



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 126 OF 2012**

**SAMUEL KIPKEMOI KIRUI.....APPELLANT**

**VERSUS**

**IBRAHIM SHERO HUSEIN.....1ST RESPONDENT**

**WESLEY MURAI.....2ND RESPONDENT**

**WESLEY KIPKORIR.....3RD RESPONDENT**

*(Being an appeal from the Judgment/Decree of Honourable Nyaga, Senior Principal*

*Magistrate in Molo SPMCC NO. 83 of 2011 delivered on 19th June 2012)*

**J U D G M E N T**

1. The appeal before the court is against the award of general damages to the appellant on the 19th June 2013 in **Molo SPMCC No. 83 of 2011**. The appellant was dissatisfied with the award as being inordinately low and urges this court to enhance the same.

Following the traffic road accident on the 10th December 2010 between the respondent's motor vehicle, the appellant sustained the following injuries that were confirmed in Dr. W.K. Kiamba's medical report dated 10th February 2011, the P3 form and discharge summary from Nakuru Provincial Hospital dated 20th December 2010.

- Fracture of the left femur
- Severe soft tissue injuries of the left knee joint that has haemarthrosis and bruises on the anterior aspect Xrays of the left femur showed open reduced and internal fixation was done.

The Doctor made findings that the Appellant complained of pain in the left thigh and had swelling of the left knee joint, had commuted fracture of the left femur on the one third and 5 cm scar on the anterior aspect of the knee.

The trial Magistrate awarded to the appellant Kshs.400,000/= for general damages for pain and suffering. It is this sum that has been appealed from as being inordinately low.

2. This is the first appellate court. It is mandated to reconsider and re evaluate the evidence tendered in the trial court and come up with its own findings and conclusions, and in deciding whether or not to disturb the *quantum* of damages, it has to satisfy itself whether the trial Magistrate in assessing the said damages took into account an irrelevant factor or left out a relevant one or whether the amount is

inordinately low that it is a wholly erroneous estimate of the damages.

See **Kemfro Africa Ltd t/a Meru Express Service vs A.M. Lubia & Another (198288) L KAR 727 and Butt vs Khan (1977) I KAR.**

3. I have looked at the appellants Amended Plaintiff dated 25th October 2011 and filed on the 24th November 2011. At Paragraph 10, it is pleaded that the appellant required a sum of Kshs.80,000/= being future medical expenses for removal of plates inserted in the fractured femur.

I have also considered the evidence tendered before the trial court by the appellant.

It was his evidence that he had plates *in situ* that he was advised by his doctor would need to be removed after 2½ years at a cost of Kshs 110,000/=. Dr. W.K. Kiamba in his report did not however refer to the cost of future medication, but mentioned the internal fixations of the plates.

4. In his submissions before the trial court, the appellant by his advocate submitted that a sum of Kshs.110,000/= was required for the future operation but did not lay a basis on how the said sum was arrived at as the Doctor did not testify, his medical report having been produced by the appellant by consent of the parties.

The appellant proposed general damages for pain and suffering of Kshs.800,000/= before the trial court while the Respondents proposed a sum of Kshs.100,000/=.

5. Before this court, the appellant submits that the sum of Kshs.400,000/= as general damages is too low as to represent a fair assessment of damages by the trial court. He referred to the case **Rosemary Bulindavs Peter Kinyanjui Gakuru and Others Nakuru HCCC No. 86 of 1998** where a sum of Kshs.650,000/= was awarded (full authority not annexed).

Also referred to is **Desmond Lempoko vs KCB (2013)e KLR**. The court on appeal awarded Kshs.800,000/= general damages up from Kshs.250,000/= in the trial court for injuries to fracture of the femur.

I have also considered the case **Charles Musau Munguti vs Doshi & Co(H) Limited (2007) e KLR** being **HCA No. 373 of 2005**. Here the trial court failed to award damages for future medical expenses when the same was pleaded and the two doctors in their medical reports recommended Kshs.80,000/=. The appeal court allowed the same.

