



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA. NO. 158 OF 2017

TERESIAH NGUGI.....1ST APPELLANT

LEAKY GICHUNGU KINUTHIA2ND APPELLANT

-VERSUS-

MICHAEL MASIA KIMENDERESPONDENT

(Formerly Tawa CC 39 of 2014).

JUDGEMENT

INTRODUCTION

1. The instant dispute arose out of road traffic accident (commonly known as running down case) in which the Respondent was a passenger in motor vehicle registered in names of the 1st Appellant and beneficiary owned by the 2nd Respondent.
2. The same occasioned an accident in which the Respondent was seriously injured.
3. He thus instituted Tawa CC 39 of 2014 in which after trial he was awarded damages thus prompting instant appeal.
4. The appeal is solely on liability and sets out the following grounds:-

i. The Learned Trial Magistrate erred in fact and in law in finding that the Respondent was entitled Kshs.200, 000/= for the injuries suffered.

ii. The Learned Trial Magistrate erred in fact and in law in finding that the Respondent was entitled Kshs.500,000/= for future medical expenses contrary to the expert opinion adduced in court by DW-1, Dr. Charles Kamau a consultant orthopedic surgeon and trauma specialist that the cost future medical expenses be assessed at Kshs.180,000/=.

iii. The Learned Trial Magistrate erred and misdirected herself as to the exact nature of the Respondent's injuries and therefore erred in law in her assessment of damages awardable to the Respondent which was manifestly excessive.

iv. The Learned Trial Magistrate erred in law and in principle by failing to appreciate the injuries alleged to have been sustained by the respondent were assessed at 7% partial permanent disability by the expert witness DW-1, Dr. Charles Kamau a consultant orthopedic surgeon and trauma specialist, were of a lesser magnitude than the pleaded 70% permanent disability by PW2, Dr. Kimuyu a general physician and did not commensurate with the amount of general damages awarded.

5. The parties agreed to canvass same via written submission which they filed and exchanged.

APPELLANT'S SUBMISSIONS

SUBMISSIONS ON QUANTUM

6. The Appellant submits that it is trite that assessment of quantum of damages in claim for general damages is a discretionary exercise.
7. However, the law has set dimensions for an exercise of discretion; must be exercised judicially, with wise circumspect and upon some legal principles.

8. The discretion in assessing the amount of general damages payable will be disturbed if the trial court;

a) Took into account an irrelevant factor or,

b) Left out of account a relevant factor or,

c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

9. See Kanga –Vs- Manyoka (1961) EA 705, 709, 713 & Lukenya Ranching and Farming Coop Society Ltd –Vs- Kavoloto (1979) EA, Paul Kipsang & Anor. –Vs- Titus Osule Osore (2013) eKLR.

10. Likewise, the Appellants rely on the holding of Onyancha J. in Millicent Atieno Ochuonyo –Vs- Katola Richard (2015) eKLR The Learned Judge observed that;

“It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the Respondent a just amount, so far as money can ever compensate, and entering a realms of very high awards, which can only in the end have a deleterious effect.”

11. The Appellants submit that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding quantum of Kshs.2,592,010.00/= that is inordinately high and excessive as discussed below.

12. They urge this court to examine the supporting authorities and comparable awards therein and allow their appeal as prayed.

13. They complain that, the Kshs.2000, 000/= awarded for pain and suffering and loss of Amenities was inordinately high as compared to similar injuries.

14. Dr. Judy Kimuyu medical report indicated that, the Respondent sustained mild head injury with facial bruises, blunt chest injury with fractured ribs, and **compound fracture of the right tibia fibula**. These injuries were also confirmed by the Appellant’s Doctor Charles Kamau.

15. The Respondent claimed and was awarded cost of future medical expenses of Kshs.500, 000/= as per Dr. Kimuyu’s medical report.

16. The Appellant’s doctor a fully-fledged orthopedic surgeon of two years standing testified that on performance of the corrective surgery, a minimum of 15 sessions of physiotherapy in a private hospital was between Kshs.150, 000/= to Kshs.250, 000/= maximum.

