



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL CASE NO. 92 OF 2016**

**ROBERT CHESEREK..... APPELLANT**

**VERSUS**

**JACKLINE JEPKOECH JIMMY..... RESPONDENT**

*(Being an Appeal from the Judgment of the Chief Magistrate Honourable M. Wambani in Eldoret CMCC No. 542 of 2015, dated 16<sup>th</sup> June, 2016)*

**JUDGMENT**

The appeal arises from the judgment in Civil Suit No. 542 of 2015 where the cause of action was that the respondent was a passenger aboard a vehicle that was involved in an accident with the appellants' vehicle where she sustained injuries. The parties recorded a consent judgment on liability and upon full trial the learned magistrate awarded general Damages of kshs. 200,000/- for pain and suffering plus special damages of kshs. 3,000/-. The appeal touches on quantum only.

**APPELLANTS' CASE**

The appellant submitted that the respondent tendered oral evidence and adduced medical evidence in support of her injuries. She tendered the initial treatment notes from Moi Teaching and Referral Hospital. She also produced a copy of *Dr. Aluda's* medical report. *Dr. Aluda* concluded that the respondent sustained soft tissue injuries that were healing well. The medical report prepared by *Dr. Jennifer Kahuthu*, that was adduced by the appellant concluded that the respondent sustained soft tissue injuries on the lower limb and lost one tooth. The trial magistrate made a finding that the respondent sustained bruises on the hips and on the gum, blunt trauma to the upper area, left hip legs and loss of one tooth. This was based on the medical report by *Dr. Aluda* which were not supported by the initial treatment notes that indicated that the respondent lost one incisor tooth and soft tissue injuries on the lower limb. On the lower limb, the P3 filled by *Dr. Aluda* indicates that injuries sustained were swollen legs which were tender and tender left hip.

The injuries enumerated in the plaint, treatment notes and medical report were clearly contradictory. The learned magistrate took into account irrelevant factors and left out relevant factors which led to an erroneous decision. Had the court evaluated the evidence vis-a-vis the pleadings it would have arrived at the conclusion that the respondent never sustained the bruises on the hips as alleged. He relied on the case of *Ndung'u Dennis vs Ann Wangari Ndirangu & Another* which provided grounds for interfering with the assessment of quantum.

The appellant submitted that the court disregarded his submissions by relying on *Section 39(b)* of the *Insurance Motor Vehicle Third Party Risks (Amendment) Act, 2013* as opposed to *Section 39(a)*. That the court misdirected itself by relying on the said section basing its findings on account of lost tooth. The applicable Section was 32(b)(1) which provided that where a claimant lost 1 tooth the percentage applicable was 1% of kshs. 3,000,000/-.

The appellant submitted that the award of 200,000/- was excessive and based upon an erroneous estimate of the nature of injuries sustained. The same ought to be set aside and the court award a sum of kshs. 60,000/- under the provision of schedule 39(a).

**RESPONDENT'S CASE**

The respondent submitted that the sum of kshs. 300,000/- as damages less 10% liability was not inordinately high. That the trial magistrate did not proceed on wrong principles or misapprehend the evidence in some material aspect and arrived at a figure that was inordinately high.

The respondents relied on the cases of *Mombasa HCCC No. 750 of 1994 – Peter Meyo Oyuga vs Mwaimie Bora & Anor.* and *Nairobi HCCC No. 2551 of 1993 – James Muli Kiarie vs Pelican Haulage Contractors Ltd & Anor.* on quantum.

The special damages were pleaded and proved by way of receipts.

## ISSUES FOR DETERMINATION

- a) Whether the trial magistrate erred in assessment of damages
- b) Whether the award was inordinately high

## WHETHER THE TRIAL MAGISTRATE ERRED IN ASSESSMENT OF DAMAGES

The appellants' contention was that the injuries that were outlined by the trial magistrate were based on the medical report by *Dr. Aluda* but the injuries outlined by *Dr. Aluda* were not supported by the initial treatment notes which indicate that the respondent lost one incisor tooth and soft tissue injuries on the lower limb. A perusal of the record shows that the injuries in the

treatment notes were that the respondent lost one incisor tooth and sustained soft tissue injuries on the lower limb.

The plaint and the medical report by *Dr. Aluda* list a plethora of other injuries that were not part of the initial treatment report. The plaint lists the injuries as blunt trauma to the upper arms, left hip and both legs. It further states that both lips were swollen and the plaintiff sustained a cut wound on the upper gums. There is a contradiction in the plaintiff's testimony as she testified that she had a fracture on the knee yet there is no evidence adduced of the same.

*Dr. Kahuthu's* report stated that the plaintiff sustained soft tissue injuries of the lower limb and mouth and that she lost one upper incisor. The report concluded that she had sustained soft tissue injuries and lost a tooth. She relied on the medical report by *Dr. Aluda* and the Medical treatment records from Moi Teaching and Referral Hospital.

It therefore follows that the injuries sustained were soft tissue injuries to the upper limbs, left hip, legs and one lost tooth. There is contradiction in the testimony of the plaintiff that she sustained a fracture on the knee and, further, the application of *Section 39(b)* of the schedule which does not apply

to these injuries as there was no moderate disfiguration as per the medical reports. The correct section of the schedule applicable as per the injuries sustained, and more specifically the loss of one tooth is 32(b)(1) of the Structured Compensation Schedule of the Insurance Motor Vehicle Third Party Risks (amendment) Act 2013 which would be 1% of Kshs. 3,000,000/- which would amount to kshs. 30,000/-.

## WHETHER THE AWARD WAS INORDINATELY HIGH

In *George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyale [2016] eKLR* the court awarded kshs. 122,100 as special and general damages for soft tissue injuries. In *Isaac Muriungi Mbataru v Silas Kalumani [2017] eKLR* the court awarded kshs. 200,000 for general damages and suffering where the plaintiff sustained similar injuries save for the loss of two teeth instead of one. In the case of *Patrick Mwiti Imanene & another vs Kevin Mugambi Nkunja [2013] eKLR* the court upheld an award of Kshs. 170,000/= for soft tissue injuries in the year 2013. In *Paul Kipsang Koech & another v Titus Osule Osore [2013] eKLR* the court awarded Kshs. 200,000/= for minor soft tissue injuries in the year 2013.

In my view, taking into account inflation, the damages are not inordinately

high and fall well within the range of damages awarded for such injuries (soft tissue injuries). I therefore find that the damages are appropriate and remains undisturbed. Appeal is accordingly dismissed with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 24<sup>th</sup> day of April, 2019.**

In the absence of;

Mr. Aguko for the appellant

Mr. Mwinamo for the Respondent

And in the presence of Mr. Etyang - Court assistant