6. The Respondents on their part submit that the appeal lacks merit, and that the sum of Kshs.400,000/= awarded is adequate compensation for pain and suffering. On future medical expenses, it is submitted that it ought not be granted as doing so goes against well known and established heads of damages under the Law of Torts as it is an affront to the general principles governing an award of special damages.

It is submitted that such an award being futuristic can only be claimed and awarded under the head of general damages (quoting from **Winfield and Folowicz on Torts, 17th Edition 2002 Page 760**). The respondents confirm that the claim was pleaded but not proved. It is urged that that claim be dismissed.

7. I have analysed the evidence and findings of the trial court and submissions by counsel in the appeal.

An award of damages is at the discretion of the trial court and an appellate court will be slow to interfere with the award unless it is clear that it is based on no evidence or is a misapprehension of the evidence.

The only issues I am called upon to determine are whether the award of Kshs.400,000/= general damages is adequate for the injuries stated in the medical records, and whether an award for future medical expenses ought to be granted.

8. I have considered the authorities submitted by the appellant in the trial court and in this court.

In **Desmond Lempoko vs KCB (Supra)** the injuries sustained were segmented fracture of the femur and future treatment was required. The sum of Kshs.250,000/= awarded as general damages was enhanced to Kshs.800,000/=: as the initial sum of Kshs.250,000/= was inordinately low.

The award complained of was granted on the 19th June 2012. I am minded to consider the trend in inflation and the reduced value of the shilling. In the case submitted by the respondents, **Kenyatta University vs Isaac Karumba (2014) e KLR**, the injuries sustained by the respondent were fracture of the right femur, soft tissue injuries head and bruises to the right knee. A sum of Kshs.700,000/= were awarded as general damages. On appeal, the High Court found the award inordinately high and an erroneous estimate of damages. In doing so, the court considered the current trend and thought. The injuries in this case compare well with the appellant's injuries in this appeal.

I have also considered the case **James Mukathi Maria vs M.A. Bayusuf & Sons Ltd (2013) e KLR**. For fracture of the femur and shortening of the leg by ½ cm, the court awarded Kshs.480,000/= in general damages in November, 2014. Having considered the above authorities, and submissions by counsel, I come to the conclusion that the award of Kshs.400,000/= was neither inordinately too low as to have been a wrong estimate of the damages and therefore call for this court's interference. Current trend in awards of damages coupled with the recent precedent justify the trial court's award of Kshs.400,000/=. I find no justification to set aside the said award and hereby confirm the same.

9. As stated by the Respondent's advocate, it is true that future medical expenses are pleaded. They are futuristic in nature, and only estimates. The appellant while testifying only mentioned that he had been told that it would cost about Kshs.110,000/= to have the metal implants removed after 2½ years. It is noted that the appellants doctor did not mention this future expense in this report. The appellant did not tender any evidence on the claims of Kshs.110,000/=. The trial Magistrate had nothing to go by to consider the claim. I cannot fault him for dismissing the claim as unproved.

10. A claim for future medical expenses is a special damage though within general damages. The law is established that an award of damages to meet the cost of future medication falls under the rubric of general damages. The need for future care is itself a special damages and it must be pleaded and proved by evidence and that flows 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, and proved.

See **Simon Taveta vs Mercy Mutitu Njeru (2014) eKLR** and **Paul Otieno Abuya and Another vs Joshua Atuti Ngoto (2016) e KLR in HCA No. 78 of 2012** where a claim for future medical expenses is extensively expounded. It is the court's finding that the appellant pleaded the claim for future medical expenses but failed to prove the same. I found that the trial Magistrate was well guided when he failed to make any award on that claim.

For those reasons, I find no merit in the appeal. It is dismissed with costs to the respondents.

**Dated, signed and delivered in open court this 14th day of July 2016**

**JANET MULWA**

**JUDGE**