



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.155 OF 2009**

**REGINA WANGARE MWANGI.....APPELLANT**

**VERSUS**

**NYORO CONSTRUCTION COMPANY LTD & ANOTHER.....RESPONDENTS**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. ONYIEGO IN NAKURU CMCC NO.2135 OF 2000 DATED 25<sup>TH</sup> JUNE 2009).***

**JUDGEMENT.**

1. On **7<sup>th</sup> July 2000** the appellant was involved in a road traffic accident along Njoro /Nakuru junction where motor vehicle registration number **KAB 200L** owned by the respondent she was travelling in collided with motor vehicle registration number **KAD 257F**. As a result of the said accident she sustained injuries, namely, **severe soft tissue injuries of the chest and Potts fracture of the right leg**.
2. She was taken to the hospital and treated. Thereafter she filed suit claiming both general and special damages. The matter proceeded to full trial where the trial court found the respondents 100% liable and awarded her general damages of Kshs. 80,000 as well as special damages of kshs.2000.
3. The appellant being dissatisfied with the decree by the lower court has failed this appeal basically challenging the quantum awarded. The issue of negligence was settled and it appears that the appellant has no issue with it.
4. The court directed the parties to file their written submission so as to determine the appeal which they have complied.
5. In her submissions the appellant has faulted the trial court for failing to appreciate the injuries suffered by the appellant *viz a viz* the award it gave. In other words, had the court considered the same it would have awarded a higher award. The injuries were not commensurate to the award given. It was too low in the circumstances.
6. The appellant relied on several authorities to support her line of submissions including the case of **WEST KENYA SUGAR COMPANY VERSES BONVENTURE ABWIRE WERE. CIVIL APEAL. NO. 39 OF 2018; DENNIS MWENDWA MBITHE KATHUKU V. GEORGE M. MWANGI CIVIL APPEAL NO 27 OF 2011** where the courts awarded general damages of Kshs. 800,000 and 450,000 respectively.
7. The appellant asked the court to raise the award to at least Kshs. 600,000 as this was reasonable in the circumstances.
8. The respondent supported the findings by the trial court for the simple reason that the same was commensurate with the injuries. It relied among others on the case of **CECILIA W. MWANGI & ANOTHER V. RUTH W. MWANGI C. A. NO 251 OF 1996**.
9. It went on to submit that the trial court considered all the injuries suffered by the appellant as well as the medical documents tendered and satisfied itself before arriving at the impugned decision. It submitted that **DR MALIK** refuted the potts fracture sustained by the appellant on her right leg.
10. The respondent was satisfied with the fact that the trial court did consider proper cited authorities before it arrived at the decision. It prayed that the appeal be dismissed.

**ANALYSIS AND DETERMINATION.**

11. I have perused the entire record of appeal and considered the submissions by counsels for both parties and there is only one issue for determination in this suit, that is, **whether the award was inordinately low in the circumstances.**

12. This being the first appeal, it is this court's duty under Section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **SELLE V. ASSOCIATED MOTOR BOAT CO. LTD (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

*“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”.*

13. **PW2 Dr. Omuyoma** confirmed in his medical report that the appellant had sustained soft tissue injuries of the chest and potts fracture of the leg. A medical report by **Dr. Malik** which was produced by the respondent indicated that the appellant sustained soft tissue injury to her chest and a sprained right ankle. The fact that a plaster of paris had been cast on the respondent's foot supports the fact that there had been a fracture. The trial court in its judgement also affirmed the injuries and awarded the appellant Kshs. 80,000.

14. The guiding principles for interfering with an award of damages were explained in the case of **BUTT VS KHAN [1977] 1 KAR LAW JA (CITED IN THE CASE OF KENYATTA UNIVERSITY VS ISAAC KARUMBA NYUTHE [2014] eKLR)** where it was held that: -

*“An appellate court will not interfere with an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the wrong principles, misapprehended evidence in some material respect and gave a figure inordinately high or low”.*

15. General damages are damages at large and the court does its best in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal observed in **SIMON TAVETA.V. MERCY MUTITU NJERU CIVIL APPEAL 26 OF 2013 [2014] eKLR** as follows:

*“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.*

16. The Appellant had asked for Kshs. 350,000/- and had cited **REBECCA AWINO AWANDO VS TAITA TAVETA EXPRESS SERVICES HCCC NO 557 OF 1991 MOMBASA** where Kshs. 180,000/= general damages were awarded in 1994. The plaintiff suffered a fracture of the left ankle, abrasions on the left ankle, leg up the knee and left foot injury and **PETER MAINA MWAURA V. SIMON KINUTHIA MWAURA & ANOTHER HCCC NO.1081 1991** where the plaintiff had sustained a compound fracture of the right ankle, bruises over the chest, shoulder, dorsal spine and left foot. He was awarded Kshs. 300,000 in general damages for pain and suffering on 1<sup>st</sup> April 1998.

17. Considering the injuries sustained by the respondent in this case, I find the submission by the appellant that the award of Kshs. 80,000 as general damages for pain and suffering inordinately low as to justify an inference that the same was based on an erroneous estimate of the damage suffered. I have considered the authorities of the appellant and do not find them comparable in this case for the reason that the plaintiffs therein suffered more severe injuries. The court relies on the case of **JAMES CARTWRIGHT. V. JOHN NAMJAA LEKIPIRI [2012] eKLR** where the respondent had sustained a simple fracture and soft tissue injuries and was awarded Kshs 100,000 in 2004 and the case of **JEFA.V. KENYA PORTS AUTHORITY [1992] eKLR** where the plaintiff had sustained pott fracture of the right ankle and was awarded Kshs. 125,000 in 1992.

18. Taking into consideration the above authorities, the period in which they were decided, the injuries suffered by the appellant in the matter at hand as well as the inflationary trends, this court is of the considered opinion that an award of **Kshs. 180,000** would be an adequate compensation in the circumstances.

19. Consequently, the appeal is hereby allowed as follows;

- a) **The award of Kshs. 80,000 being general damages by the lower court is hereby set aside and substituted with an award of Kshs. 180,000.**
- b) **Special damages of Kshs. 2000.**
- c) **Interest on (a) and (b) above at courts rates from the date of judgement at the lower court till payment in full.**
- d) **The appellant shall have the costs of this appeal as well as those of the lower court.**

**Dated signed and delivered electronically at Nakuru this 29<sup>th</sup> day of April 2021.**

**H. K. CHEMITEI**

**JUDGE**