REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.78 OF 2012

PAUL OTIENO OBUYA.....1ST APPELLANT

PATEL MAHENDRABHAI.....2ND APPELLANT

VERSUS

JOSHUA ATUTI NGOTO.....1ST RESPONDENT

DANIEL NELSON OMUTUTI.....2ND RESPONDENT

CONSOLIDATAED WITH CIVIL APPEAL NO. 79 OF 2012

DANIEL NELSON OMUTUTI.....APPELLANT

VERSUS

PAUL OTIENO OBUYA.....1ST RESPONDENT

PATEL MAHENDRABHAI.....2ND RESPONDENT

(an appeal arising from the judgment and decree of the Chief Magistrate's court at Kakamega dated 18th July, 2012 in Kakamega CMCC No.199 of 2012 by Hon. Shitubi CM)

JUDGMENT

This judgment is on the consolidated appeals which arise from the judgment and decree of the Chief Magistrate's court at Kakamega (Shitubi CM) dated 18th July 2012 in Kakamega CMCC No.199 of 2012. In the first appeal (No.78 of 2012) *Paul Otieno Obuya* and *Patel Mahhendrabhai*, (the appellants) have appealed against the decision of the trial court to award *Daniel Nelson Omututi* (The Respondent) general damages of Kshs.900,000/- for pain and suffering and Kshs.150,000/- for future medical expenses. The appellants filed a memorandum of appeal dated 14th August 2012 and raised five (5) grounds of appeal as follows:-

1. THAT the learned magistrate erred in law and in fact in awarding Kshs.900,000/- to the 2nd respondent as general damages for pain and suffering which award is inordinately

excessive considering the injuries sustained by the 2nd respondent herein.

2. THAT the learned chief magistrate erred in law and in fact in awarding the 2nd respondent Kshs.150,000/- for future operation when the same was not pleaded for by the 2nd respondent.

3. THAT the learned Chief Magistrate erred in law and in fact in failing to consider relevant case law on quantum furnished by the appellants and instead placed reliance on those supplied by the 2nd respondent which were dealing with different and more severe injuries.

4. THAT the learned chief magistrate erred in law and in fact in adopting wrong precedents to assess general damages.

5. THAT the learned chief magistrate erred in law and in fact in failing to properly and judiciously evaluate the medical evidence on record from both parties.

From those grounds the appellants prayed that their appeal be allowed.

In the second appeal, (No.79 of 2012), DANIEL NELSON OMUTUTI, (The Appellant) who was the successful plaintiff in the lower court, lodged his appeal against the award of Kshs.900,000/- general damages awarded to him saying they were inordinately low. The memorandum of appeal contains four (4) grounds as follows:-

1. THAT the learned chief magistrate erred in law and fact in awarding the sum of Kshs.900,000/- for pain and suffering for the appellant's injuries.

2. THAT the learned chief magistrate erred in law and fact in that the said award is so inordinately low as to be a wholly erroneous estimate of the general damages for injuries the appellant suffered.

3. THAT the learned chief magistrate erred in law and fact in making an award that was not within limits set out by recent and comparable cases.

4. THAT the learned chief magistrate erred in law and fact by failing to award loss of earning capacity to the appellant.

He asked for an enhanced award on general damages and an award for loss of earning capacity.

The two appeals were consolidated on 5th November, 2014 and parties agreed to dispose of the appeals by way of written submissions. Both sides filed their written submissions dated 16th February 2015 (for appellant in CA 78/2012) and 20th February 2015 (for appellant in CA 79/2012) respectively. For purposes of these appeals. The appellants in Appeal No.78 will be the "appellants" and the respondent in that appeal will remain the "respondent." Before delving into the appeals themselves these are the brief facts as they emerge from the record.

