nd appellants, the trial Court allocated 15% to the respondent in the judgment. As there was no cross-appeal on it, I will make no finding on it.

13. In conclusion, I find the appeal to be meritorious and allow the same. The appellants shall have the costs of the appeal but the respondent will have the costs of the lower Court.

It is so decreed.

DATED and **DELIVERED** at Meru this 11th day of December, 2019.

A. MABEYA

JUDGE