



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 176 OF 2013**

**STEPHEN NDICHU.....1<sup>ST</sup> APPELLANT**

**RACHEAL KIMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JACOB OBIERO MUMBO.....RESPONDENT**

***(Being an appeal from the Judgment of the Senior Principal Magistrate (Hon. C. Obulutsa )***

***in CMCC NO. 7178 of 2010 at Nairobi delivered on 6<sup>th</sup> November, 2012)***

**JUDGMENT**

This is an appeal arising from the judgment of the lower court delivered on 6<sup>th</sup> November, 2012 following a suit by the respondent who was injured as a result of a road traffic accident. The respondent had blamed the appellants for the injuries he sustained which however was denied by the appellants. After listening to the evidence presented, the trial court found in favour of the respondent holding the appellants liable to the respondent and proceeded to award Kshs. 1,000,000/= general damages plus Kshs. 25,594/= special damages. The appellants were aggrieved by the said judgment and filed this appeal.

There has been a point raised by the respondent to the effect that the appeal is incompetent in that the decree of the lower court was not made part of the record. However, such an objection now falls in the province of a technicality which has been expressly addressed by the provisions of the Constitution, in particular Article 159 (2) (d). For as long as there is a certified copy of the judgment of the lower court, I believe the appellate court is properly seized of the matter and can proceed with or without the decree of the lower court. I shall therefore proceed to address the merits of the appeal.

Going by the Memorandum of Appeal dated 2<sup>nd</sup> and filed on 3<sup>rd</sup> April, 2013 the appellants have confined their appeal to the award of general damages which they complain is excessive and based on wrong principles. The lower court was also faulted for failing to take into account the submissions made by the appellants.

The appellate court may interfere with such an award if it is shown the trial court proceeded on wrong principles, and that the award is inordinately high or low to attract such an interference. Two medical reports were tendered in evidence to guide the court in the assessment of damages.

The respondent was injured on 25<sup>th</sup> May, 2010. The first report was prepared by Dr. W.M Wokabi on 28<sup>th</sup> September, 2010 which was just four months after the accident. The respondent had suffered compound double fractures of right tibia and fibula, muscular blunt injuries to the chest and back and abrasions on the left ankle. With such injuries, it was obvious the doctor could not make a conclusive assessment and I believe that's why he said in his opinion the respondent was still recovering and his leg was far from reasonably being rehabilitated. He added that it would 15 to 20 months for him to be reasonably rehabilitated and discard the crutches he was using then.

The second report is by Dr. R.P. Shah dated 1<sup>st</sup> September, 2011 which was one year and three months from the date of the accident. At the time of examination the doctor found that the right leg had healed fully and there was a shortening of the leg by about 2.5 centimetres. It was a bit bent and the extension of the knee was slightly restricted. The X-ray revealed a satisfactory union of fracture fragments and fracture lines were not visible.

According to the doctor such fractures usually cause pain for a week and discomfort for 3 to 4 months and good healing occurs in 3 to 4 months. Temporary disability cannot exceed 4 to 4 1/2 months while his permanent disability was 15% as the leg is a bit short and bent.

Several authorities were cited before the trial court which were taken into consideration in the judgment. The trial court correctly observed that some cases cited were decided in the 1990's. Obviously, many years had gone by, and awards that followed were much higher. I have noted the submissions made by counsel on quantum.

These include all the other authorities cited before the trial court whereby the injuries were comparable to what was suffered by the respondent herein. Even if the court were to consider the steep rise of inflation and depreciation of currency, I am of the view that the award made in terms of general damages was inordinately high so as to attract the intervention of this court.

Both counsel have not assisted the court with any recent comparable cases but doing the best I can and weighing one thing against the other, I believe an award of Kshs. 700,000/= is adequate compensation for the injuries sustained by the respondent. The award of Kshs. 1,000,000/= made by the lower court is reduced accordingly.

In the end, this appeal succeeds and there shall be judgment for the respondent in the sum of Kshs. 700,000/= general damages plus Kshs. 25,594/= special damages. The respondent shall however be entitled to costs both in the lower court and in this appeal subject to reduction of 1/3 thereof plus interest at court rates.

***Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of December, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**