Joshua Atuti Ngoto and Daniel Nelson Omututi were the plaintiffs in the lower court. On 11th April 2006 Joshua was cycling with Daniel as his pillion passenger along Khumusalaba – Chavakali road while Paul Otieno Obuya was driving motor vehicle registration No. KAS 511G – Isuzu Tougher Pick-Up belonging to Patel Mahendrabhai Jashbhai. Paul Otieno Obuya is said to have negligently driven the said motor vehicle with the result that he knocked down Joshua Atuti Ngiti and Daniel Nelson Omututi. Joshua suffered blunt injury to the right elbow and bruises to the right leg while Daniel suffered more severe injuries namely compound fracture of both right tibia and right fibula

The two then filed an action in the lower court but along the way an out of court settlement was reached

on behalf of Joshua, thus leaving Daniel to battle it out in court. Liability was agreed to the effect that Daniel would shoulder 30% contribution while the defendants were to shoulder 70% and a consent recorded in court on 16th May 2012. On 20th June, 2012 parties produced documents by consent as exhibits and agreed to file written submissions on the basis of which the court would then decide on the quantum.

In his submissions, the respondent pressed for an award of Kshs.1869,245/- inclusive of both general damages, special damages and future medical expenses while the appellant urged for an award of Kshs.266,245/- for both general and special damages. In her judgment, the learned magistrate awarded general damages of Kshs.900,000/-, special damages of Kshs.10,350/- and future medical expenses of Kshs.150,000/- making a total of 1,060,350/- after deducting 30% contribution, the amount came to Kshs.742,245/- as the final award. The plaintiff was also awarded costs and interest. Both sides were aggrieved by that decision and filed separate appeals. The appellant saying it was inordinately high and the respondent that it was inordinately low, thus this judgment. Parties then agreed to dispose of the appeals by written submissions which were filed on 23rd February and 16th February respectively.

It has been submitted on behalf of the appellants that, the learned magistrate was in error in awarding Kshs.150,000/- for future medical expenses when the same was not pleaded being special damages of futuristic nature. Counsel took issue with this award saying that although the medical report by Dr. P.W. Oketch dated 8th December, 2010 was supplied to them in June 2011, no attempt was made to amend the pleadings and plead for future medical expenses and therefore it was an error for the learned magistrate to award future medical expenses which were not pleaded. On this point counsel relied on the decision in the case of *James Kyule v Elijah Musyoki HCCC No.254 of 1999* (mks) where the Judge declined to award future medical expenses because they were not pleaded, and *James Kafua Peter vs Simon Mutua Mwasya* where the court also declined to make an award for future earnings and medication because they were not pleaded and no evidence had been placed before court. Counsel further faulted the learned magistrate for awarding Kshs.150,000/- for private hospitals and not Kshs.50,000/- for public hospitals without assigning reasons for it yet the respondent had all along been treated in public hospitals.

Next counsel attacked the award of Kshs.900,000/- for general damages as being manifestly excessive and amounted to miscarriage of justice. He also faulted the learned magistrate for ignoring the decisions referred to her by the appellants, which according to them, had comparable injuries to those suffered by the respondent and only considered one decision by the respondent namely *James Maina Gichanga vs Francis Mukungi Muruthi HCCC No.2424 of 1996* NBI where an award of Kshs800,000/- was made for more serious injuries. And according to counsel, even taking into account the decision in Maina's case (supra) and the injuries herein, the proper award could have been Kshs.400,000/-which was near their offer in their submissions before that court. Counsel submitted that the doctors did not assign any permanent disability percentage to the respondent which would have guided the learned magistrate in arriving at a more reasonable award than the one she arrived at.

Regarding the cross-appeal, counsel reiterated their submissions above. Counsel prayed that their appeal be allowed, the award of Kshs.150,000/- future medical expenses be set aside and the award of Kshs.900,000/- for general damages be reviewed downwards and further that the respondents cross-appeal (No.79 of 2012) be dismissed.

