



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 1 OF 2014

BETWEEN

AGROLINE HAULIERS LIMITED 1ST APPELLANT

JOSEPH OPIYO OMOLLO..... 2ND APPELLANT

AND

EDWIN OCHIENG RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.E. M. Nyagah, SRM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 232 of 2010 dated 8th July 2014)

JUDGMENT

1. On 6th September 2010, the respondent was riding motor cycle registration number KM CJ 872D riding along Awendo-Rapogi road when, according to the respondent, a tractor registration number KAV 472B pulling trailed number ZA 5092 was driven negligently and lost control and rammed onto the motorcycle causing the respondent severe injuries.
2. I determined the issue of liability in **Migori HCCA No. 6 of 2015 (*Agroline Hauliers Ltd & Anor v Michael Abongo Kitemba*)** where I held the appellant fully liable. The parties agreed that this appeal only relates to the quantum of damages. The learned magistrate awarded Kshs. 800,000/- which award precipitated this appeal.
3. In an appeal on quantum of damages, the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727***, ***Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR*** and ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***).
4. The respondent averred that he sustained a head concussion, contused neck and chest, a fracture of the right mandible, a fracture of the left humerus and bruises on the lower limb. He was examined on 25th August 2011 by Dr Idagiza Akidiva who noted the injuries and observed that there was mal-union of the fracture fractured mandible and that the respondent complained of persistent headaches and pain in the right jaw. He opined that he required orthopaedic and dental review to correct the mal-union of the fractured mandible. He assessed the disability at 10%.
5. In the subordinate court, the respondent submitted that a sum of Kshs. 1,000,000/- as general damages

was adequate compensation. He cited ***Esther Wanjiru Kiarie v Joseph Kiarie Nganga HCCC No. 384 of 2000 (UR)*** where the plaintiff suffered a fracture of the left humerus, right tibia and fibula, socket of the left hip, dislocation of the hip joint, crush injury to the right ring finger and avulsion to the distal end of the finger. She was awarded Kshs. 1,000,000/- in 2003. The respondents on their part submitted that Kshs. 400,000/- was most appropriate based on the case of ***Esther Wayua v Kenwin Enterprises MKS HCCC No. 104 of 1999(UR)*** where the plaintiff sustained a fracture of the olecranon process left neck, fracture of the left humerus and left femur, fracture of the left tibia and fibula and bruises on the face, mild tenderness on the stomach, deep laceration to the right arm and loss of two teeth and injuries to the chest and abdomen.

6. Like the learned magistrate I find that the decisions cited are of much more serious injuries. The learned magistrate opined that since the decisions were delivered more than 10 years prior to the judgment, he had to take into account the effluxion of time, inflation and nature of injuries hence the award of Kshs. 800,000/-.

7. As I have stated in the past, I am aware that the assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

8. I have considered the cases cited and the nature of the injuries sustained and in particular the fact that the plaintiff suffered a mal-joined mandible which may continue to cause him pain and discomfort in the future. The cases cited by the parties were admittedly of more serious injuries. I have had to consider cases where there have been similar injuries and in light of the need to ensure that awards are consistent, I set aside the award of the learned magistrate and substitute it with an award **Kshs. 450,000/-** as general damages. The amount shall accrue interest from the date of judgment in the subordinate court.

9. The appellant is awarded 1/2 of the costs of the appeal.

DATED and DELIVERED at MIGORI this 20th day of July 2015.

D.S. MAJANJA

JUDGE

Mr Kanyangi instructed by Okongo, Wandago & Company Advocates for the appellant.

Mr Abisai instructed by Abisai & Company Advocates for the respondent.