



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.39 OF 2019**

**BETWEEN**

**1. BENSON IRERI**

**2. TRIPPLE KAY SYKILE LTD**

**3. JOSEPH MUNDUI**

**4. GABRIEL KYALO MBONDO.....APPELLANTS**

**AND**

**CHRISTOPHER AYUKO ORUKO.....RESPONDENT**

*(Being an Appeal from the judgment in Oyugis Chief Magistrate's CMCC No. 157 of 2016 by Hon. J.S Wesonga –Senior Resident Magistrate).*

**JUDGMENT**

1. The appellants herein were the defendants in Oyugis Chief Magistrate's CMCC No. 157 of 2016. This was a claim that arose from a road traffic accident where the plaintiff sustained injuries. The learned trial magistrate delivered judgment dated 25<sup>th</sup> March 2019 and made an award of Kshs.600, 000/=, before factoring in contributory negligence, in favour of the plaintiff.

2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Mose, Mose & Milimo advocates. They raised grounds of appeal as follows:

- a) That the learned trial magistrate erred in law and in fact in making a finding of excessive damages against the defendants.
- b) That the learned trial magistrate erred in and in fact in holding that the defendants were liable for the excessive damages so awarded in absence of concrete evidence to demonstrate the same.
- c) That the learned trial magistrate erred in law and in fact in failing to appreciate the defence of the defendants.
- d) That the learned trial magistrate erred in law and in fact in failing to appreciate the doctrine of *stare decisis* in awarding damages.

3. The appeal was opposed by the respondents through the firm of Nyatundo & Company, Advocates.

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 4<sup>th</sup> February 2019 the parties herein entered judgment on liability by consent in the ratio of 30%:70% in favour of the plaintiff. The only issue for the learned trial magistrate was on quantum of damages.

6. It is trite law that an appellate court will only interfere with an award of the trial court 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 appellant contends that the award of Kshs. 600,000/= general damages was excessive. The appellant sustained the following injuries:

- a) Multiple bruises on the head;
- b) Fractures at the base of the skull;
- c) Active nasal/ear bleeding;
- d) Deep cut wound on the head;
- e) Cut wound on the nose; and
- f) Bruises on the left and right legs.

These injuries were assessed as 50% deformity.

8. The appellants had contended that Kshs.250, 000/= would have been sufficient compensation. They cited **JMN (Minor Suing Through Next Friend and Father WWN v Petroleum & Industrial Service Ltd [2014] eKLR** where the court on appeal observed:

**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, anti-tetanus 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.**

An award of general damages in the sum of Kshs. 180,000/= was sustained in 2014.

9. They also relied on the decision in **Morris Miriti vs. Nahashon Muriuki & another [2018] eKLR** in this case the Doctor who examined the appellant noted that on physical examination the appellant had tenderness on the chest, was unable to breath well due to trauma and had multiple bruises on the posterior aspect of the chest. She further observed that the appellant had sustained a fracture of the 3<sup>rd</sup> and 4<sup>th</sup> right ribs and also a fracture of the right scapula.

From this injuries, the appellant was awarded Kshs. 300,000/=.

10. The respondent in these case suffered fractures at the base of the skull which, in my view was more severe than the injuries in the cited cases. I therefore have no reason to fault the award by the learned trial magistrate. The appeal is therefore dismissed with costs.

**DELIVERED and SIGNED at HOMA BAY this 19<sup>th</sup> day of May, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**