Counsel for the respondent on his part submitted that the appellants had not established sufficient grounds to warrant this court interfering with the decision of the lower court and review the award of general damages downwards. Counsel cited decisions in the case of *Butt vs Khan* [1981] KLR 349 for the proposition that an appellate court will not normally disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate, and *Butler vs Butler* [1984] KLR 225 for the proposition that assessment of damages is more like an exercise of discretion by a trial Judge and an appellate court should be slow to reverse the award by the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would, or has taken into consideration wrong matters or failed to take into account matters he should have. Counsel went on to submit that the appeal is unmeritorious, that the award of Kshs.150,000/- cost of future medication was well founded since he Doctors had confirmed that the injuries had not healed and the bone did not

unite which required future intervention at that cost. He submitted that there was no need to plead the cost of future medical expenses because it had not been incurred to warrant its pleading.

On the cross appeal against quantum, counsel faulted the learned magistrate saying that she ignored the authorities cited before her and also underrated the effect of the injuries suffered by the respondent. He submitted that since the time he was injured, the respondent has continued to walk on crutches and will continue to do so as the injury has not heal. Counsel argued that the learned magistrate was in error in awarding Kshs.900,000/- general damages for the injuries suffered by the respondent by failing to take into account inflation. Counsel further faulted the trial court for not awarding the respondent damages for loss of earning capacity arguing that the respondent is a small scale farmer and his injuries have prevented him from performing his daily farming activities. Counsel pleaded with the court to enhance the award for general damages to Kshs.2,000,000/- and Kshs.360,000/- for loss of earning capacity. He asked the court not to interfere with the award on future medical expenses. Counsel suggested an award of Kshs.2,520,380/- less 30%, (Kshs.756,105) leaving net award of Kshs.1,764,245. He also asked for costs of the cross appeal.

I have considered submissions by counsel on both sides in respect of the appeal and cross-appeal. I have also perused the record of appeal. This being a first appeal, it is the duty of this court to analyse and assess the evidence afresh and draw its own conclusion bearing in mind of-course that it neither saw nor heard the witnesses testify and give due allowance for that. That duty was well stated in the case of *Selle vs Associate Motor Boat Company Ltd* [1968] EA 123 and also in *Jivarangi vs Sanyo Electrical Company Ltd* [2003] KLR 425. Furthermore a Court of Appeal will not interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See (*Duncan Mwangi Wambugu, Civil Appeal No.77 of 1982*;

The record shows that no evidence was led in this matter. Parties agreed on liability at 70% and 30% in favour of the appellants and respondents respectively and left the issue of quantum to the trial court to decide upon filling written submissions. Documents in the form of exhibits were also produced by consent of the parties. They included the charge sheet from New Nyanza Hospital payment receipts, two medical reports by Dr Charles Andai and Dr Oketch dated 2nd January 2009 and 8th December, 2010 respectively. In his medical report dated 2nd January, 2009, Dr Charles M. Andai confirmed that the respondent had suffered compound fractures of both tibia and fibula of the right leg. At the time of examination, the respondent complained of inability to walk without crutches and the Doctor observed that the respondent walked with a gait which the Doctor attributed to the non-re-union of the fracture of the right tibia. In the Doctor's opinion, the fracture of the tibia would not heal without surgical intervention. The Doctor did not access the permanent incapacity percentage or assign any cost of future surgery. The medical report by Dr. P.W. Oketch dated 8th December, 2010 also confirmed the extent of the injuries suffered by the respondent. Dr. Oketch, like Dr Charles Andia, agreed that the non-reunion of the tibia bone was the cause of the limping gait and that it required surgery to correct. Dr. Oketch on his part estimated the cost of future surgery to be between Kshs.50,000/- and Kshs.150,000/- in public and private hospitals respectively. He also did not assign any percentage on permanent incapacity.