17. They further submits that Dr. Kamau the Respondent’s doctor assessed permanent incapacity at 70%, while the Appellants doctor assessed incapacity at 7%.

18. From the evidence by Dr. Kimuyu, stated that she used a chart to determine the degree of disability while on cross-examination she testified that the current injuries **ought to have been assessed by an orthopedic surgeon or specialist** but failed to refer the Respondent to such a specialist.

19. DW1, Dr. Charles Kamau was called to testify for the Appellants. He is a consultant orthopedic surgeon and trauma specialist did explain and elaborate to the court how a person with a 60% disability would be, he explained that 60% disability is where the leg is amputated at the hip joint and other limbs are injured.

20. He further explained that in such cases as this where the Respondent has three functioning limbs disability cannot be that high. He based his disability at 7% as his leg was only injured below the knee and can be fully used after corrective surgery. He did explain how disability is assessed using the Alberta scale and stated that they look at when determining disability.

21. The Trial Court formed an opinion that since the Respondent was on a wheel chair then the degree of incapacity would be 70%, this is despite there being evidence that disability was 7% by the Appellant’s doctor who is an expert orthopedic. It is their submission that this was an irrelevant factor that the trial magistrate used to make a finding.

22. They urge the court to consider permanent incapacity of 7% as correct coming from a specialist expert in the medical field.

23. It is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. See Denshire Muteti Wambua –Vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.

24. They now invite the court to consider the quantum award in light of the foregoing authorities with a common injury of **compound fracture of the right tibia fibula** cutting across the injuries sustained in the event that this Honourable Appellate court upholds the Respondent’s injuries.

25. In the case of James Gathirwa Ngungi –Vs- Multiple Hauliers (EA) Limited & Another (2015) eKLR, the Respondent therein suffered a **compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg**.

26. The Respondent injuries were fracture of the right leg, many sinuses on the right leg, pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficulty in walking, restriction mobility of the forearm, difficulties in squatting, weakness of the left upper limb, inability to carry or lift heavy objects, restriction of movement of the left limb, pain due to prolonged surgery procedure.

27. He now had to walk with the aid of crutches. In that case that was decided in 2015, Ougo J. assessed damages at Kshs.1,500,000/= for pain and suffering and loss of amenities.

28. The court will note that, the injuries sustained by the Appellant in above case were extremely severe and drastic compared to those of the Respondent herein. The Appellants thus urge the court to review the award of Kshs.2,000,000/= for general damages to Kshs.1,500,000/=.

29. Further in the case **of Kajuna Idd Noor –vVs- Rapid Kate Services & 4 others (2013) eKLR** the Respondent sustained **comminuted fracture of the right tibia and fibula, crush injury to the foot leading to below knee amputation** and abrasions of the left hand.

30. The Respondent testified during the hearing and further called two witnesses a doctor and police officer to validate his claim. The learned Judge made **an award of Kshs.1, 500,000/= as damages for loss, pain and suffering.**

31. The injuries in the **Kajuna case** were more severe since there was an amputation of below the knee.

RESPONDENT'S SUBMISSIONS

32. The Respondents submits that, the Appellants herein lodged this appeal vide their Memorandum of appeal dated 21/01/2016.

33. From the Memorandum of Appeal it is clear that the Appellants were aggrieved by the award of 2 Million as general damages and Kenya shillings 500,000/= as costs for future medical expenses.

34. There is no appeal on the court's finding on liability and on the special damages awarded of Kenya Shillings 92,010/=. The trial court's findings on these two issues therefore remains undisturbed.

