



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 591 OF 2009

NAVSHAD AHMED KHAN.....APPELLANT

V E R S U S

GEORGE KANGETHE THAIYA..... RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi, Hon. R.N. Kimingi (Mrs.) CM delivered on 30th September 2009 in CMCC 11117 of 2005)

JUDGMENT

This is an appeal by the defendant in the lower court against the decree of that court by which the Respondent (who was the Plaintiff) was awarded damages following an accident along Waiyaki Way when he was knocked down by the Appellant while walking along that road.

The Respondent was awarded KShs. 400,000/00 for pain, suffering and loss of amenities and KShs. 1,940/00 for special damages.

The appeal is clearly against quantum only as the Amended memorandum of appeal filed on 30th October 2009 shows. All the grounds of appeal are on the issue of quantum only.

It is now well-established that an appellate court will interfere with a trial court's award of damages only where it can be demonstrated that in assessing the same, the court took into account a matter that it ought not to have taken into account, or that it failed to take into account a matter that it ought to have, or that the award is so high or so low as to amount to a wholly erroneous estimate of the same.

There are four grounds of appeal. They all disclose two main complaints:-

1. That the award of KShs. 400,000/00 for pain, suffering and loss of amenities was excessive.
2. That the learned trial Magistrate did not consider the authorities submitted on behalf of the Appellant.

The court has considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the lower court record. Two medical reports dated, respectively, the 17th September, 2008 and 6th October, 2008 were produced in evidence. They confirmed that the Respondent suffered the

following injuries:-

- i. A fracture of the right clavicle. X-rays revealed the fracture. Treatment involved analgesics, tetanus toxoid, cleaning and dressing of wounds and antibiotics.
- ii. Multiple cut wounds on the face and scalp.
- iii. Soft-tissue injuries.

The Respondent was hospitalized for about 2 days. No doubt what he endured was quite painful. Both medical reports however confirmed that the Respondent had generally fully recovered and the future outlook is good.

Various cases were cited before the learned Trial Magistrate. In one of them, **NYERI HCCC NO. 81 OF 2002, GEOFFREY MBURU THEURI -VS- BOARD OF TRUSTEE ARCH-DIOCESE OF NYERI & ANOR** (Unreported), the plaintiff had suffered a deep cut on the head with a depressed fracture which had left a 7cm scar and an oval bone defect on the left frontal bone anteriorly. He was awarded KShs. 550,000/00 on 26th April 2005 for pain, suffering and loss of amenities. In another case, **KISUMU HCCC NO. 88 OF 2003, BEATRICE BOCHABERI ONWONG'A VS ATTORNEY GENERAL** (Unreported), the plaintiff had suffered fracture of the left zygomatic bone with bruises on the side of the face, contusion of the chest, comminuted fracture of the left clavicle, bruises on both thighs and on the left knees. He was awarded KShs. 480,000/00 on 9th February 2005 for pain, suffering and loss of amenities.

In awarding KShs. 400,000/00 for pain, suffering and loss of amenities, it is not evident that the learned Magistrate took into account any factor she ought not to have. The award was also not so high as to amount to a wholly erroneous estimate. It is not sufficient that this court would probably have awarded a slightly less amount.

In the result, there is no merit in this appeal. It is hereby dismissed with costs to the Respondent. It is so ordered.

Dated and delivered at Nairobi this 2nd day of June, 2015

A. MBOGHOLI MSAGHA

JUDGE