



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. 18 OF 2019

DANIEL OTIENO OWINO.....1ST APPELLANT

EZEKIEL OTIENO OWINO.....2ND APPELLANT

VERSUS

ELIZABETH ATIENO OWUOR..... RESPONDENT

(Appeal against judgment and decree on quantum from judgment of E.N. Wasike, Senior Resident Magistrate delivered on 9/5/2019 in Bondo PM CC No. 144 of 2015)

JUDGMENT

1. This appeal is against quantum only, by the **Defendants Daniel Otieno Owino and Ezekiel Otieno Owino**, in the lower court against the judgment and decree of Hon. E.N. Wasike, Senior Resident Magistrate delivered on 9/5/2019 awarding the Respondent/Plaintiff general damages in the sum of Kshs. 600,000/= and proven specials of Kshs. 2,000/= less contribution of 20% leaving a balance of Kshs. 481,600/= plus costs of the suit and interest.
2. Liability between the parties' advocates, had already been agreed upon.
3. Aggrieved by the said judgment and decree, the appellants lodged this appeal on 29/5/2019 setting out the following grounds of appeal:
 - 1) *The trial magistrate erred in not taking into consideration the evidence on record with regard to quantum and arriving at a finding that there was no evidence with regard to quantum to enable the court to award damages;*
 - 2) *The trial magistrate failed to analyze the evidence on record with regard to quantum on a balance of probabilities and thereafter arriving at a finding on quantum;*
 - 3) *The trial magistrate erred in not taking into consideration the defence submissions on record with regard to quantum;*
 - 4) *There was misdirection on the part of the trial magistrate in awarding damages.*
 - 5) *The trial magistrate erred in awarding damages that were excessive.*

4. The appellants urged this court to allow this appeal and the judgment in the subordinate court be set aside and the suit be dismissed on quantum. In the alternative, they urged this court to allow the appeal

and make a finding on quantum.

5. The appeal was admitted to hearing on 11/7/2019 but the directions on hearing were not adhered to as there was delay in extraction and filing of decree of the lower court into this appeal file.

6. The judgment was scheduled for delivery on 29/4/2020 but rescheduled due to the **COVID-19** pandemic that threw the courts and its users into lockdown and so downscaling of judicial services leading to reorganization on delivery of judicial services online.

7. The appeal which was opposed by the Respondent was canvassed by way of written submissions. The appellant's counsel filed her written submissions dated 13/2/2020 on 14/2/2020 whereas the Respondent's counsel filed his written submissions dated 28/2/2020 on 2/3/2020.

8. In support of the 5 grounds of appeal, the appellant's counsel argued grounds 1, 2 and 3 together whereas grounds 4 and 5 were argued together.

9. In support of grounds 1, 2 and 3, it was submitted that the trial magistrate did not take into account the pleadings and the entire evidence on record and thereafter arrive at a finding on quantum.

10. According to the appellants' counsel, the injuries as pleaded and testified on by PW1 when analyzed confirmed that all the injuries pleaded were proved. Secondly, that the evidence by PW2 when analyzed confirmed that the treatment notes did not mention head and chest and lower limbs injuries which were mentioned in the medical Report, that no Xrays were produced and that the incapacity was based on an act which had been repealed.

11. Regarding the evidence of PW3, it was submitted that when analyzed, it confirms that the treatment notes on which PW2 purported to rely on were not produced as exhibits; that the discharge summary contained provisional and not conclusive findings, That there was no Xray Report produced and that an Xray report is conclusive proof of a fracture and further that the record shows that neither the treatment notes nor P3 form was produced in evidence. Hence, the plaintiff/Respondent failed to prove her case on a balance of probabilities on the injuries allegedly sustained and as I pleaded hence this court should dismiss the Respondent's suit on quantum.

12. Regarding grounds 4 and 5, the appellant's counsel submitted that the trial magistrate awarded damages that were excessive and not comparable to the injuries allegedly sustained or in relation to comparable awards which should be within the limits the Kenyan economy can afford as large awards are inevitably passed onto the members of the public the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.

13. Counsel cited several decisions and awards made in those decisions ranging between Kshs. 300,000/= to Kshs. 400,000/= general damages and urging that should this court find that the Respondent sustained any injuries which were proved then it should set aside the award of Kshs. 600,000/= and substitute it with an award of Kshs. 300,000/= general damages on 100% liability.