Based on those medical reports, both counsel implored the court to award the respondent general damages commensurate to the injuries suffered. The appellant suggested general damages of Khs.370,000/- and the undisputed special damages of Kshs.10,350/- making a total of Kshs.380,350/- less 30% which brought the net figure to Kshs.266,245/-. He relied on the decisions in the case of *Master Sye Mbeli Kula Ndoga vs Muta Mwora & Another - HCCC No.1990*, *Jackson Rundoli vs Symptematic Supplies Col Ltd - HCCC No. 925 of 1991 and Diamond Shipping Services Ltd vs Julius Onyango Ongwech - CA No. 46 of 2006.* On the other hand, the respondent asked the court to award general damages of Kshs.,2,000,000/-, Kshs.150,000/- cost of future surgery, Kshs.360,000/- for loss of earning capacity and special damages Kshs.10,350/- making a total of Kshs.2,670,350/-, less 30% contribution (Kshs.801,105/-) leaving amount due as 1,869,245/-. Counsel relied on the decisions in the case of John Kimani Kamau vs Stephen Wani Kiarie HCCC No.4503 of 1993 and *James Maina Gachanga vs Francis Murungi Muriithi & Another – HCCC No.2241 of 1996.*

After considering submissions by both parties the learned magistrate stated as follows at page 4 of the judgment:-

> *"I have perused the documents filed herein, submissions and case law. Dr. Oketch's medical report on remaining the plaintiff's elaborate on injuries sustained (sic). He suffered severe and crippling injury to the right leg sustaining compound fractures of the tibia and fibula bones. That despite treatment the fractures were never re-united and for the reason he limps and walks supported by crutches. That he would benefit from surgical intervention estimated to cost between Kshs.50,000/- to 150,000/- in public and private hospitals respectively. He relied on the case of James Maina Gachanga vs Francis Murungi Muriithi & Another Nairobi HCCC No.22 of 1996 (unreported) when (sic) Justice Ang'awa awarded Kshs.800,000/- for:-*

- *Fracture of the right humorous, dislocation of the right shoulder,*
- *Brachial plexis*
- *Fracture of the right leg and cut on the right knee*
- *Cuts on elbow and bruises on both heads (sic)*
- *Cuts on hip. That was a decision made in the year 1996 and the victim appears to have suffered more severe injuries. However considering the lapse of tie (sic) since 1996 and the inflationary trends, I would find it appropriate to award the plaintiff herein Kshs.900,000/- for paid and suffering. He is also entitled to the sum of Kshs.150,000/- needed for surgical intervention and proven special damages of Kshs.10,350/-."*

The learned magistrate then applied the 30% contributory negligence and the net award payable came to Kshs.742,245/- plus costs and interest thus prompting this appeal from both sides.

From the decision of the learned magistrate and submissions by counsel, three issues arise for determination in this appeal, namely; whether the trial magistrate was in order to award damages for future medical expenses, whether the court should have awarded damages for loss of earning capacity and whether the general damages of Kshs.900,000/- awarded is inordinately high or low to warrant interference by the court.

Future medical expenses are special damages which are claimed by a plaintiff to take care of the expenses he will require for treatment in future. They are required to be pleaded and proved. In the case of *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR, the Court of Appeal referred to the case of *Kenya Bus Services Ltd vs Gituma (*2004) EA 91 where the court held:-

> *"And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded. If evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights, should be pleaded."*

The Court of Appeal went ahead to allow the appeal on that aspect and set aside the award for future medical expenses. Further in the case of *Tracom Limited & Another vs Hassan Mohamed Adan [2009]* eKLR the same court held:-

> *"We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it."*

That being the position in law, the question then is whether this claim was pleaded in the case before the trial court for it to make an award on it. I have carefully perused the plaint dated 17th March 2009 and filed in court on the same day both in the body and prayers but I do not find the claim for future medical expenses pleaded therein. The prayers in the plaint were as follows:-

"REASONS WHEREFORE the plaintiffs claim for judgment against the defendants jointly and severally for:-

a) General damages

b) Special damages for both plaintiffs for Kshs.14,350/-

c) Interest on (a) and (b) at court rates

d) Any other or further relief which this honourable court may deems fit and expedient to grant."

