

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 22 OF 2017

MULAMA DAWKINS.....APPELLANT

VERSUS

BENJAMIN OTANGA.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. WK Cheruiyot, Resident Magistrate (RM), in Vihiga PMCCC No. 71 of 2014 of 16th April 2017)

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant for general and special damages arising from a motor traffic accident involving him and a motor vehicle owned and controlled by the respondent. 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 70:30. Judgment on quantum was pronounced on 16th February 2017. General damages were awarded at Kshs. 800, 000.00, and specials at Kshs. 14, 575.00, making a total of Kshs. 814, 575.00, plus costs and interest. After application of the liability ratio the quantum came down to Kshs. 570, 272.50.
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 and did not apply the correct principles on assessment of damages, hence it arrived at a determination that was against the weight of the evidence tendered.
4. According to the plaint on record, the appellant had sustained compound fractures of the right leg tibia and fibula bones, head injury with multiple wounds, internal bleeding causing blood clots in the brain causing brain damage and loss of speech. He had a deep cut wound on the left supra orbital region, cut wound on the left shoulder, multiple cut wounds on both arms, deep wound on the right leg at the fracture site, chest pain and backache. 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 discharge summary and the medical report by Dr. P. Umara, dated 21st April 2014, are the compound fracture and those to the soft tissue. The medical report by Dr. Umara is not medico-legal and was no doubt not meant for these proceedings, and my layman's mind is not able to decipher the conclusion made on the recovery process. The more relevant report appears to be that by Dr. Manasseh O. Onyimbi, dated 27th July 2014, it was marked for identification, but it does not appear to have been produced.
5. The appellant caused the appellant to be examined by his own doctor, Dr. DO Olima, and his report dated 18th June 2015 was put in evidence. It reflects that the respondent sustained a cut wound to the left of his supra-orbital region, blunt chest injuries, oblique comminuted fracture distal 1/3rd right tibia, fracture distal 1/3rd fibula, lacerations over the right iliac region and lacerations of the right arm, forearm and hand. He was treated with analgesics, antibiotics and tetanus toxoid. The wounds were cleaned and dressed, while the fracture was immobilized in a leg long plaster of Paris. He had healed of his injuries but with deformity.
6. At the trial court, the respondent sought general damages at Kshs. 2, 000, 000.00. He placed before the court three High Court decisions. *Laban Buyole Mamboleo vs. Rift Valley Textiles* (1998) eKLR, *Kornelius Kweya Ebichet vs. C&P Shoe Industries Ltd* (2008) eKLR and *Euphemia Awino Odego vs. Martin Ingudi Osodo* (2009) eKLR where awards of Kshs. 650,000.00, Kshs. 2, 100, 000.00 and Kshs. 1, 000, 000.00 for pain and suffering were made, for compound fractures of the fibula and tibia and other injuries. The injuries in those authorities are comparable, but I do note that the authorities are rather dated being of 1998, 2008 and 2009.
7. The appellant, on the other hand, cited *Simon Mutisya Kavii vs. Simon Kigutu Mwangi* (2013) eKLR, *SDV Transami K Ltd vs. Scholastica Nyambura* (2012) eKLR and *Johnson Mose Nyaundi (minor) (suing through next friend and father Wilfred Wadimbe Nyaundi vs. Petroleum & Industry Service Ltd* (2014) eKLR, where damages for pain and suffering for compound fractures of the tibia and fibula and related injuries were awarded at Kshs. 200, 000.00, Kshs. 250, 000.00 and Kshs. 500, 000.00. I note that the accidents the subject of the three decisions happened in 2005 and 2007, and the appeals turned on decisions of the trial courts made at about that time.
8. I have considered more recent decisions. In *Godfrey Wamalwa Wamba & another vs. Kyalo Wambua* [2018] eKLR, the appellant had a compound fracture of the right distal tibia and fibula and cut wounds on the scalp and chest and a cut on the lower limb, and the court, in 2018, awarded Kshs. 700, 000.00. There is the more conservative award in *Jitan Nagra vs. Abidnego Nyandusi Oigo* [2018] eKLR, where the trial court had awarded Kshs. 1, 000, 000.00 for a compound fracture of tibia and fibula, segmental distal fracture of the right femur, cut wounds on the back, right knee and lateral lane, bruises, lacerations and blunt trauma, but the same was reduced to Kshs. 450, 000.00 on appeal in October 2018. In 2017, the High Court in *SAO (suing thro next friend MOO vs. Registered Trustees, Anglican Church of Kenya Maseno North Parish* [2017] eKLR, awarded Kshs. 600, 000.00 where the appellant had sustained a compound fracture of the tibia and fibula, fracture of ankle, dislocation, head injury, lacerations, bruises and multiple cut wounds.
9. Considering the injuries sustained and the recent decisions that I have cited above, I am persuaded that the award made by the trial court

matched the pain and suffering that the respondent went through, and was globally within comparable awards by the courts in Kenya. I shall accordingly uphold the decision of the trial court. The appeal is accordingly dismissed. Costs shall follow the event.

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

W. MUSYOKA

JUDGE