



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.E41 OF 2021**

**BETWEEN**

**EDWARD MUTEVU MAITHYA.....1<sup>ST</sup> APPELLANT**

**THE THIRD ENG. BUREAU OF CHINA CITY COST. GROUP CO LTD....2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL NYAMUMBO.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. 126 of 2020 by Hon. C. Okore – Principal Magistrate).*

**JUDGMENT**

1. Edward Mutevu Maithya and the Third Eng. Bureau of China City Cost. Group Co Ltd the appellants herein, were the defendants in Oyugis Senior Principal Magistrate's SPMCC No. 126 of 2020. This was a claim that arose from a road traffic accident on 5<sup>th</sup> July, 2020. The accident involved motor vehicle registration number KCN 223G registered in the name of the 2<sup>nd</sup> appellant. At the time of the complained accident, the 1<sup>st</sup> appellant was in control of the said motor vehicle which lost control and as a result the complained of accident occurred. The respondent who was a passenger therein sustained injuries. He was awarded Kshs. 7,050/= special damages and Kshs.550,000/= general damages.

2. The appellants were dissatisfied with the finding on liability and the award and filed this appeal. He was represented by the firm of Munyaga Githaiga Advocates LLP. eleven grounds of appeal were raised as follows:

- a) The learned magistrate erred in law and in fact by finding that the appellants were 100% liable for the accident which was the subject matter of the suit.
- b) The learned magistrate erred in fact and law in failing to consider the defendants submissions on the issue of liability.
- c) The learned magistrate erred in fact and law in failing to consider the evidence which was tendered by the defence on liability during the hearing of the suit and the submissions filed.
- d) The learned magistrate erred in fact and law in finding that the plaintiff was entitled to general damages that were too high in view of the injuries suffered by the plaintiff.
- e) The learned magistrate erred in fact and law in failing to consider the defendants submissions on quantum.
- f) The learned trial magistrate erred in law by weighing the respondent's case in isolation from the appellant's case and precluded herself from assessing the magnitude of damages impartially.
- g) The learned magistrate erred in law and in fact by failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum.
- h) The learned magistrate grossly misdirected herself by treating the evidence and submissions before her on quantum superficially and consequently arrived at a wrong decision without any basis in law or fact.
- i) The learned magistrate erred in law and fact in finding that the respondent had proved his case on a balance of probabilities in view of the evidence on record.

j) The learned magistrate erred in fact and law in failing to accord the appellant's evidence and submissions due consideration.

k) The learned magistrate's findings on liability and quantum of damages are not supported by facts or law hence irregular.

3. The respondent was represented by the firm of O.H. Bunde & Company Advocates. The appeal was opposed and it was contended that it lacked merits.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. On 5<sup>th</sup> July, 2020 the respondent contended that he was a conductor of motor vehicle registration number KCN 223G and was therefore on duty when the accident occurred. The evidence of DW1 in Oyugis Senior Principal Magistrate's SPMCC No. 127 of 2020 was adopted. This witness testified that the respondent was not in the vehicle but in a shovel. His evidence was inadmissible hearsay for he relied on what he was allegedly informed by other people. His investigations blamed the 1<sup>st</sup> appellant for the accident. The learned trial magistrate was justified to find the driver (1<sup>st</sup> appellant) 100% liable.

6. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

**...an appellate court will not disturb an award of damages unless it is so, inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

7. The respondent herein sustained the following injuries:

- a) Cut wounds on the scalp;
- b) Chest contusion;
- c) Blunt trauma to the back;
- d) Blunt to trauma to the right elbow; and
- e) Blunt trauma to the neck.

8. At the trial court, the respondent prayed for Kshs.600, 000/= for pain and suffering while the appellant was of the opinion that an award of Kshs.80, 000/= would be adequate compensation. Each party cited authorities in support of their proposal.

9. The respondent suffered soft tissue injuries. I have perused the authorities cited by both parties at the trial court. One such case is **FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] eKLR**. the appellant sustained injuries as follows:

- a) Blunt Object injury to the head
- b) Blunt Object injury to the neck
- c) Blunt Object injury to the thorax
- d) Blunt Object injury to the abdomen
- e) Blunt Object injury to the limbs

The court awarded an award of Kshs. 100,000/=.

10. These injuries are comparable with what the respondent herein suffered. The Court of Appeal in **Odinga Jacktone Ouma vs. Moureen Achieng Odera [2016] eKLR** stated:

**Comparable injuries should attract comparable awards.**

I therefore set aside the award of the learned trial magistrate and substitute it with an award of Kshs.100, 000/=.

11. Since the appeal has partially succeeded, the appellant will be entitled to one half of costs.

**DELIVERED and SIGNED at HOMA BAY this 26<sup>th</sup> day of January, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**