When counsel for the parties addressed the court while recording consent on liability, they did not address the issue of future medical expenses. Although this aspect was contained in the medical report by Dr Oketch dated 8th December, 2010, (and not 8th December, 2012, as indicated in the consent,) counsel for the respondent did not address it at that time or at all. The issue was only raised by counsel in the written submissions. On the need to plead certain claims, the court in Tracom case (supra) said:-

> *"The purpose of requiring certain claims to be pleaded is to forewarn the defendant that there are other claims to be made which may not be the necessary and immediate consequence of the wrongful act as those claims are in respect of losses which the law does contemplate as arising naturally from the infringement of the plaintiff's legal right."*

That being the position that the respondent did not plead his claim for future medical costs or expenses, I find and hold that the learned trial magistrate fell into error by awarding the respondent Kshs150,000 for future medical expenses when the same was not pleaded. It was not awardable.

The second question which arises for determination is whether the trial court should have awarded damages for loss of earnings capacity. The respondent has faulted the trial court for failure to award damages on this head. Counsel for the appellants on his part has opposed the respondent's position that the learned trial magistrate was in error in failing to award the respondent damages for loss of earning capacity. Counsel for the appellant argued that the respondent did not lead any evidence on this issue and that the same was not pleaded in the plaint and therefore no award could be made on it. Counsel for the respondent on his part submitted that the trial court should have awarded the respondent Kshs.360,000/- damages for loss of earning capacity. Counsel had argued before the trial court that the respondent was a small scale farmer who, for reason of the injuries he suffered, had been rendered incapable of doing any farming activities for his own sustenance and that of his family. According to counsel, loss of earning capacity was not special damages which required pleading and proof, as submitted on behalf of the appellant.

Loss of earning capacity is different from loss of future earning. While loss of future earning refers to the actual amount a party would have earned save for the injuries sustained in the accident and are therefore special damages which should be pleaded and proved, loss of earning capacity on the other hand, is compensation deminution of earning capacity and is usually awarded as part of the general damages under the head general damages for pain, suffering and loss of amenities. Chesoni Ag. JA in the case of <u>Butler vs Butler</u> 1984] KLR 225 said at page 235:-

> *"Loss of earning capacity or earning power may and should be included as an item within general damages ... but where it is not so included, it is not improper to award it under its own heading as the learned Judge did in this case."*

The Court of Appeal drew the distinction between loss of earnings and loss of earning capacity in the case of <u>Cecilia W. Mwangi & Another vs Ruth W. Mwangi</u> [1997] eKLR thus.

> *"Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "l<u>oss of earning capacity" can be classified as general damages</u>*

but these have also to be proved on a balance of probability. (empasis)

In assessing damages under this head, the court considers the disadvantage the respondent will suffer in future for not working because of the injuries, and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others.

The respondent herein did not testify before the trial court and therefore there is no evidence on what he was doing before the accident, and how much if any he made from such activities. Dr. Charles Andai's medical report dated 2nd January 2009 puts his age at 55 years, and says that he is a farmer. The report by Dr P.W. Oketch dated 8th December, 2010, one year after the first examination, puts his age at 54 years. The charge sheet from Nyanza Provincial General hospital dated 24th April 2006 put his age at 52 years. The two medical reports though in agreement that the injuries have not healed and require further surgery, do not give any assessment on permanent disability. They do not also say how and to what extent those injuries have diminished the respondent's ability to work.

Apart from submissions by counsel that the respondent was a small scale farmer earning about Kshs.10,000/- a year, and that the injuries sustained cannot allow him to carry on farming activities or herd cattle, there is no other evidence to support the fact that he was a farmer and that he is unable to continue with his former life due to that gait limp caused by the injuries. That would make it difficult for the trial court as well as this court, to assess with ease damages under this head. In the case of *SJ vs Frances Di Nello & Another* [2015] eKLR the Court of Appeal expressed the difficulty faced by courts in making awards under this head when it said:-

> *"The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market."*

Taking into account the above and bearing in mind that a claim under this head is proved on a balance of probability, I hold that there was no sufficient evidence before the trial court to make an award on it. In the same vain I do not find sufficient evidence to enable this court allow the cross-appeal on this head. There was no evidence that the respondent's injuries resulted into such inability as to render him incapacitated to the extent of not working at all or limiting his working life to the extent requiring compensation. The respondent did not prove his claim under this head on a balance of probability and I am unable allowed the same on appeal.