14. On the part of the Respondents, it was submitted, opposing the appeal and contending that the plaintiff pleaded and proved all the injuries that she sustained following the accident. Further, that PW2 and PW3 corroborated her evidence and that there was no contrary evidence adduced by the appellants to dislodge that adduced by the Respondent on the injuries that she sustained and called evidence to support the same.

15. According to the Respondent, the only way to challenge medical evidence is to subject the injured person to a second medical examination by a doctor of one's own choice and produce the resultant medical Report which the appellants failed to do in the instant case.

16. Reference was made to the cases of **Beatrice Nthenya Sila Vs Ruth Mbithe Kitsisa & 3 Others [2014]eKLR; Erick Juma & 2 Others V Fredrick Gacheru & Another Ksm CA 120/2013**

[2013]eKLR; Charles Maranga Bagwasi & Another vs Kamonjo Muchiri & Another [2000]eKLR; Stephen Kagooivo vs Waithaka Kabai & 3 Others HCC 4089 of 1988; and Upan Wasana EPZ Ltd vs Ziporah Wangui Mbuchi [2010]eKLR. The principle running in the above decisions is that lack of medical evidence is not fatal to the Plaintiff's claim in civil proceedings where proof is on a balance of probabilities, counsel submitted that the discharge summary which is an initial treatment document was produced by PW3 and that failure to produce a P3 form was not fatal to the Respondent's suit as observed by the trial court.

17. It was further submitted that Prof. Were Okombo's medical Report was not challenged by any other contrary report and that more so the applicants did not object to its production during the trial meaning the Respondent proved her case on a balance of probabilities.

18. On quantum, counsel relied on 3 cases to urge the court to uphold the award made by the trial court. He prayed for dismissal of the appeal with costs. *The cases relied on are HCC 62/2017 - Embu - HCA Francis Ndungu Wambui & 2 Others Vs V.K. (mino);*

- *HCCA 141/2011 - Mombasa - Alphonse Muli Nzuki Vs Brian Charles Ochuodho*
- *Mortex Co. Ltd & Another V Fidelis Njoki Gachoka Nairobi HCCA 205/2011 wherein the courts awarded damages of between Kshs. 800,000/= and Kshs. 1,000,000/= for various injuries.*

The above authorities are the same cited in the lower court.

19. As required of this court being the 1st appellate court, I must reassess, reanalyze and reevaluate the evidence adduced in the lower court and arrive at my own independent conclusion bearing in mind the fact that I neither saw nor heard witnesses as they testified. This is the requirement under Section 78 of the Civil Procedure Act as espoused in **Sielle vs Associated Motor Boat Co. Ltd [1968] E.A 123.**

20. Revisiting the evidence before the trial court; the plaintiff who is the Respondent in this appeal testified on oath as PW1 and stated that she was involved in an accident and sustained the following injuries:

- ***A fracture on the right leg.***
- ***Chest injuries.***
- ***Injuries on the eye bridge.***
- ***Injury on the left leg.***
- ***Injury on the left eye.***

21. She stated that after the accident she went to Bondo District Hospital where she was treated as an inpatient. She was admitted for 7 days. She identified a discharge summary from Bondo Sub County Hospital dated 10.7.2015 marked as PMFI 2(a), treatment notes from the said Hospital in a bundle as PMFI 3.

22. She further testified that she went for further medical examination in Kisumu at Dr. Okombo's clinic and be examined her and she paid Kshs. 1500/=.

23. The Medical Report dated 20/1/2016 was marked as PMF14 (a) and Receipt produced as PEx 4(b).

24. The Plaintiff further testified that she went and reported to Bondo Police Station where she was issued with a P3 form which was filled at Kisumu by Dr. Onyimbi and she paid Kshs. 500/=. P3 form dated 16.7.2015 was marked as PMFI 5(a) and Receipt for Kshs. 500/= PMFI 5(b).

25. She stated that she was not yet fully healed because she still experienced pains on the left leg that got a fracture. She identified a bundle PMFI 6 of copies of receipts for drugs amounting to Kshs. 4920.

26. In cross examination, the Plaintiff stated that she could not read English but that she recognized the documents when they were being shown to her. She denied knowing Jane Alibisa. She identified her medical Report and P3 form all done in Kisumu.

27. She stated that she was aged 54 years and that at the time of accident, she was aged 52 years although on the treatment notes PMFI 3 it is indicated that her age was 45 years.

