



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 183 OF 2010**

**J MN (Minor suing through Next Friend and Father**

**WWN ..... APPELLANT**

**VERSUS**

**PETROLEUM & INDUSTRIAL SERVICE LTD.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court in Kisumu CMCC Case number 108 of 2008 - THOMAS OBUTU Esq.)*

**JUDGMENT**

1). On 28<sup>th</sup> January, 2007 the appellant, then aged about fourteen (14), was riding a bicycle along Ondiek road in Kisumu town when he was hit from behind by motor vehicle registration number KAT 381 H make Nissan pick up. The vehicle belonged to the respondent and was being driven by its employee **PATRICK AUMA OPELO (DW1)**. The vehicle took the appellant to New Nyanza General Hospital where he was admitted for unstated period to be treated for the suffered injuries. Upon discharge and recovery, this suit was filed on his behalf by his father for general and special damages against the respondent whose driver was blamed in negligence was made. The suit was heard and a determination made that the driver was 70% liable and the appellant 30% liable in negligence. This was followed by an award of general damages in the sum of Kshs. 180,000/= on 100% basis. The appellant was aggrieved by the quantum and filed this appeal.

2). The grounds of appeal were that the trial court erred in law and fact in making the assessment which was inordinately low as to present a miscarriage of justice; wrong principles were applied in arriving at the amount, and the amount of Kshs. 180,000/= was an erroneous estimate of the injuries that were suffered.

3).The firms of OCHILLO & Co. Advocates for the appellant and L. G. Menezes Advocates for the respondent filed written submissions which referred to various decisions.

4). Both sides appreciate the law regarding the test to be applied by the appellate court when considering whether or not to interfere with the decision of the lower court regarding the amount of damages. Such a decision entails the exercise of a discretion based on the evidence that the trial court has considered. The appellate court will not disturb such an award unless it is shown that the trial court took into account irrelevant facts or left out a relevant fact or that the amount is inordinately low or high that it amounts to a wholly erroneous estimate of the damage (**BUTT vs. KHAN [1982] KLR 356**). An appellate court does not interfere with quantum of damages simply because in its opinion the damages awarded are excessive; it only interferes if there is evidence that the damages have been assessed for the wrong grounds or are unreasonable. Lastly, it should be noted that general damages are assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of all the independent assessment of each injury (**TAHIR SHEIKH SAID TRANSPORTERS (K) LTD AND ANOTHER vs. CHARLES MUGARO, Civil Appeal No. 273 of 1998**).

5). In the instant case, the medical evidence produced by **DR. P. M. AJUOGA (M.D)** was that the appellant suffered bruises on the face, chest contusion, cerebral concussion, bruises on the elbows and the fracture of the right tibia and fibula bones. Treatment included dressing, plaster of paris and the provision of analgesics, antitetanus and antibiotics. When the appellants was examined on 8<sup>th</sup> April, 2008 the injuries had healed except for scars. The fracture had healed except for residual pains. The doctor opined that the compound fracture presented a high risk of developing osteomyelitis as a common complication. The record shows that the doctor testified and was cross examined to say:

“Apart from the fracture the other injury was soft tissue injuries. By the time of examination the fracture had healed.”

6). For these injuries the appellant had asked for Kshs. 500,000/= in general damages while relying on the decision in **EZEKIEL MASEK MUTHONGO vs. JOHN KAMINJA MUGNI AND ANOTHER, NBI HCC NO. 437 OF 1991**. In the case the plaintiff, aged 40, suffered fractures of the right tibia and fibula, fracture of 3<sup>rd</sup> metacarpal bone of the left hand and blunt injury of the lumbar spine. He was admitted at Kenyatta National Hospital where he underwent an operation to immobilize the fracture of the right tibia. He was later admitted to the Mater Hospital after developing post-traumatic osteomyelitis and underwent another operation to fix the fracture with a 9 hole plate. The fracture of the third metacarpal in the left hand healed with angulation and deformity. The injury to the spine resulted into tenderness at the back and restriction in movement in the spine. General damages of Kshs. 300,000/= for pain, suffering and loss of amenities was awarded in 1993. It is certain that the injuries, and their effect, were more serious in the case when compared with those in the instant case.

7). The appellant further relied on the decision in **MICHAEL GICHONI MWANGI vs. PETER MWANGI & ANOTHER (1990) e KLR** in which the plaintiff suffered a compound fracture of the right tibia and fibula bones third level. He also suffered a large laceration on the left leg with associated profuse bleeding. He was hospitalised for two weeks and continued on treatment for three months as an out patient. He underwent a second minor operation to correct a malunion and bone grafting. When examined in October, 1988 (the accident was on 12<sup>th</sup> October 19987) the plaintiff was still in crutches and walked with a limp. The fracture site was painful and the leg had become

shorter by half an inch. He was unable to walk for long distances. He had several 6 inch scars on the legs. He still needed further operation for removal of the metal plates. The plaintiff had suffered a permanent incapacity of 20% of. He was awarded Kshs. 350,000/= in 1998. Again, the injuries suffered were more serious when compared to those in the instant case.

8). A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. On the evidence presented to the trial court, and even after considering the authorities cited to it by the appellant, I am not able to find that the assessed general damages reflected any misdirection or inability to consider any relevant factor. The result is that the appeal lacks merits and is hereby dismissed with costs.

**Dated, signed and delivered at Kisumu this 7<sup>th</sup> day of May, 2014.**

**A.  
JUDGE**

**MUCHELULE**