The last issue in this appeal revolves around the quantum of damages awarded to the respondent, and both parties have taken positions that they were either low or high thus calling for interference by this court.. It is strite law that an appellate court will not interfere with the discretion of the trial court in assessing damages unless there are good reasons for doing so. Kneller JA speaking for the Court of Appeal for Eastern Africa in the case of *The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs Munyambu* [1985] e|KLR said:-

> "*I recall that it is a grave move for an appeal court to interfere with an award of damages. Lord Wright in* Davis vs Powell Duffuryin Associated Collieries Ltd (1942) AC 601, 617 (HC) declared it
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> '*... should be satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere whether on the ground of excess or insufficiency*."

The learned judge continued:-

> *"In making the award the learned Judge was exercising a discretion. In the circumstances this*

court ought to interfere with his award only if any one or more of the following factors exists, namely, that:-

a) the award is manifestly excessive or inordinately low as to amount to erroneous assessment, or

b) the award emanates from an erroneous application of the law or principles applicable in assessment of damages; or

c) the Judge failed to consider relevant factors and took into account matters he ought not to have considered."

The Court of Appeal reiterated the same position in the case of *Salim S. Zein & Another vs Rose Mulee Mutua* [1997] eKLR as follows:-

"The appeal court must be satisfied either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately high it must be a wholly erroneous estimate of damages."

And in the case of *Rahim Tayab & Another vs Anna Mary Kinaru* (1987- 88) KAR 90 Potter, JA. said:-

"I would commend to trial Judges the following passage from the speech of Lord Morris of Borthyhiest in the case of West (H) & Son Ltd vs Shepherd (1964) AC 326 at PS 345:-

But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so fart as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

The authorities stand against interfering with the trial court's exercise of discretion in assessing damages except where there are sound grounds. Taking the above into account I now turn to consider whether I should interfere with the award of the trial magistrate.

In the lower court, the learned magistrate awarded Kshs.900,000/- general damages which she found appropriate in the circumstances of this case. The appellants faulted the award saying it was inordinately high while the respondent says it was inordinately low. The award of Kshs.900,0000/- was made on the basis of the injuries suffered by the respondent and the trial magistrate justified the award citing inflamatory trends. The respondent suffered a compound fracture of both tibia and fibula. The fractured tibia did not re-unite and as a result he walks with a gait and has to use crutches for support due to the shortening of the leg. However no measurements are given for extent of the shortening leg in the medical reports.

It must be clear that the respondent did not give evidence in the court below and the trial court relied on documentary evidence and submissions by counsel to arrive at the award. It must also be made clear that an award of damages is normally made to compensate the person for the injuries suffered, must be within limits of decided cases and also within limits of the Kenyan economy. see *Osman Bundit Mohammed Civil Appeal No.30 of 1997.*

Before the trial court the appellant cited the case of *Master Syembeli Kala Ndoga vs Mutamwopna & Another HCCC No.646 of 1999* where an award of Kshs.250,000/- was made in 1994 for injuries that were more serious than those suffered by the respondent herein, *Jackson Rundoli vs Systematic Supplies Co Ltd HCCC No.925 if 1991* where an award of Kshs.490,000/- was made in 1995 for fracture of tibia and fibula and *Diamond Shipping Services Ltd vs Julius Onyango Ongwech HCCA No.46 of 2006* where

an award of Kshs.300,000/- was made for fracture, dislocation of left leg, cut would on the shoulder, and other multiple injuries. The award was made in 2011. On his part the respondent cited the case of *John Kimani Kamau vs Stephen Warui Kiarie HCCC No.4503 of 1993* where an award of Kshs.200,000/- was made in 1993 for fracture of tibia and fibula which had healed, *James Maina Gachanga vs Francis Murungi Muriithi & Another HCCC No.2241 of 1996* where Kshs.800,000?- was awarded for injuries that were fairly serious than those suffered by the respondent in this appeal and the trial magistrate acknowledged this fact in her judgment.

