

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 67 OF 2010

LUKE KING'ARA NDUNG'U1ST APPELLANT

CLEON EVANS ODUOR2ND APPELLANT

VERSUS

JAMES MAINA MUTURARESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Thika (C.W. Meoli) in CMCC No. 1438 of 2003 delivered on 12th June, 2009)

JUDGMENT

This appeal follows a judgment by the lower court delivered on 16th September, 2009 whereby the respondent was awarded Kshs. 700,000/= general damages for injuries sustained as a result of a road traffic accident. Before that judgment, liability had been recorded at 90% on the part of the appellants while the respondent was to bear 10% contributory negligence. The award given by the trial court was therefore subjected to 10% contributory negligence on the part of the respondent leaving a balance of Kshs. 630,000/=

In arriving at the said award the trial court relied on the medical reports prepared by Dr. Waihenya C. Githiaka and Dr. Ashwin Madhiwala. The said reports had been produced by consent. There were several authorities which had been cited before the trial court.

As the first appellate court, I am required to make an evaluation of the evidence presented before the trial court with a view to arriving at independent conclusions. The respondent was not called to testify and so the court relied on the medical reports that had been presented relating to his injuries.

Dr. Githiaka examined the respondent after ten months from the date of the accident. The respondent had suffered cut wounds on the upper and lower left eye lids, cervical injuries (soft tissue), fracture of the pelvis involving superior and inferior rami of the right side. After examination the doctor concluded as follows,

“David sustained serious neck, pelvic and eye injuries as a result of the road traffic accident. He was out of work for a period of not less than 10 weeks. He may suffer from post-traumatic arthritis of the cervical spine (cervical spondyloses as a sequelae.”

Dr. Ashwin saw the respondent one and half years after the accident. His report captures the same injuries as those in the report of Dr. Githiaka. The respondent still complained of pain while turning on the right side and in the right hip in cold weather. On examination there was no evidence of any external injury on the neck cervical region neither did he have any scar, pain, swelling or tenderness. His walking was normal and in the opinion of the doctor the injury to the pelvis had healed well with no permanent disability. Temporary disability was limited to 2 months only, while the pain to the neck and cervical spondylosis would require physiotherapy.

In the Memorandum of Appeal lodged by the appellant, the lower court was faulted for awarding excessive general damages and failing to pay any regard to the appellants' submissions. The lower court was also faulted for not taking into account the medical evidence presented. Both parties have filed submissions which I have noted.

An appellate court may not disturb an award of damages given by the lower court unless it is inordinately high or low so as to represent an entirely erroneous estimate. For the court to interfere with such awards, it must be shown that the trial court proceeded on wrong principles or that there was misapprehension of the evidence in considering the material represented.- See **Butt vs. Khan [1997]1 KLR. See also Kemfro Africa Limited T/A Meru Express Service vs. A.M. Lubia & Another [1987] KLR.**

Courts have a duty to maintain some uniformity in considering damages awardable to litigants, bearing in mind the nature of the injuries, depreciation of currency, and that comparable awards should be made for comparable injuries. Cases cited include **Chege vs. Vesters [1982-88] 1 KAR 1197, John Kamore & Another vs. Simon Irungu Ngugi [2014] e KLR** and **Southern Engineering Co. Limited vs. Kazungu Kenga Mombasa Civil Appeal No. 48 of 1998.**

I have considered the awards made in the authorities cited and guided by the medical reports presented before the court, I am not persuaded that the trial court proceeded on wrong principles, or that the award is inordinately high so as to attract interference. The court correctly reviewed the authorities cited and said as much in the judgment. I see no merit in the appeal which is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE