



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 27 OF 2011**

**DENNIS MWENDWA MBITHE KATHUKU.....APPELLANT**

**VERSUS**

**GEORGE M. MWANGI.....RESPONDENTS**

**JUDGMENT**

1. The only issue for determination is this appeal is whether or not in awarding to the Appellant the sum of Kshs.180,000 the court erred in law and therefore the award should be set aside as being too low.

2. This is a first appeal hence the discretion to interfere with the determination of an award by the trial court have been well settled since *ILANGO -VS- MUANYOKA* [1961] EA 705 and has been followed consistently by the courts without departure. Simply put, an appellate court should not be in haste to interfere with an award in quantum by a trial court unless it is satisfied that court took into account irrelevant factors, failed to consider relevant factors or short of that the sum awarded is so inordinately and excessively high or so low as to amount to a wholly erroneous estimate of damages. In exercising that discretion, based on the crystallised principles, this court as first appellate court is enjoined to reevaluate and reassess the evidence, the exercise being a kin to retrial, and come to own conclusion without necessarily disagreeing or agreeing with the trial court and while appearing that it lacks the benefit of seeing or hearing the witness testify. See *SELLE -VS- ASSOCIATED MOTOR BOAT CO.LTD.* [1968] EA.123.

3. The appellant in the instant matter has challenged me and faulted the finding of the trial court on three (3) grounds namely:-

**1. That the Learned trial magistrate erred in Law and in fact in assessing general damages at Kshs.180,000 for a compound fracture and dislocation of the right ankle joint which damages were inordinately low to constitute an erroneous estimate of damages.**

**2. That the Learned trial magistrate erred in law and fact in fairly to take into consideration a factor he ought to have taken into consideration thus arriving at an erroneous award of damages.**

**3. That the Learned trial magistrate erred in law and in fact in failing to have due regard to the authorities cited by the Appellant and as such arrived at a wrong estimate of damages.**

4. In reevaluating and reexamining the evidence at trial I note that the plaintiff gave own evidence (Pw3)

and called DR.S.K. Ndegwa (Pw2) who produced his medical report as exhibit P5. In that report he and evidence the doctor said:-

**“He sustained a potts fracture on the right ankle joint. It involved the fracture of the distal distal tibia, distal tibia and dislocation of the ankle joint. They were compound fractures and bones were exposed. He was treated at Coast General hospital where he was admitted from 21.7.2008 to 4.8.2008. Xray we done and confirmed the fractures I have mentioned. He was done reduction and stitched, a pop applied for 6 weeks.**

**When I examined him, he. Complained of pain on the ankle joint and inability to resume work. He was walking using two crutches. The right leg was in pop and there was a large oozing wound on the outside. I concluded that they were very severe, bone and multiple injuries.”**

5. I note that the injuries were suffered on the 18/7/2008 and the doctor examined the plaintiff on 11/9/2008. By that time there was still an oozing wound and the must have continued pain and suffered beyond that date.

6. In his evidence, the plaintiff (as Pw3) said, (Page 26 of the Record)

**“My leg was twisted and faced the opposite direction and I could not walk. I still feel pain when it is cold and it swells and walking is difficult and I cannot perform heavy work.”**

7. In my view, this was the evidence placed before the trial court on which it was to exercise its discretion and make an award as liability had been settled by consent between the parties.

8. In the reserved judgment after parties had filed written submission and cited decided cases binding on the court, the trial court delivered itself as follows:

**“I have perused the written submissions filed and the authorities cited together with the proposed awards. I have also perused the medical report by DR.NDEGWA and DR.IBRAHIM which are unanimous that the plaintiff suffered a compound fracture and disclosed of the right ankle which was confirmed by ex-rays. It is also clear that from the two report that the plaintiff had healed from the injuries without any permanent disability. It is my considered view that an award of kshs.180,000 would be adequate and fair compensation to the plaintiff and...”**

9. I have highlighted the words I consider informed and influenced the decision in that award; the medical reports and the decisions cited. In making the determination in this appeal, I note that the award was for pains, suffering and loss of amenities. Consequently it is my view and finding that the award although made as lumpsum consists of three distinct heads. One (the plaintiff) is compensated for the injury, the pains suffered and the effects of such injury and pain on his subsequent life and life style. It is therefore important to take note of what is reasonably expected to be the amenities of life as lost by the claimant. The term “*Loss of amenities*” of life has been defined to mean:-

**“a legal term which occurs in injury compensation claims and relates to how your quality of life has been affected by an injury. This is a feature of a personal injury claim which acknowledges personal adjustments that have been made to your work, social and domestic lifestyle which are not financial.**

**These factors of an injury claim are not life threatening and to qualify for loss of amenity compensation they don't even have to be lasting. Compensation for loss of amenity is monetary**

**settlement for any loss of enjoyment of life also known as**

**inconvenience of incapacity.”**

see [www.oxfordreference.com](http://www.oxfordreference.com) and [www.ukclaims.ltd.co.uk](http://www.ukclaims.ltd.co.uk)

10. In the judgment impugned before me, it appears to me that the trial Court took into account and gave premium to the fact that there was no permanent disability disclosed. The court therefore ignored the plaintiffs testimony that he suffered pain every time it was cold, the injury site swells and he was unable do heavy work. These factor were relevant and due for consideration considering that the plaintiffs disclosed occupation was that of a loader. It was equally important to take into account the evidence in Dr.Ibrahims medical report to the effect that development of post-traumatic arthritis of the right ankle joint later on was a possibility. I am convinced that failure to consider these factors is sufficient cause for me to interfere with the trial courts award. I shall so interfere.

11. The second area I think was due for consideration was the decided cases cited to the court which the judgment says it had taken into account. The decision are between pages 30-38 of the Record of Appeal. While it is expected that parties would invariably take extreme positions in their submissions, where both cite decisions, it is the duty of the court to give reasons for believing on set of submissions and disbelieving the other or just departing from all the submissions filed.

12. The plaintiff proposed to court the sum of Kshs.500,000 and grounded its submissions in the decision of **PETER MWAURA -VS- SOLOMON KINUTHIA, HCCC NO. 1081 OR 1991 BY MBITO J**, dated 1.4.1998 in which an award of Kshs.300,000 was made to a plaintiff who suffered injuries disclosed to be compound fracture of ankle joint and bruises over the shoulder, chest and dorsal spine, was hospitalised for one day during which duration he was done reduction by P.O.P. In it there was healing without permanent incapacity.

13. On the other side the defendant proposed a sum of Kshs.110,000 and cited:

**NBI HCC.NO.1296 OF 1989 SAMUEL WARUI KIRATHE -VS- PHILLIP INTERNATIONAL & ANOTHER in which Mbogholi J on 31.7.1990 awarded the sum of kshs.100,000 for fracture of the ankle which, healed with a limping gait found by the Judge to be a permanent disability.**

14. Equally relied upon was the decision in the **HCC. NO.4956 OF 1991 JOHN CHIRIBA MUTONDO -VS- NAFTALI OGOMBO OGIRA** decided on 6.5.95 by Mwera J, as he then was, in which an award of Kshs.100,000 was made to a plaintiff who had suffered a dislocation of the ankle joint and was reduced and healed without permanent disability.

15. It is clear that the two parties took extreme positions in their submissions and the authorities cited. It then fell on the shoulders of the court to consider those positions and make a determination of its own but bound by the dictates that it gives reasons for such decision. For me I hold the opinion that it was not enough to say that the trial court had read the submissions and the authorities. That would pass if the authorities and submissions were reconcilable in figures awarded. They were not and therefore he had to take position one way or another. Questions of age of the decided case, and hence erosion of value of money by effects of inflation as well as the nature and extent of injuries were therefore due for consideration but were never considered or if considered, inadequately so. This is another reason for the court to interfere with the award.

16. I will therefore interfere but do so well aware that an award of damage is an exercise in discretion and I am convinced that the discretion was not properly exercised. This being a jurisdiction the court exercises by way of a retrial, I will take into account the evidence tendered, the expert opinion rendered, the submissions filed both at trial and in this appeal and the law relied upon.

17. I take note that all the decisions cited were only persuasive upon this court but were binding on the trial court. In my view, and opinion the submissions by the defendant/Respondent totally failed to take into account the ages of the decisions cited and the incidence of initiation on value of money. I am

equally aware that money is not a panacea to restore physical impaired body and all the court can do is award what it considers fair and reasonable Compensation. Of the decisions cited, I chose to be by persuaded by that by Mbitio J made on 1.4.1998 in PETER MAINA MWAURA (supra) as the more comparable to the plaintiffs injuries albeit a little more extensive. I equally take regard of the length of appellants hospitalistaion, the fact that he was on a plaster for some six(6) weeks and his occupation as a loader and award the sum of Kshs.450,000.

18. The upshot of the foregoing is that the trial courts assessment of damages is therefore set aside and in its place substituted with an award of kshs.450,000.

19. The sum payable to the appellant therefore works out as follows

|                       |                      |
|-----------------------|----------------------|
| General damages       | kshs. 450,000        |
| Special damages       | <u>kshs. 16,734</u>  |
| Total                 | <u>kshs. 466,734</u> |
| Less 30% contribution | kshs.141,020.20      |
| Net due.              | kshs. 325,713.80     |

20. The sum shall attract interest at the court rates from the date of Judgment till payment in full. I further award to the appellant the costs of this appeal and the costs in the trial court.

**Dated, signed and delivered at Mombasa this 2<sup>nd</sup> day of June 2016 in the presence of**

Mr.Nyabena for the Appellant

Kabue for Munyasi for the Respondent.

**P.J.O.OTIENO**

**JUDGE**