The authorities cited before the trial court had injuries that were to a large extent dissimilar to the injuries suffered by the respondent herein. Except in James Maina's case, the awards in all other cases were less. However the trial magistrate took into account the case of James Maina where injuries were far more serious than those of the respondent and awarded the respondent general damages of Kshs.900,000/-.

On my part, the closer decisions I have come to are the case of *Joseph Musee Mua vs Julius Mbogo Mugi & 3 others* [2013] eKLR where the court awarded Kshs.1,300,000/-for fracture of *tibia* and *fibula* in 2013 but where the plaintiff had been hospitalised on several occasion, and underwent several operations for injuries that were more severe than those of the respondent in this appeal.

In the case of *Mwaura Muiruri vs Suera Flowers Limited & Another*[2014] eKLR where the plaintiffs had suffered –

a) Multiple lacerations on the face

b) Soft tissue injuries on the chest cage (mainly subaxilliary area)

c) Commuted fractures of the right humorous upper and lower third of the tibia and

d) Compound double fracture of the right leg upper and lower 1/3 of tibia and fibula, the court awarded Kshs.1,450,000 under the head of pain and suffering. These injuries are far more serious than those suffered by the respondent in this appeal.

In the case of *Charles Muhavi Isinga* [2008] eKLR an award of damages of Kshs.500,000/- for the fracture of tibia and fibula was reduced on appeal to Kshs.400,000/- in September, 2008. In *SDV Transami K. Ltd v Scholastica Nyambura* [2012] eKLR the respondent suffered compound fracture of the right tibia and fibula, cut wound on the left leg and multiple cut wounds on the right leg. An award of Kshs.350,000/- was reduced to Kshs.250,000/- on appeal by the High Court in May 2012.

The first two decisions that I came across, relate to injuries that are more serious than the injuries the respondent herein suffered, while the last decisions represent more or less similar injuries to those suffered by the respondent. As stated in the case of *Cecilia W Mwangi(supra),* damages ought to be assessed so as to compensate reasonably but not so as to smart the respondent, money is not meant to renew a physical frame that has been buttered and shattered. Courts make awards which must be regarded as giving reasonable compensation, and are sustainable within the Kenyan economy.

From the decisions cited above, and considering that the respondent suffered compound fracture of tibia and fibula while the decision relied on by the learned magistrate had far more serious injuries, I find that the award of genral damages of Kshs.900,000/- was inordinately high. The learned magistrate applied the wrong principles in assessing those damages and as a result arrived at a figure that was inordinately high that it must be wholly erroneous estimate of damages to warrant interference by this Court. In my considered view, an award of Kshs.700,000/- would be a fair assessment of damages taking into account the nature of the injuries and inflation.

That being my view of the matter, I allow the appeal, set aside the judgment and decree of the trial magistrate and in lieu thereof enter judgment for kshs.700,000/- general damages for pain, suffering and loss of amenities. To this add Kshs.10,350/- special damages making a total of Kshs.710,350/- less 30% contribution (Kshs.213,105), leaving a net award of Kshs.497, 245/-.

The final orders are that the respondent shall have judgment for Kshs.497,245/-, costs and interest from the date of the judgment of the lower court. The appellant will have costs of this appeal having, substantially succeeded. The cross appeal is dismissed with no order as to costs.

Dated and delivered at Kakamega this 10th day of February, 2016.

E. C. MWITA

JUDGE