35. On quantum the Respondent sustained the following injuries as per the medical report prepared by Dr. J.M Kimuyu.

ü **Mild head injury with facial bruises.**

ü **Blunt chest injury with fractured ribs.**

ü **Cut wound right leg below the knee.**

ü **Compound fracture of right tibia/fibula.**

36. On physical examination, the doctor noted the following:- The Respondent was on wheel chair and that the prolonged immobility had led to marked:-

ü **Muscle wasting on both lower limbs.**

ü **Healed scar right anterior tibia region with hypo pigmentation.**

ü **Swollen right knee joint with stiffness and tenderness.**

ü **Fractured bones have not fully recovered and cannot bear weight.**

ü **The injuries have affected his ability to work and economically he has been significantly affected.**

ü **Needs counseling and occupational therapy.**

ü **Full recovery will not be achieved and a permanent incapacity assessed at 70%.**

ü **Future medical expenses assessed at Kenya Shillings 500,000/= to cover physiotherapy, occupational therapy, counseling and reconstructive surgery.**

37. The Respondent was admitted for treatment at Kenyatta National Hospital for 11 months (see page 11 of the record).

38. A second medical examination was done by the Appellant's doctor Leah Wainaina on 25/08/2015 (**see report on page 23 of the record**) and she noted the following.

ü **Respondent was using a wheel chair.**

- ü **Unable to walk without support.**
- ü **Multiple hypo pigmented scars on the right leg.**
- ü **Healing fractures of 8th, 9th and 10th ribs.**
- ü **Fractures of both tibia and fibula.**
- ü **Mild head injury.**

39. For physical disability and estimated costs of future treatment, that was left for Dr. Kamau to examine the Respondent and give his opinion.

40. As per the evidence of Dr. David Kamau he did examine the Respondent on 05/11/2015 and noted the following:-

- ü **Respondent sustained head, chest compound fractures of the tibia fibula.**
- ü **He had rib fractures.**
- ü **He is on wheelchair because the bone has taken some time to heal.**
- ü **Healed scars on the face and chest.**
- ü **Fractures at the junction of the proximal and mid-shaft tibia and fibula with external fixtures.**
- ü **X-rays showed mal union of the tibia with a 10 degrees deformity.**
- ü **Had partial permanent disability.**
- ü **Will require reconstructive surgery which will cost Kenya Shillings 180,000/= for taxation.**

41. On cross-examination the Appellant stated that :-

- ü **His bone was exposed and the flesh had come out. It was fixed using a metal.**
- ü **There is a mal union.**
- ü **He could not get off the wheelchair because there was muscle wasting. Muscle wasted as he sat on a wheelchair for a long time.**
- ü **With muscle wasting one cannot stand.**
- ü **He cannot do any manual work.**
- ü **The mal union can be corrected through surgery.**
- ü **Gave 7% permanent incapacity as fracture union was okay.**

42. Both medical reports and the doctor's testimonies are in agreement that the Respondent sustained quite severe injuries. Then point of departure is on degree of permanent incapacity and the costs of future medical treatment.

43. Dr. J.M Kimuyu in arriving at the permanent incapacity of 70% took into account that the Respondent had suffered muscle wasting.

44. Once a muscle wastes, it cannot be regenerated. The Respondent will be on wheelchair for a longtime or for the rest of his life. In that state he could not do any manual work.

45. Indeed the court on page 51 of its judgment stated:-

“But when I looked at the Respondent when he was giving evidence the opinion I formed was that the Respondent will be on that wheel chair for a very long time than we expect because his muscles have wasted.”

46. Comparing the severe injuries sustained by the Respondent, he is on wheelchair and cannot engage in any economic activity, the degree of permanent incapacity of 70% given by Dr. Kimuyu is more accurate.

47. The award by the trial court of Kenya Shillings 2 Million as general damages for pain, suffering and loss of amenities was therefore appropriate in the circumstances.

48. On the costs of future medical expenses, both doctors are in agreement that the Respondent will need to undergo corrective surgery to correct the mal union on the fractured tibia-fibula.

49. Dr. Kamau gave estimated costs of corrective surgery of the mal union at Kenya shillings 180,000/=.

50. However he did not factor the costs of physiotherapy, occupational therapy, counseling and bed charges if Respondent is admitted in hospital to be incurred subsequent to the corrective surgery. This he admitted during cross-examination in page 46 of the record.

