



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 84 OF 2017**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**PAUL KITHINJI KIRIMI.....1<sup>ST</sup> APPELLANT**

**ESTON MWIRIGI NDEGE..... 2<sup>ND</sup> APPELLANT**

**AND**

**GATWIRI MURITHI..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.E. Mbicha, RM dated 1<sup>st</sup> September 2017 at the Chief Magistrates Court at Meru in Civil Case No.273 of 2015)***

**JUDGMENT**

1. This is an appeal against the award of Kshs 700,000/- as general damages and Kshs. 117,255/- for injuries sustained following a road traffic accident that took place on 19<sup>th</sup> March 2015 along the Meru-Nkubu road. The respondent was a passenger in motor vehicle registration number KBX 953K owned by the 1<sup>st</sup> appellant which collided with another motor vehicle registration number KBX 058J. She sued the appellants for damages and according to the plaint, she sustained the following injuries; cut on the upper lip, (hyperaemic) red right eye, fracture of the right mandible and the distal third of the right femur. The issue of liability was agreed in the ratio 85:15 in favour of the appellant.

2. In the memorandum of appeal dated 25<sup>th</sup> September 2017 and from submissions by their counsel, the appellants complain that the award of general damages for pain and suffering was inordinately excessive compared to the injuries sustained by the respondent. They contend that the learned trial magistrate failed to consider and take into account the principle that comparable injuries should attract comparable awards and that the trial magistrate awarded special damages which were not proved.

3. Counsel for the respondent supported the trial court's decisions. She submitted that the assessment was not erroneous or damages excessive as claimed by the appellant. She noted that injuries sustained by the respondent were serious enough to warrant the award.

4. In her testimony, Gatwiri Murithi (PW 1) testified that she sustained a broken right leg, the thigh bone and a fracture of the mandible. She also suffered injuries on the face. She testified that she was taken to Meru Level 5 Hospital casualty ward where she stayed for 2 days and was transferred to Nkubu Consolata hospital where she stayed for two weeks and was discharged on 11<sup>th</sup> April 2015. She told the court that she had undergone surgery two weeks prior to the hearing for the nail implanted in her thigh to be removed as it was infected.

5. Dr James Kihumba (PW 2) and Dr John Macharia (PW 3) testified. The primary medical evidence is set out in the medical report prepared by PW 3 on 20<sup>th</sup> June 2015. PW 3 examined the respondent and examined the P3 form, discharge summaries and treatment notes. He noted that following her injuries the mandible fracture was managed by dental wiring that stayed in place for 3 weeks. The femur was managed surgically with open reduction and internal fixation with a nail and screws. When the respondent was discharged, she was on crutches. When he examined her, the respondent was complaining of difficulties in walking and squatting and at the time she was still using a single crutch and had a limp of the right lower limb. She had surgical scars on the thigh and hip and the mandible fracture had healed while the femur fracture had partial union. At the time he examined her, PW 3 opined that the mandible had healed and the femur partially healed. The soft tissue injuries had completely healed. He noted that the respondent would require surgery to remove the implants.

6. The nature and extent of the respondent's injuries are not in dispute. What is in dispute is the extent of the award. Before the trial court, the respondent submitted that an award of Kshs. 900,000/- would be adequate compensation based on several cases cited. In ***Jesca Kaari Mutwiri Mwangi v Fara Said Hassan and Another MERU HCCC No. 170 of 2001 [2009] eKLR*** where the plaintiff suffered a fracture of the right and left femur, deep cut wounds on the face, fracture of the mandible and fracture of the femoral neck and soft tissue injuries on the

heel of the right foot. She was awarded Kshs. 1,500,000/- as general damages in 2009. In *Mary Mwhiki Mutie v Joseph Katunge Muswii NRB 3214 of 1993 (UR)*, the plaintiff sustained a fracture of the left ulna, fracture of the left femur which had a k-nail inserted and injuries on the left forearm. He was awarded Kshs. 500,000/- in 2002. Finally, the respondent cited the case of *Mugambi and Another v Gitiru [2005]1 EA 289* where the claimant sustained a comminuted fracture of the left and right femur. The award of Kshs. 1,000,000/- was reduced to Kshs. 500,000/- in 2004.

7. The appellant submitted that Kshs. 450,000/- would be a sufficient award for general damages. He called into aid two decisions. In *Agroline Hauliers Limited and Another v Edwin Ochieng MGR HCCA No. 1 of 2014 [2015]eKLR*, the claimant sustained a head concussion, contused neck and chest, a fracture of the right mandible, a fracture of the left humerus and bruises on the lower limb. Kshs. 800,000/- awarded as damages was reduced to Kshs. 450,000/- on appeal in 2015. In *Martha Agok v Kampala Coach BGM HCCA No. 75 of 2014 [2017]eKLR*, the claimant suffered a swollen face, tender lacerations and cut wounds, she lost 1 incisor tooth and fracture on the other, blunt trauma on the lower abdomen, the chest and body iliac region with a swollen cut wound on the right leg. Kshs. 350,000/- was awarded in 2017.

8. 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 failed to take into account a relevant 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*).

9. It bears repeating that this appeal concerns the award of general damages. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR* that:

*Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.*

10. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards 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*).

11. In summary, the respondent sustained two fractures; of the mandible and femur. The evidence is that the former has healed while the respondent is still undergoing treatment for the latter. The injuries sustained by the respondent fall within the rubric of multiple fractures with soft tissue injuries. I have looked at the decisions cited by both parties particularly the more recent cases cited by the appellant and I think they are apposite to the case before the court. Considering the nature of the respondent's injuries and the authorities cited, I agree with counsel for the appellant that the sum of Kshs. 450,000/- would be fair compensation.

12. I allow the appeal to the extent that I set aside the award of Kshs. 700,000/- and substitute it with an award of Kshs. 450,000/- as general damages. The sum shall accrue interest from the date of judgment in the subordinate court.

13. The respondent shall pay costs of this appeal assessed at Kshs. 30,000/-.

**DATED and DELIVERED at MERU this 6<sup>th</sup> day of June 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Kariuki instructed by Mithega and Kariuki Advocates for the appellant.

Ms Ntarangwi instructed by J. G. Ntarangwi and Company Advocates for the respondent.