28. She stated that Xrays were done on her fractured leg but she had not produced them and that her age on the Discharge Summary was indicated to be 45 years. She maintained that she was illiterate and that she had no idea about any alternation on her discharge summary. She stated that she was put on plaster at Bondo District Hospital, on her ankle, close to the knee.

29. In re-examination, the Plaintiff reiterated the evidence in chief on the injuries sustained and her age to be 52 years as at the time of accident.

30. **PW2 Professor Were Okombo** a physician testified and stated that on 20.1.2016 he examined the Plaintiff Elizabeth Atieno Owuor who had been involved in an RTA on 10.7.2015 where she sustained the pleaded injuries namely:

- *Head injuries with cut wounds.*
- *Chest injuries.*
- *Injuries to the right leg with cut wounds and a fracture.*
- *Injuries on the left lower ankle joint.*
- *Injuries on the left thigh.*

31. He stated that at the time of examination, the patient had not fully recovered as she was complaining of headaches, pains in the nose, chest and on the right leg.

32. On examination, her general condition was good and vital signs were normal. The Xray presented showed fracture of the right tibia and tibula bones. She could not walk without support. She had a scar measuring 1 cm on the nostril and another measuring 3 cm on the right leg. She had tenderness on the nose, chest and right leg. He classified the injuries as soft and bone tissue.

33. He recommended for further treatment and assessment the incapacity at 50%. In preparing the medical report, he stated that he referred to treatment documents presented and her personal history and Xrays form and findings on physical examination. He produced Medical Report as PEx(a) and stated that he charged Kshs. 7,000/= for court attendance.

34. On being cross examined by Ms. Pandit, PW2 stated that the, patient fractured her mid region of the leg and that a clinical officer and nurse can treat a patient. He stated that in the treatment notes, it was not indicated head injury or chest injury or any injury on the lower left ankle joint. He stated that the incapacity was based on Workman Compensation Act.

35. **PW3 Kennedy Opiyo Omondi** testified and stated that he was a clinical officer at Bondo Sub County Hospital and was standing in for the medical superintendent of Bondo Sub County Hospital. He produced the original discharge summary that was authored by Annete Odhiambo who he said was in South Sudan. The discharge summary was for Elizabeth Atieno Were the Respondent herein, admitted in hospital on 10.7.2015 and discharged on 17.7.2015. According to PW3, the patient sustained a compound fracture and he produced a discharge form dated 17.8.2015 as PEx 2(a).

36. In cross examination by Ms. Pandit, PW3 stated that he had nothing to show that he was working at Bondo District Hospital. He also stated that he did not have the treatment notes in court but that they had copies of medical documents in their file at the hospital. He stated that the discharge summary had no official stamp and that it contained provisional diagnosis but not a final diagnosis. He also stated that he did not have an Xray report which is a conclusive proof of a fracture.

37. In re-examination, he stated that the Discharge Summary was prepared from documents in the patient file and that he had authority to produce the documents.

38. The case was then adjourned to call witnesses to produce certified copies of other medical documents but on 19/11/2018 the plaintiff's counsel Mr. Odongo closed the plaintiff's case without calling the anticipated witness or medical documents which had been marked for identification.

39. The defence case was also closed without calling any witness or adducing any evidence.

40. Parties' advocates were then granted leave to file their respective written submissions but only the Plaintiffs' counsel filed the same and which are generally replicated in this appeal.

41. In his judgment the trial court having found that the liability had been agreed upon at 20:80 in favour of the Plaintiff, the only issue for determination was quantum of damages payable.

42. In determining general damages payable, the trial court at page 3 of the judgment relied on PEx 2(a) discharge summary and PEx 4(a) a Medical Report by Dr. Okombo which showed that the Plaintiff sustained a compound fracture on the tibia fibula of the of the right leg and she had a scar on the nostril, the right leg and tenderness on the chest, nose and the right leg. The trial court also stated that it had considered the injuries vis avis the submissions and cited authorities and awarded the plaintiff Kshs. 600,000/= general damages for pain and suffering. He also awarded the plaintiff proven special of Kshs. 2,000/= all totaling Kshs. 602,000/= less 20% contribution leaving a balance of Kshs. 481,600/= which balance is impugned herein.

