



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 715 OF 2019**

**UAP ASSURANCE LIMITED.....1<sup>ST</sup> APPELLANT**

**SYLVIA NTHIGA.....2<sup>ND</sup> APPELLANT**

**OWEN WAWERU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**RACHAEL WARIGIA NDUNGU.....RESPONDENT**

**(Being an appeal against the Decree and Judgment delivered by Hon.Peter Muholi, Senior Resident Magistrate on 13<sup>th</sup>**

**November 2019 at Milimani Commercial Court in CMCC No. 8160 of 2016**

**JUDGMENT**

The respondent was involved in a road traffic accident on 1<sup>st</sup> August, 2014 while travelling as a passenger in motor vehicle registration number KBY 776N. She filed Civil Suit number CMCC 8160 of 2016 before the Milimani Chief Magistrate's Court, Nairobi. The trial court delivered its judgment on 13<sup>th</sup> November, 2019 and awarded the respondent Kshs. 650,000 as general damages. Liability was agreed upon between the parties on 21<sup>st</sup> August 2019 at the rate of 85%:15% in favour of the respondent. The appellants were dissatisfied with the trial court's assessment of damages and preferred this appeal on the following grounds: -

- 1. The Learned magistrate erred in law and fact in awarding excessive general damages of Kshs.650,000/-**
- 2. The Learned magistrate erred in fact and law in failing to properly analyze the evidence before it.**

Counsel for the appellant submitted that the award of Kshs.650,000 as general damages is excessive. The respondent suffered fracture of the right clavicle with permanent incapacity estimated at 10%. The injury has healed. Counsel relies on the case of **LYNN KAMBUA ENTERPRISES –V- EDITH VAATI SIMON KASIKA (2021) eKLR** where the claimant was awarded Kshs. 350,000 for fracture of the left clavicle and multiple soft tissue injuries on 2<sup>nd</sup> June 2021. Further reliance was placed on the case of **JALDESSA DIBA T/A DIKUS TRANSPORTERS & ANOTHER –V- JOSEPH MBITHI ISIKA (2013) eKLR** where the court on 30<sup>th</sup> May 2013 (Thuranira Jaden J.) upheld an award of Kshs.350,000 for fracture of the right clavicle and blunt injuries to the back and shoulder.

Counsel for the respondent submitted that the respondent suffered serious bodily injuries that were classified as grievous harm by Dr.Cyprianus Okere. Counsel urged the court not to interfere with the award. Counsel referred to the case of **ROY MACKENZIE –V- CARTRACK KENYA LIMITED & ANOTHER (2012) eKLR** where Kshs. 700,000 was awarded. Reference was also made to the case of **ANNE AYUMA HARRISON –V- SIMON GITURE MARUNGO (2014) eKLR** where the plaintiff was awarded Kshs.500,000. Further reliance was also made on the case of **SHEIKH ABDULQADIR MOHAMED AHMED SHALLO –V- JULIUS MUTISO MUMO (2018) eKLR** where Kshs.500,000 was awarded.

Counsel for the respondent further contend that before the trial court, the appellants' counsel relied on two authorities which awarded damages of Kshs. 200,000 and 120,000 respectively. The two authorities are over twenty (20) years old. It is Counsel's submission that counsel for the appellant cannot introduce new authorities on appeal. Reliance has been placed on the case of **GABRIEL MAINA MUNGAI –V- JANE WANJIKU MWAURA (2019) eKLR** where the court (Meoli J) held as follows:-

**“As happened in the latter case, the Appellants have attempted on this appeal to introduce new authorities in urging the reduction of the award in damages to KShs.500,000/= .**

I am in full agreement with the sentiments of Ochieng J in his judgment in Tiren's case wherein took exception to the introduction of new authorities on the appeal stating inter alia that:

**“None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”**

**It is too late for the Appellants to bring in new decisions on this appeal to support their proposal for damages and the court will not consider the said new authorities.”**

From the Memorandum of appeal and the rival submissions, I do find that the appeal raises two issues namely:-

- 1) Whether the award of Kshs.650,000 by the trial court is inordinately high and should be interfered with.**
- 2) Whether the appellants can introduce new authorities on appeal.**

This is a first appeal and the court is expected to evaluate the evidence on its own before drawing its own conclusion. Reference was made by counsel for the appellants to the case of **SELLE & ANOTHER –V- ASSOCIATED MOTOR BOAT CO LTD & OTHERS (1968) E.A. 123** where it was held:-

**"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270) . "**

The record shows that on 21<sup>st</sup> August, 2019 counsel for both parties recorded a consent in the following terms:-

**“By Consent**

- 1. Judgment be entered on liability in favour of the plaintiff against defendant at the ratio of 15:85**
- 2. The plaintiff witness statement dated 2/11/16 be adopted as evidence in chief.**
- 3. The plaintiff's list of document dated 2/11/2016 be adopted as Pexh.1 to Pexh 13.**
- 4. The defendants list of documents dated 3/4/19 be adopted as defence**

**exhibit 1.**

- 5. Quantum of damages be assessed by way of written submissions.**
- 6. Mention on 20/9/2019 to confirm filing of submissions.”**

The respondent in her witness statement dated 2<sup>nd</sup> November 2016 states that after the accident she was taken to Guru Nanak Hospital and later to Kenyatta National Hospital. She suffered fracture of the right clavicle. The medical report of Dr.Cyprianus Okoth Okere dated 22<sup>nd</sup> September 2016 gives the respondent's injuries as fracture of the right clavicle. The doctor further stated that the respondent complained of inability to lift a heavy load with the right hand and assessed degree of permanent incapacity at 10%. The second medical report by Dr. Wambugu dated 25<sup>th</sup> March, 2019 also identified the suffered injuries as fracture of the right clavicle. The respondent complained of occasional pains on the right collar bone. The shoulder joint movements moved at complete range.

