

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 79 OF 2018

MASINDE MULIRO UNIVERSITY.....1ST APPELLANT

JOHN ASILIKWA SAMIA.....2ND APPELLANT

VERSUS

HILLARY MIHESO SHIUMA.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. Mrs. Moranga Senior

Principal Magistrate in Kakamega CMCCC No. 278 of 2010 of 19th August 2012)

JUDGMENT

1. The appellant lodged herein a memorandum of appeal dated 19th September 2013, in which it was averred that the trial court had made an award of general damages which was excessive and a travesty of justice considering the evidence on record and the injuries sustained. It is sought that the said decision of the lower court be aside and replaced with an appropriate.

2. This is a first appeal and I am conscious of the requirement pronounced in *Ephantus Mwangi and another vs. Duncan Mwangi* (1982-1988) 1 KAR 278, *Williamsons Diamonds Ltd vs. Brown* (1970) EA 1 and *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.

3. The respondent's injuries as recorded in his plaint dated 3rd May 2010, were head injury or brain concussion resulting in loss of consciousness for some days, swollenness and tenderness on the scalp with a cut wound, blunt trauma with tenderness on the neck chest and lumbo-sacral spine, and swollenness and tenderness on both arms and shoulders and ankles and feet with bruises on the latter. At the hearing on 10th January 2011, he said that he sustained injuries to his chest, head, neck, both hands,, back and legs.

4. The medical report put in evidence was by Dr. SI Aluda, dated 29th March 2010. His findings upon examining the respondent roughly two weeks after the injuries were sustained were that he had tenderness in all the regions of the body where he had been injured, swellings on the scalp shoulders arms ankles and legs, and scabs on the scalp ankles and feet. He noted his complaints at the time to have been pains in the injured areas, and swellings and scabs in the noted areas. In his opinion, the injuries were severe and continuing to heal, pain was to subside after sometime with use of painkillers, and so would the swellings. The scabs would fall off and he would be completely healed.

5. The trial court made an award of Kshs. 400, 000.00 general damages for pain and loss of amenities, subject to contribution. The court cited the decisions in *Mark Ochieng vs. Stephen Karuga Dindingu* HCCC No. 813 of 1990 and *Joseph Kitheka vs. Stephen Muthuka Pius* HCCC No. 1750 of 1999, where the courts had awarded damages in the region of Kshs. 400, 000.00 to Kshs. 480, 000.00.

6. The parties have urged the appeal by way of written submissions. The respondent has urged me to uphold the judgment of the lower court, on the basis that the same was made after the court considered what it ought to have considered. The appellants argue that the injuries suffered by the respondent were not as severe as presented by him. They were mainly soft tissue injuries, the respondent was received in hospital at conscious state, based on what is stated in the treatment notes. It is averred that the award was excessive and cites *Sibiah Ondieki vs. Samuel Ochillo* (2010) eKLR and *Mbati John & Combo DVD Coach Ltd vs. China Zhongxing Construction Co Ltd & Ngolua Mukiri Imuru* (2016) eKLR.

7. I have looked at the record before me. I am satisfied that the injuries sustained by the respondent were essentially soft tissue, but multiple. Although the plaint and the medical report do refer to loss of consciousness, suggesting serious head injuries, the medical treatment notes prepared on the day he was received in hospital do not refer to any such loss of consciousness. I have looked at the authorities that the trial court relied on and noted that the injuries in those cases were a lot more severe than those sustained by the respondent. There is no doubt in my mind that the award the subject of this appeal was excessive. In my view, the respondent's injuries are closer to those suffered by the parties in *Sibiah Ondieki vs. Samuel Ochillo* (2010) eKLR and *Mbati John & Combo DVD Coach Ltd vs. China Zhongxing Construction Co Ltd & Ngolua Mukiri Imuru* (2016) eKLR.

8. In the more recent decision in *Mbati John & Combo DVD Coach Ltd vs. China Zhongxing Construction Co Ltd & Ngolua Mukiri Imuru* (2016) eKLR the court upheld Kshs. 75, 000.00 for similar injuries. I am conscious that the lower court in that case pronounced its judgment in 2011, and am also alive to inflationary trends since then. I believe that an award of Kshs. 120, 000.00 would have been adequate compensation in the instant case.

9. In view of the foregoing, I do hereby allow the appeal, set aside the award of Kshs 400, 000.00 made by the trial court and substitute thereof an award of Kshs 120, 000.00, subject to contribution, with costs and interests. I shall make no order as to costs.

DATED, SIGNED and DELIVERED at KAKAMEGA this 17th DAY OF July, 2018

W. MUSYOKA

JUDGE