51. Dr. J.M Kimuyu gave the estimated costs of future medical expenses at a global figure of Kenya shillings 500,000/=. Her estimation will cover physiotherapy, occupational therapy, and counseling, reconstructive surgery and bed charges. The figure of Kenya shillings 500,000/= is more realistic and they urge the court to confirm the same.

52. They therefore urge the court to find that this appeal has no merits and proceed to dismiss the same with costs to the Appellant.

DUTY OF THE APPELLATE COURT

53. The role of the Appellate court is now a matter of judicial notice.

54. In the case of **Joyce Moraa Oyaro Supra Okwany J.** recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kangu –Vs- Manyoka (1961 EA 705, 709, 713 and in Lukenya Ranching and Farming Coop. Society Ltd –Vs- Kavoloto (1979) EA** that if the trial court;

a) *Took into account an irrelevant fact or,*

b) *Left out of account a relevant fact or,*

c) *The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

55. The Appellants aver that the Learned Magistrate's award was **extremely high** and was made without taking into account relevant factors resulting in an erroneous estimate. (see page 51 of the Record of Appeal)

56. The Appellants ask the court to review the evidence and facts on record and the foregoing submissions, the law and case law cited herein to allow their appeal and set aside the award of **Kshs.200,000.00/= as general damages substitute the same with an award of between Kshs.1,200,000/= – Kshs.1,500,000/=.**

57. Further, they urge the court to set aside the award of future medical expenses of Kshs.500, 000/= and substitute with the award Kshs.180, 000/= as per the evidence of the Appellant's Doctor Kamau.

EVIDENCE

58. The Respondent Michael Masia testified that on 15/12/2012, he was from Nairobi whilst aboard a Nissan Matatu of registration no. KBM 327L, the vehicle was being driven at a high speed and it fell inside a bridge.

59. He sustained very serious injuries on various parts of his body and was treated at Machakos General Hospital and thereafter at Kenyatta National Hospital where he was admitted 11 months. He thereafter reported the matter to Machakos police station.

60. PW1, Dr. Judith Kimuyu of Machakos Level 5 Hospital testified that on 29/09/2014, she filled the P3 for PW1 and at the same time prepared his medical report on 21/10/2014.

61. She made a conclusion that PW1 had suffered serious bone and soft tissue injuries which had not fully healed. She assessed his permanent incapacity at 70%. She produced her P3 form and the medical report as exhibits.

62. On cross examination, PW2 testified that the Respondent will be on a wheel chair for the rest of his life.

63. The Respondent's case was closed after PW1 and PW2 had testified. The defense called one witness, Dr. David Kamau an Orthopedic and Trauma surgeon.

64. He testified that on 05/11/2015 he examined the Respondent and prepared a second medical report which he produced as an exhibit. He made a conclusion that the Respondent had a partial permanent disability and he will require reconstructive surgery.

65. On cross-examination DW1 testified that PW1 was on a wheel chair when he visited him and that he could not get out of the wheel chair because there was muscle wasting.

ANALYSIS

66. I analyzed the evidence that adduced by both parties. My points of determination are:-

- 1) *Whether the case for disturbing award herein has been made?*
- 2) *If yes, how much is the Respondent entitled to?*
- 3) *What is the order as to costs?*

67. The Respondent testified that on the 15th day of December 2012 as he was travelling from Nairobi to Masii whilst aboard, a Nissan Matatu registration No. KBM 327L, the driver of the said vehicle was over speeding as a result of which the vehicle plunged into river at a bridge thereby occasioning him serious bodily injuries.

68. The Respondent was a mere passenger in that vehicle and therefore he did not have control over the same in any way. The accident herein was therefore self-involving. The liability was held against appellants at 100%. The Trial Court verdict on liability is not impugned in the instant appeal.

69. On quantum, the Respondent that he sustained a mild head injury with facial bruises, a blunt chest injury with fractural ribs, a cut wound right leg below. The knee had a compound fracture of the right tibia fibula.