DETERMINATION

43. I have considered the grounds of appeal, the evidence tendered before the trial court, the pleadings and submissions for and against this appeal. The main issues for determination are: -

- 1) Whether the plaintiff/Respondent proved that she sustained any injuries in the undisputed accident.**
- 2) Whether the Respondent is entitled to any damages and if so, how much.**
- 3) What orders should this make?**
- 4) Who should bear costs of the appeal?**

44. **On whether the plaintiff/Respondent proved that she sustained any injuries in the undisputed accident of 10/9/2015**, in her plaint dated 25th November 2015, the Plaintiff pleaded that following the accident, she sustained injuries involving: -

- a) Compound fractures of the tibia/fibula bones on the right leg.**
- b) Deep cut wound and tissue damage on the right leg.**
- c) Head injury with cut wound on the nose.**
- d) Blunt chest injury.**

e) Soft tissue injury on the left lower limb involving the high and ankle region.

45. The above pleaded injuries were a replica of the injuries enumerated in the medical Report produced by **Dr. Okombo (BSc. M.D. M.P.H (Physician))** dated 20.1.2016. The Doctor also testified on the stated injuries, indicating that he examined the Respondent and confirmed the said injuries.

46. **PW3 Kennedy Opiyo Omondi** clinical Officer, Bondo Sub-County Hospital testified and produced a discharge summary for the Respondent authored by his colleague Annette Adhiambo who was away in South Sudan.

47. The discharge summary produced as PEx 2(a) and is dated 17/7/2015 shows that the Respondent herein Elizabeth Atieno Were aged 45 years was admitted as inpatient No. 82812 on 10.7.2015 with a provisional diagnosis of fracture of Tibia fibula compound fracture on the Right leg and was discharged on 17/7/2015 to return after two weeks to the surgical clinical for physiotherapy on 3/8/2015 at 7.00 am.

48. The said document shows that the Respondent returned to hospital on 3/8/2015 and was given a further appointment for 17/8/2015 at 7.00 am when plaster paris (POP) was removed and reapplied above knee for the remaining 6 weeks to return on 28/9/2018 for check of Xray plus possible POP removal and for ankle support.

49. The court observes that apart from the discharge summary and medical Report, the other documents which were marked for identification including the P3 form, were not produced as exhibits. For that reason, I find that the trial magistrate was right in relying on the discharge summary and medical Report as the only documents produced to prove injury. Besides the medical documents above stated, the Respondent testified on oath that she sustained injuries involving fracture of the right leg, chest injuries, injuries on the eye bridge, injury on the left leg and injury on the left eye. She also stated that she was taken to Bondo District Hospital and was further referred for medical examination at Dr. Okombo's clinic.

50. The appellant asserts that there was no fracture because no Xray films were produced as exhibits. However, having considered the evidence of the plaintiff and exhibit 2(a) Hospital discharge summary, I am satisfied that even in the absence of Xray films, the Respondent/Plaintiff was admitted at Bondo District Hospital following the accident on 10/7/2015 and that the main injury that she was being treated for was the compound fracture of the Right leg, tibia and fibula and there is evidence on the said discharge summary that the Respondent upon discharge returned to the same hospital for follow up, POP reapplication and removal and physiotherapy.

51. The burden of proof lies on he who alleges and in the case, on the Respondent that she sustained injuries in the road accident. However, the standard of proof is on the balance of probabilities and not beyond reasonable doubt. From the oral evidence adduced by the Plaintiff, who, by her own testimony, was illiterate, I am inclined to believe that besides the fracture of the right leg, she sustained other injuries which she complained of which were nevertheless not indicated in the discharge summary. It was of course, her undoing that she never produced in evidence as exhibits her treatment notes and P3 form but this court having considered the Respondents' oral testimony and the evidence adduced by Dr. Okombo, I have no doubt that the Plaintiff/Respondent sustained the injuries stated in the medical report. This is because albeit the Respondent did not produce the treatment notes and P3 form which she had filed in court as her documentary evidence to be adduced, Dr. Okombo had the opportunity of seeing the Respondent physically and examining her before the suit was instituted in court.

52. As correctly submitted by the Respondents counsel, based on the authorities cited, this is one of those cases where the appellants could have subjected the Respondent to a second medical opinion if at all they did not believe that the assessment of her injuries were accurate.

53. The oral evidence adduced by the Respondent coupled with the evidence by Dr. Okombo and production of the medical Report and Hospital Discharge summary clearly indicate that the compound fracture of the right leg was the major injury sustained by the Respondent, but there is no indication that

that was the only injury sustained by her. Dr. Okombo also assessed the injuries to be grievous harm, which injuries were both bone and soft tissues. The Dr. Okombo's detailed report in my humble view supports the plaintiff's own oral evidence and therefore I find no reasons to doubt that evidence that indeed the Respondent sustained the injuries pleaded and testified on.

54. For the above reasons, I find and hold that the plaintiff/Respondent proved on a balance of probabilities that she sustained the injuries pleaded and testified on by the Respondent and PW2 Dr. Okombo as contained in the medical Report produced as PEx 4(a).

55. On the second issue of whether the Respondent is entitled to any damage and if so, how much, having found that the Respondent proved that she was injured in the areas stated above, I am persuaded that the Respondent was and is still entitled to damages. The only question is how much.

56. The trial court awarded the Respondent Kshs. 600,000/= general damages and Kshs. 2,000/= - pleaded and proven specials less 20% contribution leaving a balance of Kshs. 481,600/=.

57. In this appeal, the Respondent submitted maintaining that she is entitled to the award made by the trial court, citing the same authorities relied on in the trial court. On the part of the appellants, it was submitted in contention that should this court find that the Respondent proved that she sustained injuries in the cited areas then this court should find that the award of Kshs. 600,000/= was inordinately high and manifestly excessive.

58. The appellant's counsel urged the court to find that for those type of injuries, an award of Kshs. 300,000/= on 100% liability is sufficient compensation. Reliance was placed on **Kisumu HCCA 8/2013 Thomas Ombima Vs Samson Anindo Mwenje; Muranga HCCA 60 of 2012 David Gakenya Vs Mary Nyambura and Kisumu HCCA 9 of 2016 KPLC Ltd Vs Benson Aseka Anyanzwa; and Kisii HCCA 40 & 41 of 2018 Damaris Ombati Vs Moses Mogoko Levis & Samson Ogendi**; which are all recent decisions.

59. Having considered the above rival positions, it is important to set out the principles applicable on appeal against quantum of damages.

60. The Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** set out the parameters under which an appellate court will interfere with an award in general damages when it held:

'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...'

61. In **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held:

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).'

62. The same principle was restated in **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held:

'...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be

convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:

‘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 at a figure which was either inordinately high or low.’

In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said: -

“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 that 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. See Ilango V. Manyoka [1961] EA 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto [1970] EA 414, 418, 419. This Court follows the same principles.”

And in Gicheru V Morton and Another (2005) 2 KLR 333 this Court stated:

‘In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.’

See also Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.

The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal.”

63. In the instant case, the trial magistrate awarded Kshs 600,000 damages for pain and suffering, which amount the appellant regards as inordinately high. The respondent agrees with the trial magistrate on the award.

64. 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.”

65. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR* the court stated:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler vs Butler (1984) KLR 225.

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) *An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.*
- 2) *The award should be commensurable with the injuries sustained.*
- 3) *Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.*
- 4) *Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*
- 5) *The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.)*

66. The respondent herein sustained the following injuries:

- a. *Compound fracture of tibia and fibula bones of the right leg*
- b. *Deep cut wound and tissue damage of the right leg*
- c. *Head injury with cut wound on the nose*
- d. *Blunt Chest injuries*
- e. *Soft tissue injury on the lower left leg*

67. The doctor assessed incapacitation at 50 %. However, he never mentioned the basis upon which a person who had a fracture which had healed well at the time of examination about six months after the accident, had suffered 50% incapacitation. There was no evidence of mal-union of the fractured site or evidence of progressive chronic osteomyelitis of the fractured bones or loss of bone tissue or necessity for bone grafting due to infection as was the case in **KORNELIUS KWEYA EBICHET V C&P SHOE INDUSTRIES LTD & ANOTHER** relied on by the Respondent in the lower court and which complications informed the court in the said case to award Kshs 1 million general damages for pain and suffering and loss of amenities. In my humble view, this percentage of incapacity attributed to the Respondent in this case was not supported and I reject it.

