



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 14 OF 2015**

**GEOFFREY OTIENO RIRO.....APPELLANT**

**VERSUS**

**RACHUONYO ELMARD.....RESPONDENT**

*(Being an appeal from the Judgment decision of Hon. Karanja (RM) in Bomet PMCC No.52 of 2013 delivered on 4/11/2013)*

**JUDGMENT**

1. This is an appeal from the Judgment in Bomet PMCC No.52 of 2012 in which the Plaintiff/Appellant was awarded Kshs.750,000 in respect of general damages and special damages less 30% contribution.
2. The Plaintiff/Appellant has filed suit against the Respondent seeking general damages and special damages of Kshs.106,140 for injuries the plaintiff sustained in an accident which occurred on 17/1/2010 along Bomet – Kaplong road involving Motor Vehicle Registration KBD 528D Subaru belonging to the Respondent.
3. It's alleged that the Respondent's driver drove, controlled and or managed Motor Vehicle Registration No.KBD 528D Subaru recklessly that he permitted it to lose control and collide with motor vehicle registration No.KBH 981 N Toyota and as a result the Plaintiff/Applicant who was a passenger in Motor Vehicle Registration No.KBH 981N sustained the following injuries.
  - i) Fracture of the left Clavicle mid
  - ii) Blunt abdominal injury
  - iii) Stab wound on the right abdominal area
4. The parties entered into consent on liability and agreed on a ratio of 70 : 30% in favour of the plaintiff and the court assessed general damages of Kshs.750,000 less 30% contribution.
5. The Plaintiff/Appellant is aggrieved with the award of Kshs.750,00 less 30% contribution and has appealed to this court on the ground that the said award is too low.
6. The parties filed written submissions which I have duly considered. The sole issue for determination is whether the award of Kshs.750,000 less 30% contribution is too low in view of the injuries sustained by the Appellant.
7. The Appellant stated in his written submissions dated 14/5/2018 that the award was too low and he ought to have been awarded as follows;
  - i) Fracture of the left Clavicle - Kshs.700,000/=
  - ii) Blunt abdominal injury which led to rupture of the intestines – Kshs.700,000/=
  - iii) Stab wound in the right abdominal area – Kshs.500,000/=Total – Kshs.1,900,000 less 30% contribution.
8. The Respondent submitted relying on the case of **KEMFRO AFRICA LTD vs LUBIA [1987] & ANOTHER [1987]KLR** the basis for interfering with the discretion of the trial court is where the court took into account irrelevant factors or where the award is too low or too

high that it must be a wholly erroneous estimate of damages.

9. The Respondent relied on the case of **NYERI HIGH COURT CIVIL APPEAL NO.102 of 2011 FLORENCE NJOKI MWANGI vs PETER CHEGE MBITIRU** where Kshs.700,000 was awarded for similar injuries.

10. I have considered the rival submissions filed in this case. I have also analyzed and evaluated afresh all the evidence adduced before the trial court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

11. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus;

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

**It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”**

12. I find that there is no basis for this court to interfere with the award as the same is neither too low or too high. In the Court of Appeal Case of **Bashir Ahmed Butt –vs- Ahmed Khan (1982-88) KAR**, it was held;

**“An appellate court will not disturb an award of damages unless it’s so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence on some material respect and so arrived at a figure which was rather inordinately high or low...”**

13. I find that the appeal herein lacks in merit and I dismiss it accordingly.

14. Each party to bear its own costs of the Appeal.

**Delivered, dated and signed at Bomet this 5<sup>th</sup> day of August 2020.**

**A. N. ONGERI**

**JUDGE**