70. He was treated at Machakos General Hospital and at Kenyatta National Hospital where he was admitted for 11 months.

71. Bone grafting was done on his right leg and metal bars were inserted.

72. According to the medical report that was prepared by Dr. Kimuyu, she made a deduction that the Respondent suffered serious bones and soft tissue injuries and has developed notable complications, which have affected his ability to work. She assessed the Respondent's permanent incapacity at 70%

73. The Respondent was also examined by the defense doctor one Dr. David Kamau who formed an opinion that the Respondent has a partial permanent disability of 7% and he will require correctional osteotomy of the mal union with fixation which will cost roughly Kshs.180,000/=.

74. I had the benefit of going through the written submissions that were filed by the counsels of either parties or the authorities that were supplied therein.

75. The trial court noted that when the Respondent gave his evidence in court, he was still on a wheel chair , for almost 3 years after the occurrence of the accident.

76. In **HCC. NO. 266 of 1998 at Machakos, Zachariah Nyabuti Uchiri –Vs- Tashrif Bus Services Ltd**, the Respondent sustained a severe head injury with a fracture of the right macular sinus a fracture of the right transverse process of the cervical, spine, a compound fracture of the left tibia and fibula.

77. The degree of permanent incapacity was assessed at 45% and was awarded Kshs1, 650,000/= got general damages.

78. In **HCC no. 728 of 2007 at Nairobi, Regina Mwikali Wison –Vs- Stephen Gichubu and Peter M. Muinde**, the Respondent sustained multiple skeletal fractures and soft tissue injuries which occasioned her pains and prolonged ongoing mobility and was awarded Kshs.2.5 million in general damages. Her estimated incapacitation had been assessed at 20%.

79. In this instant case the Respondent was still on a wheel chair during trial, meaning he could not engage in any income generating activity. Dr. Kimuyu assessed his permanent incapacity at 70% whereas the defense doctor assessed the same at 7%.

80. The Trial Court observed the Respondent when he was giving evidence, the opinion that it formed was that the Respondent will be on that wheel chair for a long time than expected because his muscles had wasted.

81. However an expert orthopedic surgeon and trauma Dr Kimuyu was of opinion that a person with a 60% disability is where the leg is amputated at the hip joint and other limbs are injured.

82. He further explained that in such cases as this where the plaintiff has three functioning limbs disability cannot be that high.

83. He based his disability at 7% as his leg was only injured below the knee and can be fully used after corrective surgery. He did explain how disability is assessed using the Alberta scale and stated that they look at when determining disability.

84. The trial court relied on the fact that the Respondent was on a wheel chair to rely on suggested incapacity of 70% opined by Respondent Doctor who was not an expert in the circumstances.

85. That consideration was irrelevant for trial court to utilize it in making a finding. A disability of 7% as opined and supported by Dr Kimuyu was more persuasive.

86. The Trial Court was entitled to take into account the inflation trend in this country and the ages of the cited authorities in making the award however taking to account the disability degree (70%) relied on, the award of Kshs. 2 million was inordinately high in the circumstances and thus set aside the same and substitute it with award of Kshs. 1,500,000/= as **general damages** for pain and suffering and loss of amenities.

87. As to cost for future medical operations the expert opined that, on performance of the corrective surgery, a minimum of 15 sessions of physiotherapy in a private hospital was between Kshs.150,000/= to Kshs.250,000/= maximum.

88. Thereafter the Respondent would walk, he stated that there would be no need of excessive transport costs as it is better if Respondent was hospitalized. He stated that Kshs.180,000/= was sufficient to cover surgery, physiotherapy and bed charges.

89. Thus the court sets aside the award under this heading and substitutes it with an award of Kshs. 250,000/=.

90. In sum the appeal succeeds to that extent and court makes the following order;

- a) **General damages for pain and suffering and loss of amenities Kshs. 1,500,000/=.**
- b) **Cost for future medical operations Kshs. 250,000/=.**
- c) **On special damages, Kshs.92, 010/= being the amount that was pleaded and proved.**
- d) **Thus, Global award is Kshs. 1,842,010/=.**
- e) **The Appellant will get 50% of the costs of the appeal.**

SIGNED, DATED AND DELIVERED THIS 3RD DAY OF OCTOBER, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE