



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 21 OF 2013**

KYOGA HAULIERS (K) .....1<sup>ST</sup> APPELLANT

PALUKU LUMIKA.....2<sup>ND</sup> APPELLANT

VERSUS

PHILIP MAHIU NYINGI

*alias* PHILIP MBURU MAHIU..... RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon. S. Muchungi Resident Magistrate delivered on the 11<sup>th</sup> January 2013 in Naivasha PMCC No. 537 of 2009)*

**JUDGMENT**

1. The appeal before me is against the award of damages by the trial court in the sum of Kshs.1,000,000/= for pain and suffering subject to contributory negligence of 25%.

The appellants in their grounds of appeal fault the trial Magistrate and state that the award is excessive, that the trial court failed to consider their submissions and appreciate principles applicable in assessment of damages and thus arrived at an erroneous award. This court has been urged to set aside and/or review the said award.

2. The appellants in their written submissions submit that Dr. Kiamba who presented his medical report to court had indicated that the respondent had recovered and so was Dr. Malik who stated that there was no serious disability. Citing the case **Arrow Cars Ltd -vs- Bimongo & 2 Others (2004) 2 KLR where it was stated:**

***“that comparable injuries should as far as possible be compensated by comparable awards.”***

Referring to the case **Kemfro Africa Ltd -vs- A.M. Lubia C.A No. 1 of 1984)1982-88) I KAR 727** the principles of assessment of damages were stated and it was submitted that the trial court failed to follow the same thus arrived at an erroneous estimate of the damages.

The respondent submitted that nothing was placed before the court to show in what manner the trial court ignored submission by the appellant, and combed through the judgment indicating that the trial court considered the submissions and also evidence adduced by both parties, and thus no basis was laid in support of the appeal.

3. This is the 1<sup>st</sup> appellate court. My duty is to re-consider and re-evaluate the evidence adduced in court and come up with my own findings and conclusions.

See **Kemfro Africa & Others -vs- .M. Lubia (Supra) (1982-88) I KAR 727.**

4. The respondent testified as PW1. His evidence on the injuries was that he was treated at Valley Hospital Nakuru where he regained consciousness after the accident, that he was X-rayed and a CT scan done and operated. He produced the Discharge Summary that showed a fracture of the skull and injury to the chest and that sometimes he faints.

5. I have considered the Medical report dated 21<sup>st</sup> October 2009 prepared by Dr. W. Kiamba. He referred to the Discharge Summary from Naivasha District Hospital and Valley Hospital. He also looked at the the CT scan, P3 form and also medical report by a consultant surgeon, Dr. B.R. Ombito. His report is therefore a compilation and summary of the respondents injuries and after effects. It is quite detailed on the treatment given to the respondent. Injuries stated are

- **Communuted depressed fracture of the skull at the occipital bone.**
- **Intracerebral haemotome right occipital area**
- **Deep cut wound on the right occipital region**
- **Soft tissue injuries right ankle joint**
- **Severe soft tissue right side of chest.**

This doctors opinion was that at date of examination, the Respondent had recovered fully from the soft tissue injuries, and had not developed severe complications of the head but stands a chance of developing post traumatic epilepsy due to the depressed fracture of right occipital bone. He assessed permanent disability at 20%.

6. Dr. M.S. Malik's medical report is dated 25<sup>th</sup> February 2010, four months after Dr. W. Kiamba's report. Stated are the following injuries:

- **Cut wound on the scalp with depressed fracture of the skull**
- **Pain and swelling of the right ankle joint.**
- **Present complaints are stated as follows:**

occasional pain in the chest and opined that he had no clinical signs indicating any permanent physical damage to the brain or the ankle, but indicated a small bony defect in the skull in the occipital region. In his special comments, Dr. Malik stated that due to the skull fracture, the respondent carries a high risk of seizures but as the doctor who treated him did not put him on prophylactic anti-combat drugs post operatively, he did not envisage any danger of seizures.