68. In the other authority relied on at the trial being **Teresiah Ngugi & another v Michael Masia Kimende [2018] e KLR**, the plaintiff/respondent had sustained injuries as follows: *mild head injury with facial bruises, blunt chest injury with fractured ribs, cut wound right leg below the knee and compound fracture of right fibula. The injuries led to muscle wasting on both lower limbs, healed scar with hyperpigmentation, swollen right knee joint with stiffness and tenderness, fractured bones could not bear weight. Permanent incapacity was assessed at 7%. He needed reconstructive surgery and other future medical care. It was noted that his bone was exposed and flesh had come out and it was fixed using metal implant. He could also not get off the wheelchair because there was muscle wasting. He could not stand or do any manual work. He was awarded Kshs 1,500,000 general damages for pain suffering and loss of amenities.*

69. Comparing these injuries in the cited cases and those sustained by the plaintiff/ Respondent herein, I am not persuaded that the plaintiff/respondent suffered as serious injuries as the plaintiffs in the cited cases. Although no two cases can be similar. The trial court, regrettably did not indicate in his judgment which of the authorities persuaded him to make the award. He simply stated that he had considered the injuries vis a vis the submissions and the cited authorities. Surprisingly the respondent's counsel now in this appeal has shifted and submitted different authorities from those relied on at the trial. Nonetheless, submissions are not evidence hence the court is not bound by the same. They are only a guide in awarding damages.

70. In the **Francis Ndung'u case (supra)** case, the plaintiff suffered injuries involving *soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula as well as loss of consciousness and the severity of the fracture was at risk of secondary stress fractures on the same site. Muchemi J awarded Kshs 1 million general damages in November 2019.* In the **Alponse Nzuki Muli (supra)** case on appeal Kasango J sustained the damages awarded by the trial court in the sum of Kshs 800,000 for injuries involving *compound comminuted fracture of right tibia and fibula and degloving injury medial aspect of right leg and foot. He underwent three operations and was hospitalized for 42 days. He had an implant removed in future operation.* In **Montrex Co Ltd case (supra)** the respondent was awarded Kshs 800,000 general damages for pain and suffering and loss of amenities for injuries involving *injury to the right leg with wound which resulted in an open fracture involving tibia and fibula. There was surgery with external fixations which were removed as the fracture healed well. And injury to the right jaw resulting in non-displaced fracture of the right mandible which was treated conservatively. He was hospitalized for three weeks and plaster removed after three months. The fractures healed leaving scars on the left right leg.*

71. In the **Thomas Ombima** case cited by the appellant's counsel, the plaintiff suffered *comminuted fracture of middle 1/3 femur, back injury, dislocation of ankle-left, chest injuries, and soft tissue injuries to the elbow. He court did not indicate the extent of the injuries in awarding Kshs 400,000 general damages.* The injuries suffered in the David Gakinya case were off those suffered by the respondent herein and so were those suffered in the **KPLC Ltd v Benson Aseka case and Damaris Ombati** case.

72. The respondent relied on the cases of **Bayusuf Freighters Limited vs. Patrick Mbatha Kyengo (2014) eKLR** where the Court of Appeal made an award of Kshs 1,600,000.00 for similar injuries. It should be noted that the said decision was delivered in 2014. As stated in the case of **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR**, *the court in making an award for general damages must always consider the prevailing inflation.*

73. From the above authorities, it is clear that the trial magistrate made an inordinately high award in view of the injuries sustained by the respondent.

74. The respondent at the time of hearing of the case stated that she had not fully healed but never demonstrated what treatment she was receiving at that time following the doctor's advice in 2016. There was no indication that she had any malunion of the fractures site to warrant surgery. In my view, the respondent's injuries were not as serious as those suffered by the plaintiffs in all the cited cases and especially on the long term effect thereof. That being the case, I find an award of Kshs 600,000 general damages for pain, suffering and loss of amenities to have been inordinately high. I interfere with the same and substitute the award with an award of Kshs 400,000 general damages, at 100% liability. This amount to be subjected to 20% contribution leaving Kshs 320,000 plus specials of Kshs 2,000 pleaded and proved making a total of Kshs 322, 0000 plus costs of the suit and interest at court rates from date of judgment in the lower court on general damages and from date of filing suit on special damages. There shall be no contribution on special damages.

75. To that extent therefore this appeal succeeds partially on reduction of general damages.

76. On costs I order that each party bear their own costs of this appeal as both parties have succeeded halfway.

Orders accordingly.

Dated, signed and delivered at Siaya this 29th Day of May 2020 via skype in the presence of Mr. G. Okoth Advocate for the Respondent.

R.E.ABURILI

JUDGE