



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 9 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

DUNCAN MWENDA.....1ST APPELLANT

THOMAS MUNGANIA.....2ND APPELLANT

KENYA COMMERCIAL BANK LIMITED.....3RD APPELLANT

AND

SILAS KINYUA KITHELA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Ochieng, PM dated 3rd June 2016 at the Chief Magistrates Court at Meru in Civil Case No.334 of 2016)

JUDGMENT

1. Both parties are dissatisfied with an award of Kshs. 600,000/- as general damages to the respondent for injuries sustained in a road accident that took place on 15th June 2009 along the Ruiru – Isiolo road at Monyon area. He was a passenger in motor vehicle registration number KBD 703W which lost control and as a result he was injured. The issue of liability was agreed in the ratio 80:20 against the appellant.

2. According to the plaint, the respondent sustained the following injuries; severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. The nature and extent of the injuries was not disputed as the report by Dr I. M. Macharia dated 22nd March 2010 was produced by consent. He confirmed the injuries sustained He noted that after the accident, the respondent was referred to Kenyatta National Hospital on 17th June 2009 where he was admitted for 5 months in an unconscious state for that period. At the time of examination, he was complaining of headache and chest pain and inability to extend the left middle finger. The doctor’s prognosis stated that the respondent was not able to hold anything tightly with the left hand. He noted that the respondent suffered recurrent headaches as a result of the head injury. He concluded that the injuries were treated well and healed well without permanent incapacity.

3. As regards the quantum of damages, the respondent cited several authorities and prayed to be awarded Kshs. 3,000,000/-. In **Hellen Kinanu Nyamu v Kenafri Bakery Limited and Others MERU HCCC No. 100 of 2006 (UR)**, the plaintiff sustained severe brain concussion leading to edema and loss of consciousness, fracture of the left mandible, fore arm bones at the distal zone and left collar bone and traction injury of the left branchial plexus. He also sustained laceration on the cheek, severe contusion of the right thigh, degloving injury of the skin of the right thigh muscle and severe laceration of the right thigh. One of the doctors who testified stated that the plaintiff suffered 60% disability. She was awarded Kshs. 2.5 million as general damages in 2010. In **Silvano N. Nyaga and Another v Joseph Kogi Ngotho and Others NYR HCCC No. 95 of 2002 (UR)**, the 1st plaintiff sustained a severe closed head injury resulting in unconsciousness for 5 days and confusion for 12 days, a closed fracture of the right radius and ulna with dislocation of the elbow joint for which he underwent two operations and diffusely swollen brain with contusion of the cerebellum resulting in post-traumatic epilepsy, poor memory and cognitive function He was awarded Kshs. 2,000,000/- in 2005. The plaintiff in **Brian Omwega Nyabuto v Ringwani Investment t/a Otange Bus Service and Another NKU HCCC No. 154 of 2003 [2005] eKLR** was awarded Kshs. 2,500,000/- in 2005 for suffering cerebral haemorrhage, bilateral frontal oedema leaving him with limited developmental capacity and a chance of developing epilepsy.

4. The appellants submitted that the sum of Kshs. 150,000/- as general damages would be sufficient. They also cited several cases. In **Dr Harish Cunilal Shah v Richard Kipkoeh Sang and Another NRB HCCC No. 307 of 1997 [2004] eKLR**, the court awarded Kshs. 150,000/- in 2004 where the plaintiff had sustained a cerebral concussion, laceration on the forehead, fracture of four left side ribs and bruising on the chest and a fracture of the acetabulum of the left hip joint without any displacement. In **Francis Ochieng and Another v**

Alice Kajimba MGR HCCA No. 23 of 2014 [2015] eKLR the claimant sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, loss of 5 anterior lower and two upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. The court held that an award of Kshs. 350,000/- was awarded in 2015. In *Cecilia W. Mwangi and Another v Ruth Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR*, the Court of Appeal awarded Kshs. 350,000/- in 1997 for the following injuries; head injury (cerebral concussion), cut wound over the vertex of the scalp, cut wounds over the right lower left and injury to the pelvis resulting in fractures of the right superior and inferior rami.

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

6. The difficult nature of the court's task in assessing damages was expressed by the Court of Appeal in *George Kirianki Laichena v Michael Mutwiri NRB CA Civil Appeal No. 162 of 2011 [2011] eKLR* where it observed that:

It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case...

7. However, it is accepted that the court in awarding damages must always bear in mind that money cannot renew a physical frame that has been battered and shattered and that the courts' only concern is to fair and reasonable compensation. In arriving at what is fair and reasonable the court ought to ensure that there is uniformity in the general method of approach and so far as possible comparable injuries should attract similar awards (see generally *Rahima Tayab and Another v Anna Mary Kinaru [1987-88] 1 KAR 90*, *Simon Taveta v Mercy Mutitu Njeru NYR CA Civil Appeal No. 26 of 2013 [2014] eKLR* and *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*).

8. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards which injure the body politic must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR* and *Jabane v Olenja [1986] KLR 661*).

9. I have considered the cases by the parties cited vis-à-vis the injuries sustained by the respondent. The cases cited by the respondent reveal not only serious head injuries but other injuries particularly fractures. I also note that unlike in this case, the claimants in those cases suffered long term mental disability which cannot be compared to the present case. In short, the cases cited by the respondent bear little relationship to the injuries sustained by the respondent. On the other hand, the appellant has cited more relevant cases two of which are quite dated as they were decided over 10 year ago. The case of *Francis Ochieng and Another v Alice Kajimba (Supra)* is closer to the present case but the hospital stay was much shorter. In this case, although the respondent was hospitalised for a period of 5 months, Dr Macharia concluded that he had healed and would not suffer any permanent disability.

10. Taking into account the decisions cited, the nature and extent of the respondent's injuries, I find the sum of Kshs. 600,000/- inordinately high. The sum of Kshs. 150,000/- suggested by the appellant would not adequately compensate the plaintiff. I therefore award Kshs. 350,000/- as general damages.

11. Consequently, I allow the appeal and set aside the award of Kshs. 600,000/- as general damages and substitute the same with an award of Kshs. 350,000/- as general damages.

12. The appellant shall have costs of this appeal assessed at Kshs. 30,000/-.

DATED and DELIVERED at MERU this 6th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Kariuki instructed by Mithega & Kariuki Advocates for the appellants.

Mr Kaimenyi instructed by Kaimenyi Kithinji and Company Advocates for the respondent.