He concluded that the respondent did not suffer any permanent physical disability.

7. In his judgment, the trial magistrate considered the two medical reports as evidenced by his analysis of the two and his observation was that Dr. Malik's medical report was inaccurate as it did not capture all the injuries sustained by the Respondent.

8. I have considered all the treatment notes and discharge summaries from the two hospitals.

I too agree that Dr. Malik's medial report does not capture all the injuries, treatment and post treatment effects of the respondents injuries. That as it may, I now proceed to reconsider the award of damages.

9. The appellants submission of Kshs.200,000/= for such serious injuries was to say the least mockery of Justice. It was too low and not reflective of the injuries sustained.

The respondents proposal was Kshs.1,800,000/= and relied on were several authorities that the trial court duly considered to arrive at the sum of Kshs.1,000,000/=.

I have revisited the said authorities, together with the others cited in this appeal.

In **Eldoret HCCC No. 37 of 1991 Monica Kori Ndunda -vs- Malindi Taxis Ltd (1997) e KLR**, for quite comparable injuries, though slightly less severe, a sum of Kshs.450,000/= was awarded 24 years ago.

In **Nakuru HCCC No. 192 of 2001 Samuel Mwangi Kamau -vs- Joseph M. Kimemia (2004) e KLR** for injuries comparable, a sum of Kshs.1,000,000/= was awarded in October 2004.

10. The issue for determination by this court is whether the award of general damages of Kshs.1,000,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it.

I have stated the principles that a court ought to consider in the assessment of damages, and which a court ought to consider to interfere with a trial court's discretion in the assessment. The appellants have not put forth a strong case for interference.

The authorities cited by the respondent in the trial court were comparable, unlike the authorities cited by the appellant.

It must be noted that injuries will never be fully comparable to other person's injuries. What a court is to consider is that **“as far as possible comparable---”** to the other person's injuries, and the after effects.

See **Arrow Cars Ltd case (Supra)**.

11. I have in particular considered the case **Nakuru HCCC No. 192 of 2001 Samuel Mwangi Kamau(Supra)**. A 20% permanent incapacitation was assessed by the doctor. The plaintiff injuries were very comparable and closely similar to those sustained by the respondent in the present appeal. The doctor was of the opinion that he could develop epilepsy due to the injuries.

The appellant has not demonstrated by citing any comparable authorities that the trial court failed to consider any decisions or in what manner the Magistrate failed to consider their submissions.

It is not enough to assert or state. Evidence ought to be adduced in support of a party's assertions. See **Section 107-109** of the **Evidence Act**.

I have noted that the appellants have not cited any authority in their submissions before me to persuade me that the award of Kshs.1Million was inordinately high.

It is my considered opinion that the award of Kshs.1,000,000/= is within the comparable awards for comparable injuries.

I therefore dismiss that ground of appeal.

12. On the matter of **special damages**, on the parties advocates recorded a consent on the 26<sup>th</sup> October 2012 and agreed on special damages at Kshs.157,229/= following a consent order having been recorded on liability at 25:75 in favour of the respondent. I agree that the trial magistrate did not subject the contributory negligence of 25% by the respondent to the agreed special damages.

It is my view that any award whether by consent or not is subject to the agreed contributory negligence and ought to be so applied unless the parties expressly agree otherwise.

I therefore direct that the agreed special damages of Kshs. 157,229/= be subjected to the 25% contributory negligence by the Respondent.

13. Costs are awardable upon the discretion of the court after due consideration of the circumstances of each case.

**Section 27 of the Civil Procedure Act** gives the court wide discretion to determine by whom costs ought to be paid. The appeal has succeeded partially. That being the case, I direct that each party shall bear its costs of the appeal.

However the Appellants shall bear costs of the primary case as awarded by the trial court.

**Dated, Signed and Delivered this 19<sup>th</sup> Day of January 2017**

**JANET MULWA**

**JUDGE**