In its assessment of damages, the trial court stated as follows:-

**“In their submissions filed in court on 03/09/2019 the plaintiffs have urged the court to award Kshs 800,000/= and made reference to the case of Roy Mackenzie v Car track Kenya Limited & Another [2012] eKLR where the plaintiff sustained severe injury to the shoulder which required major surgery and the court awarded Kshs 700,000/-.**

**The plaintiff also referred to the case of Anne Ayuma Harrison V Simon Githure Marungo [2014] eKLR where the court**

awarded Kshs 500,000/- for fracture of the clavicle and soft tissue injuries.

Sheikh Abdulqader Mohammed Ahmed Shallo Julius Matteo Mumo 2018) eKLR where the plaintiff was awarded Kshs 500,000/- for similar injuries.

The defendants in their submissions filed in court on 30/08/2019 urged the court to award Kshs 200,000/= and relied on the case of David Ndungu Macharia vs Samuel K. Muturi & Anor Nairobi HCCC 125 of 1989 where the court awarded Kshs 200,000/- for a fracture to the shoulder. And the case of Benjamin Kirunyu vs Joseph M. Kasuna & Anor Nairobi HCCC No. 440 of 1990 where the plaintiff sustained fracture of the clavicle and was awarded Kshs 120,000/-.

The defendant's authorities though relevant were decided over 25 years ago and may not make a true reflection of compensation currently. There has been enormous economic change since then.

**I have considered the injuries sustained, the opinion of the doctors, the authorities cited and the rate of inflation and I am of the view that an award of Kshs 650,000/= will be adequate compensation for pain and suffering.”**

The case of Roy Mackenzie (supra) refers to quite severe injuries. The claimant suffered severe injury to his shoulder and had to undergo a major surgery. He required a further surgery and rehabilitation at an estimated cost of Kshs.530,000. I do find that that authority does not provide comparative injuries.

In the case of **Sheik Abdulqadir Mohamed Shallo** (supra) Justice P.J. Otieno made reference to the case of **Jaldessa Dira** (supra) and that of **Anne Ayuma Harrison** (supra) where Kshs.350,000 and 500,000 were awarded respectively. In the Jaldessa Dira case, the claimant suffered fracture of the clavicle among other soft tissue injuries while in the Anne Ayuma case the claimant suffered fracture of the left clavicle, chest and head injuries. Justice P.J. Otieno in the Sheikh Abdulqadir Mohamed Ahmed Shallo case upheld the trial court's award of Kshs. 500,000 as general damages for displaced fracture of the left clavicle, blunt injury to the neck and left leg and bruises on the cheeks and left knee. Permanent disability was assessed at 3%.

In the case of **BUTT –V- KHAN** the court held:-

**“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 at a figure which was either inordinately high or low.”**

The assessment of damages involves the discretion of the trial court. The parameters to be applied by an appellate court when dealing with assessment of damages are already established as per the holding in the Butt V Khan case. The authorities provided by both counsel indicate that awards of between Kshs.350,000 to Kshs.500,000 have been made for fracture of the clavicle. The trial court awarded Kshs.650,000 after considering comparative awards. Can it then be held that the award is inordinately high as to amount to an entirely erroneous estimate. In my view the award is reasonable taking inflation into account. The judgment in the case of Sheikh Abdulqadir was delivered in 2016 by the trial court and the award was upheld on appeal on 5<sup>th</sup> October, 2019. I dealt with the case of Anne Ayuma Harrison and delivered my judgment on 8<sup>th</sup> October 2014 and this was an appeal against the trial court's judgment that was delivered on 7<sup>th</sup> September, 2010. I am satisfied that the award by the trial court is reasonable.

With regard to the issue of allowing fresh authorities on appeal, I am of a contrary view to the holdings of my colleague Meoli J and F. Ochieng J that one cannot introduce new authorities on quantum on appeal. The case of Selle & Another (supra) is also applicable to the High Court. An appeal from the subordinate court to the High Court is equally by way of a re-trial. Once the matter is being retried then the parties cannot be limited in their evaluation of the case to only what was provided to the trial court. I do agree to the reasoning that the trial court did not have the benefit of the newly introduced authorities. However, the appellant should be left at liberty to introduce what authorities he/she found in support of the appeal. The contrary view would be that the appellant should not be allowed to make fresh submissions on quantum on appeal and should only rely on what was submitted before the trial court.

In my considered view the authorities provided to the court on quantum are mainly intended to guide the court in its effort to arrive at a fair assessment of damages. The fact that the appellants before the trial court relied on authorities which assessed damages for fracture of clavicle at between Kshs. 120,000 to 200,000 cannot be a good reason to limit them to those authorities and stop them from referring to their two fresh authorities which provide for awards of Kshs.350,000. The court is being asked to review the trial court's award downwards and the appellants, in my view are within their right to provide fresh authorities in their attempt to convince the court to allow the appeal. Counsel for the respondent relied on the case of Sheikh Abdulqadir Mohamed Ahmed Shello (supra). In that judgment, the trial court relied on the case of Jaldessa Diba (supra) that was cited by counsel for the appellant in this appeal. This court cannot ignore the new authority as it is also part of what counsel for the respondent has referred to.

The upshot is that the award by the trial court is fair and the same is upheld by this court. The appeal lacks merit and is hereby dismissed with costs.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022**

**S.J. CHITEMBWE**

**JUDGE**