



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO 538 OF 2010**

**LUCAS ADHOLA OLAL.....APPELLANT**

**VERSUS**

**PATRICK MUTUA NDERITU.....RESPONDENT**

**JUDGMENT**

The appeal herein arose from the judgment of A. Ireri M/S in Milimani Civil Case Number 4617 of 2008 which was delivered on 10<sup>th</sup> November, 2010.

In the said suit, the plaintiff(appellant) sued the defendant (respondent) claiming General Damages, Special Damages, costs of future medical surgery, costs and interest.

The plaintiff's cause of action is alleged to have arisen on the 2<sup>nd</sup> day of April 2006 when he was walking as a pedestrian along Thika road near Muthaiga Police Station in Nairobi, when the defendant and/or his authorized driver so negligently drove, managed and/or controlled motor vehicle registration number KAQ 475M that it knocked down the plaintiff as a consequence of which he sustained serious body injuries.

On the 2<sup>nd</sup> day of September, 2010 judgment on liability was entered by consent of the parties at 7:30 in favour of the plaintiff. Therefore, parties agreed to file submissions to assist the court in assessing the quantum of damages payable to the plaintiff.

On the 10<sup>th</sup> November, 2010, judgment was delivered for the plaintiff in which the court awarded general damages in the sum of Kshs.150,000/- and special damages in the sum of kshs.2,000/-

The plaintiff having been dissatisfied with the award, filed the appeal herein and has listed the following grounds of appeal.

- (1) The learned magistrate misdirected herself on the evidence and the applicable law.
- (2) The learned magistrate erred in not considering the submissions made by the plaintiff's Counsel on quantum.
- (3) The learned magistrate erred in acknowledging the need for the future medical surgery but thereafter failed to make a finding on the same.
- (4) The learned magistrate failed to consider the severity of the plaintiff's injuries and the incapacity suffered as set out in the medical reports produced in court.

(5) The learned magistrate erred in awarding general damages which were manifesting low and which were not commensurate with the severe injuries sustained by the plaintiff.

(6) The learned magistrate erred in not taking into account the cited authorities and the submissions filed by the plaintiff.

On the part of the plaintiff/appellant, it was submitted that the learned magistrate did not consider his submissions on quantum. That the magistrate only mentions that she considered the plaint, the defence and the medical report.

It was also submitted that the learned magistrate acknowledged the need for future medical surgery to remove the metal implants in the plaintiff/appellant's right leg but failed to award the claimed sum in her judgment without giving any justification and reason.

That the learned magistrate failed to consider the severity and the incapacity set out in the two medical reports produced in court. That the injuries sustained by the plaintiff were serious as the permanent disability was assessed at 100%.

It was further submitted that the general damages awarded by the learned magistrate were manifesting low and are not commensurate with the severe injuries sustained by the plaintiff. The sum of Kshs.150,000/- awarded is low for a person who suffered 100% permanent incapacity which amounted to injustice to the appellant.

The respondent submitted that the appeal is incompetent and fatally defective for the reason that the decretal sum was settled vide a cheque dated 19<sup>th</sup> January, 2011 which fully settled the decretal sum and the costs. The said cheque was accepted by the counsel for the appellant and by filing the appeal, his intention was to waste judicial time. The counsel for the respondent cited the case of **laban Onono & Another Vs. Dan Owiti** wherein Mutungi J. stated;

***“The decretal sum, the subject matter of the appeal herein, having been paid in full, the appeal even if it were heard, serves no purpose, and would be a waste of valuable judicial time”.***

The respondent prays to this Honourable Court to dismiss the appeal.

On whether the learned magistrate considered the plaintiff's submissions, it was submitted that she indeed considered the submissions by both counsels and came to a well reasoned conclusion which should not be disturbed. Counsel for the respondent relied on the case of **Richard Omeyo Omino Vs. Christine A. Onyango** where J.R. Karanja J. Stated;

***“Although the judgment of the learned trial magistrate was rather short and straight forward there is no obvious suggestion that he did not take into consideration the submissions made by the parties nor the evidence adduced in court” this ground must fail”.***

On the future medical costs claimed by the appellant, it was submitted that the same should fail and in support of this contention, the respondent relied on the case of **Zacharia Waweru Thumbi Vs. Samuel Njoroge Thuku** where Mutungi J. observed that an award of damages for future medical costs is irregular and outside the known and established heads under the law of torts, the Hon. Judge's argument being that even if such claim is pleaded it cannot be proved.

The respondent submitted that on the basis of that authority the learned magistrate was right in not awarding the claim for future medical costs. Counsel for the respondent further averred that judgment was found and based on pleadings, evidence and submissions on record and he has asked the court to uphold the same and dismiss the appeal.

The court has considered the grounds of appeal and the submissions by both parties to this appeal. Before I can venture into the merits of the appeal, allow me to consider the competence of the appeal. Judgment

in the lower court matter was delivered on the 10<sup>th</sup> November, 2010 and a stay of execution was granted for 30 days.

The appellant's counsel wrote to the respondent's counsel on the 3<sup>rd</sup> day of December, 2010 with regard to the settlement of their tabulated costs and the decretal sum. That notwithstanding, the appellant went ahead and filed the memorandum of appeal on 2<sup>nd</sup> December, 2010. The respondent vide a letter dated 24<sup>th</sup> January, 2011 forwarded a cheque dated 19<sup>th</sup> January, 2011 fully settling the decretal sum and costs. (a copy of the said letter and the cheque are attached to the respondent's submissions.

The court has perused the said documents referred to by the respondent. In the letter dated 3<sup>rd</sup> December, 2010, the appellant's advocate tabulated the costs at Kshs.34,460/-. The respondent vide a letter dated 24<sup>th</sup> January, 2011, forwarded a cheque of Kshs.400,130/- and the same was in full and final settlement of the decretal sum in two suits namely; **Nairobi CMCC No. 4617/2008 (Lukas Adhola Olal Vs. Patrick Mutua Nderitu and Nairobi CMCC No. 3223 of 2009 (Lawrence Wambua Muasya Vs. Seyani Brothers & Co. Ltd.** The said cheque is also annexed to the submissions and is cheque number 113816 drawn in favour of Ombune Ongeru & Co. Advocates for Kshs. 400,130/- dated 19<sup>th</sup> January, 2011.

The court notes that counsel for the appellant has not denied receiving the cheque. Infact, the submissions by the appellant are very silent on that issue. In the circumstances, the conclusion that this court would make is that the decretal sum was indeed paid. The respondent's letter dated 24<sup>th</sup> January, 2011 is very clear that the same was paid in full and final settlement. The fact that the appellant's advocate accepted the cheque and went ahead to encash the same, implies that they received it on the same terms that it was forwarded by the respondent and that was "in full and final settlement".

I wholly agree with the finding by Mutungi J. in the case of **Laban Onono & Another Vs. Dan Owiti (supra)** "that the subject matter of the appeal herein having been paid in full, even if it were to be heard, serves no purpose, and would be a waste of valuable judicial time".

Having said that, I find and hold that the appeal herein is incompetent and the same is dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 30<sup>th</sup> day of March, 2017.

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**L. NJUGUNA**

**JUDGE**

**In the presence of**

..... **For the Appellant**

.....**For the Respondent**