



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM A.K. NDUNG'U J.**

**CIVIL APPEAL NO. 41 OF 2019**

**THE THIRD ENGINEERING BUREAU CHINA CITY**

**CONSTRUCTION GROUP LTD..... APPELLANT**

**VERSUS**

**EVALYNE KERUBO RANGI .....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. N.S. Lutta (PM) delivered on 3<sup>rd</sup> April 2019 in CMCC No. 285 of 2018 Kisii)**

**JUDGEMENT**

1. The appellant is aggrieved by the trial court's assessment of damages. Her case before the trial court was that on 19<sup>th</sup> March 2018, she was travelling as a lawful pillion passenger on motorcycle registration mark KMDS 102 S along Kisii-Oyugis road when at Bochura area the appellant's driver negligently controlled the vehicle along the road and violently collided with the motorcycle as a consequence of which she sustained the following injuries;

- a. Chest contusion
- b. Compound right radio fracture
- c. Compound right ulna fracture
- d. Bruises on the hands
- e. Bruises on the right elbow
- f. Bruises on the buttock
- g. Right tibia fracture
- h. Right fibula fracture

2. The appellant does not contest the finding that it was wholly liable for the accident. Its contention is that the quantification of damages by the trial magistrate was inordinately high based on the injuries suffered. The appellant submits that the injuries claimed to be suffered by the respondent were at variance with the documentation produced during trial and the testimony of the respondent. Counsel submits that the injuries indicated in the Discharge Summary from Kisii Teaching and Referral Hospital, where the respondent had been admitted, did not include fracture on the right tibia and fibula. That the first time these injuries are mentioned was in Dr. Ezekiel Ogando Zoga's medical report.

3. Counsel contends that there was no basis for the injuries or the claim by the doctor that the respondent would need to undergo a second surgery to remove metal implants on her leg. That in her evidence before the trial court, the respondent never mentioned having metal implants or requiring to undergo a second surgery to remove them. The appellant contends that the documents that came after the discharge summary prepared at KTRH including the medical report and the P3 form were unsupported by any treatment notes. The appellant also disputes the trial court's finding that the respondent complained of pain at the site of the scars as no such evidence was given at trial.

4. Further, counsel contends that the authority of *Charles Maati Onyancha v Ndugu Transport Company Limited [2004]eKLR* relied on by the trial magistrate was in complete contrast with the present case. The plaintiff in the authority had suffered a brain contusion whereas in the instant suit no head injuries were suffered by the respondent. Counsel argues that the principles applied in awarding damages were wrong which warrants the appellate court to interfere with the award.

5. The respondent's counsel supports the trial court's assessment of damages. He submits that the award made by the court was warranted given the time the respondent spent in hospital and the classification of the injuries as "grievous harm." He submits that the medical report prepared by Dr. Ezekiel Ogando Zoga, was produced without objection and the injuries listed in the report tallied with the injuries pleaded. Counsel contends that no medical report was provided by the appellants to counter the medical report of Dr. Zog and maintains that the award by the trial court sufficed and need not be disturbed.

6. The principles to be observed when an appellate court is dealing with an appeal on assessment of damages where set out by the Court of Appeal in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

7. Having considered the record of appeal and the parties' rival submissions, I take the following view of the matter. The respondent testified that following the accident involving the appellant's vehicle she lost consciousness and was taken to RAM Hospital for treatment. She was then transferred to Kisii Teaching and Referral Hospital where she got admitted for 7 days and was issued with a discharge summary. She produced the discharge summary a copy of the P3 form, a police abstract, a medical report prepared by Dr. Peter Momanyi Morebu and also produced a bundle of receipts.

8. The discharge summary indicates that the respondent suffered an open right distal fracture and a fracture of the right arm. That document further indicates that the respondent was admitted in the hospital from 19<sup>th</sup> March 2018 to 25<sup>th</sup> March 2018 and also states that an X-ray was done. The hospital's discharge instructions are that the appellant should come back after 10 days for cylinder cast. The respondent also produced a receipt from RAM Hospital Limited which indicates that an X-ray was done on the right ankle and the right arm.

9. I have anxiously perused the record of appeal and the trial court file and have not come across the medical report allegedly prepared by Dr. Ogando Zoga. The medical report produced by the respondent as "P exhibit 4" was one prepared by Dr. Morebu Peter Momanyi at Kisii Teaching and Referral Hospital. The same doctor also filled the P3 form that was produced by the respondent as "P exhibit 2". In view of the fact that the respondent was treated at the hospital from the day she sustained the injuries, I take it that the injuries listed by Dr. Morebu were a true representation of the nature of the injuries suffered by the respondent. I however note that the respondent did not indicate in her plaint or her evidence that she had metal implants fixed and will disregard that part of the doctor's report.

10. In the trial court, the appellant proposed an award of Kshs. 300,000/= based on the case of *Harun Muyoma Boge v Daniel Otieno Agulo Civil Appeal N. 7 of 2015 [2015]eKLR*. The appellant in that case had suffered blunt chest injuries, a cut wound on the right wrist, a deep cut wound on the right foot, fracture on the right tibia and fibula and soft tissue injuries.

11. The respondent relied on the case of *Alphonse Muli Nzuki v Brian Charles Ochuodho Civil Appeal No. 141 of 2011 [2014] eKLR* where the court upheld an award of Kshs. 800,000/= for the respondent who had suffered compound comminuted fracture right tibia and fibula and degloving injury medial aspect of right leg and foot. She also cited the case of *Peter Namu Njeru v Philemone Mwangoti Civil Appeal No.132 of 2012 [2016] eKLR* where the court declined to interfere with the trial court's assessment of general damages quantified as Kshs. 700,000/= for the claimant who had suffered comminuted crush fracture of the distal ½ of the right radius; avulsion fracture of the right ulna styloid process and fracture of the right 6<sup>th</sup> rib on the posterior aspect.

12. The Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR* observed that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries. Having considered the authorities cited before the trial court, I find that the court's assessment of general damages was not inordinately high as to warrant interference by this court, even having disregarded the claim that the respondent would need to undergo a second operation to remove metal implants. The respondent's injuries were more severe as compared to those suffered in the case cited by the appellant before the trial court. She was admitted in hospital for a week and still complained of pain at the site of the scars.

13. In the premises, I disallow the appeal with costs to the respondent.

**Dated and Delivered at Kisii this 26<sup>th</sup> day of February 2020.**

**A. K. NDUNG'U**

**JUDGE**