



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 71 OF 2019**

**JAMES OKONGO.....APPELLANT**

**VERSUS**

**ELMAT SAGWE OGEA.....RESPONDENT**

*(Being an appeal from the Judgment/Decree of the Honorable N.S Lutta (CM) Kisii Law Courts delivered on the 15<sup>th</sup> May 2019)*

**JUDGMENT**

1. The appeal before me concerns a road traffic accident that occurred on 5<sup>th</sup> June 2016. On the said date the respondent was riding Motor Cycle Registration No. KMDQ 338Y along Kisii-Migori road when he was hit by the defendant's motor vehicle KUL 934 that was negligently being driven by the appellant's driver. The respondent alleged that as a result of the accident he sustained a fracture of the right tibia and fibula, fracture of the right femur, bruises on the face and a blunt trauma to the chest.

2. The appellant filed his defence denying the claim.

3. The trial magistrate after conducting a hearing found that the appellant was 100% liable for the accident and awarded the respondent general damages in the sum of Kshs 1,500,000/- and Kshs 5,085/- as special damages.

4. The appellant being dissatisfied with the findings of the court filed this instant appeal on the following grounds;

*1) THAT the Learned Trial Magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or applicable law.*

*2) THAT the learned trial magistrate erred in fact and in law by disregarding or failing to accord due consideration upon defence written submissions in relation to injuries sustained by the plaintiff.*

*3) THAT the learned magistrate erred in law and in fact in failing to consider or even adopt and appreciate the written submissions of the defendant on record and the authorities annexed therein in support of the defendant's case.*

*4) THAT the learned magistrate erred in fact and in law in judiciously, arbitrarily and exorbitantly apportioning and awarding the respondent a sum of Kshs 1,500,000/- as general damages for injuries suffered which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of damages suffered.*

*5) THAT the learned Magistrate erred in fact and in law in failing to consider current judicial precedence in awarding general damages. As such the same is harsh, unjustified and punitive.*

5. This appeal is both on liability and quantum.

6. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (*See Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126*)

7. At the hearing the respondent reiterated what was in his plaint and stated that on the material day the appellant's motor vehicle was joining the feeder road from the main road and that it did so without indicating thereby knocking the respondent. The appellant did not call any witness to testify. In *Edward Muriga through Stanley Muriga v Nathaniel D Schutler*, Civil Appeal No 23 of 1997 the Court of Appeal stated:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”

8. The applicant having failed to call any witness in support of its case, the evidence by Pw1 is uncontroverted and I cannot fault the trial court’s finding on liability.

9. I shall now proceed to consider the issue of quantum. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** as follows:

*‘An appellate court will not disturb an award for general 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...’*

10. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that–

*“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.”*

11. In this case the respondent produced a medical report by Dr Ezekiel Ogando Zoga indicating that the respondent had sustained right fracture of the tibia, fibula and femur as well as bruises on his face and blunt trauma to the chest. Dr Ogando Zoga was of the opinion that the respondent is likely to develop osteoarthritis. He also concluded that he will need another operation to remove the implant at a cost of Kshs 120,000/-. According to the medical report by Dr Jenipher Kahuthu, she recommended that the respondent sustained soft tissue injury to the scalp and the right leg. However, the respondent could not only have suffered soft tissue injuries as recommended by Dr Kahuthu. According to the discharge summary the respondent was admitted with Right G3A floating knee and femur osteo. He was admitted on 6<sup>th</sup> June 2016 and discharged after three months in hospital. His diagnosis at the time of discharge was a fracture of the femur. In the circumstance, it is my finding that the respondent suffered a fracture of the right fracture of the tibia, fibula and femur as well as bruises on his face and blunt trauma to the chest.

12. The appellant before the subordinate court proposed that an award of Kshs 400,000/- would be sufficient and relied on **HCCA NO 17 OF 2017 Mwavita Jonathan v Silivia Onunga [2017] eKLR**. However, the respondent in that case only sustained a fracture at the hip joint and the other injuries sustained therein were in the nature of soft tissue injuries. In my view, therefore the injuries are not comparable to those by the respondent in this instant case.

13. The respondent on the other hand proposed an award of Kshs 1,800,000/- as reasonable. They cited the case of **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others (2013) eKLR** where the court found that the plaintiff had sustained the following injuries:

*“It was evident that he sustained serious injuries resulting in surgeries in several hospitals and treatment. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow.”*

14. In the case of **Lucy Waruguru Gatundu v Francis Kinyanjui Njuku (2017) eKLR** where the plaintiff sustained the following injuries: right femur fracture (distal end) with bone loss; right tibia segmental fracture; and right fibula segmental fracture the plaintiff was awarded Kshs. 1,600,000/-.

15. In my view, the cases cited by the respondent were of plaintiffs with far much severe injuries when compared to the injuries suffered by the respondent herein which were simple fractures. I find that the award of Kshs 1,500,000/- as general damages was inordinately high.

16. In the end, I set aside the award of general damages and substitute it with an award of Kshs 900,000/-. The appellant is awarded the cost of the appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF MAY 2021**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Appellant Absent**

**Miss Kusa For the Respondent**

**Ms. Rael Court Assistant**