



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.40 OF 2019**

**BETWEEN**

**SULEIMAN ASMAN OTIENO.....APPELLANT**

**AND**

**1. VIATECH SERVICES LTD**

**2. JAMES GICHINA NJOROGE.....RESPONDENTS**

*(Being an Appeal from the judgment in Homa Bay Chief Magistrate's*

*CMCC No. 10 of 2017 by Hon. T. Obutu –Senior Principal Magistrate).*

**JUDGMENT**

1. The appellant herein was the plaintiff in Homa Bay Chief Magistrate's CMCC No. 10 of 2017. This was a claim that arose from a road traffic accident. On 28<sup>th</sup> August 2016 he was riding motor cycle KMDU 720E along Gendia murrum road. He was hit from behind by motor vehicle KBQ 748G after he had gone off the road to give way. He sustained injuries. The learned trial magistrate delivered judgment dated 18<sup>th</sup> April 2019 and made an award of Kshs.350, 000/=.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Kerario Marwa & CO. advocates. He raised three grounds of appeal that can be collapsed into one; that the learned trial magistrate erred in law and in fact by making an inordinately low award.

3. The appeal was opposed by the respondents through the firm of Mose, Mose & Mose Advocates. They did not respond to the appeal but in their submissions appeared to challenge the finding on liability.

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. It is improper to fail to respond to the grounds of appeal but during submissions appear to challenge the finding on liability. This is unacceptable.

6. 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. 350,000/= general damages was inordinately low. The respondents have contended that Kshs. 250,000/= would have been the appropriate award. The appellant sustained the following injuries:

a) Lacerated wound on the right temporal aspect of the head;

- b) Wound on the frontal aspect of the face;
- c) Lacerated wound on the upper aspect of the back;
- d) Fracture of the radius of the right hand;
- e) Dislocation of the right hip; and
- f) Superior-posterior right limb dislocation.

8. In urging the court to review the award upwards, the appellant relied on several authorities and I will cite a few of them. In **Anthony Keriga Mogesi vs. Florence Nyomenda Tumbo [2015] eKLR** the plaintiff sustained the following injuries:

- a) Open book pelvic fracture;
- b) Cut wound on the left upper eye lid;
- c) Facial cut wound;
- d) Contusion to lower limbs; and
- e) Cut wound on sacroiliac joint.

For these injuries Kshs.600,000/= was awarded on 11<sup>th</sup> day of March, 2015.

In **AMBROSE MICHENI KINYAMU vs. GILBERT BUNDI & another [2012] eKLR** an award of Kshs.400,000/= was given. The court on appeal summarized the injuries as follows:

**Appellant was admitted at Tigania hospital. Screws were then put in place to correct the fracture. He was discharged on 12.12.2004. He continued with surgical outpatient clinic till January 14.1.2005. That plaster cast was removed on 6.1.2005. When the doctor examined the appellant on 7.2.2005 the appellant was complaining of swelling of the joint upon walking.**

**The doctor noted the appellant was in good condition. That locally the right ankle was clinically healed, movement of dorsus [sic] and planta flexion were limited. Eversions and inversion at the front was also limited. The doctor's opinion was that the loss of active movement at the joint and the history of swelling upon physical activity was indicative of development of post traumatic arthritis of the joint and considering his profession (as a teacher) will greatly hamper his teaching due to long period of standing. The prognosis the doctor observed to be fair.**

9. The respondents in opposing the appeal cited and relied on the decision in **Simon Kimote vs. Agro Solutions Limited [2021] eKLR** where the plaintiff sustained the following injuries:

- a) Right femoral fracture lower 1/3;
- b) Tibia plateau fracture;
- c) Blunt head injury; and
- d) Blunt neck injury.

He was awarded Kshs 350,000/- general damages.

10. After analyzing these earlier decisions, only the **Simon Kimote vs. Agro Solutions Limited [2021] eKLR** tend to favour the appellant's argument on quantum. I am persuaded that the award by the learned trial magistrate was inordinately low. I will therefore interfere and set aside the award of Kshs 350,000/= and substitute it with an award of Kshs.550,000/=. The appeal therefore succeed with costs.

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

**KIARIE WAWERU KIARIE**

**JUDGE**