



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 36 OF 2017**

**GLADYS LYAKA MWOMBE.....APPELLANT**

**VERSUS**

**FRANCIS NAMATSI.....1<sup>ST</sup> RESPONDENT**

**PETER O. OGOT.....2<sup>ND</sup> RESPONDENT**

**ALI MALIK BROTHERS.....3<sup>RD</sup> RESPONDENT**

*(An appeal arising from the judgment and decree of the*

*Hon. TA Odera, Senior Principal Magistrate (SPM),*

*in*

*Mumias PMCCC No. 183 of 2015 of 24<sup>th</sup> March 2017)*

**JUDGMENT**

1. The suit at the trial court was initiated by the appellant herein against the respondents for general and special damages arising from a motor traffic accident involving her and a motor vehicle owned and controlled by the respondents. She sought general and special damages. When the respondents failed to enter appearance and file defence within the period allowed in law, an interlocutory judgement was entered 12<sup>th</sup> April 2016. The suit was for all practical purposes undefended.

2. The issue of liability was settled by a consent entered into by the advocates on record for both sides, for an appearance was subsequently entered for the respondents. Liability was apportioned on 22<sup>nd</sup> November 2016, by consent, between the appellant and the respondents, at the ratio of 80:20. On the same date the appellant took the witness stand to formally prove her case. Eventually judgment on quantum was pronounced on 24<sup>th</sup> March 2017. General damages were awarded at Kshs. 300, 000.00, and specials at Kshs. 5, 500.00, making a total of Kshs. 305, 500.00, plus costs and interest.

3. The appellant was aggrieved by the award and lodged this appeal. Her principal case is that given the nature and extent of the injuries that she suffered the award by the trial court was manifestly low. She argues that the trial court did not appreciate the authorities that were cited before it, hence it arrived at a determination that was against the weight of the evidence tendered.

4. According to the plaint on record, it is pleaded that the appellant had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The injuries reflected in the plaint were extracted from medical records that are in the trial court's file. The injuries reflected in the P3 Form, dated 22<sup>nd</sup> May 2014, and filled by the doctor on 28<sup>th</sup> January 2015, are a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibiofibular. There is also a medical report, dated 22<sup>nd</sup> April 2014, prepared by PI Mambiri, a clinical officer at the Kakamega General Hospital. It reflects that the appellant had suffered head injury and lower limb fractures. She was hospitalized for nine days. The injuries detailed in the report are head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. X-rays and CT scans were done, together with an operation to fix a plate on the tibia fracture. The soft tissue injuries were cleaned and dressed and she was put on antibiotics, analgesics and sedatives for the head injury. She was left with scars on the face and on both lower limbs, and mild headaches from the head injury. The soft tissues were said to have had fully healed.

5. At the trial court, the appellant sought general damages at Kshs. 3, 000, 000.00. She cited two High Court decisions. *Dorcus Wangithi*

*Nderi vs. Samuel Kiburu Mwaura & another* Embu High Court Civil Appeal No. 58 of 2013 and *Cold Car Hire Tours Ltd & 2 others vs. Elizabeth Wambui Matheri* Nakuru High Court Civil Appeal No. 70 of 2012. In *Dorcus Wangithi Nderi vs. Samuel Kiburu Mwaura & another*, the appellant had sustained multiple soft tissue injuries, blunt injury to the head, fracture to the left radius and ulna, and compound fractures of both the right and left tibia and fibula. The appellate court awarded her Kshs. 2, 000, 000.00 in 2015 as general damages. In *Cold Car Hire Tours Ltd & 2 others vs. Elizabeth Wambui Matheri*, the respondent had suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement. As a consequence of the said injuries she developed other complications, such as deep vein thrombosis on both legs with a high risk of being predisposed to blood clot formation, inability to sit and stand for long periods of time. Her permanent disability was assessed at 35% to 50%, with another total hip replacement required after ten years. The trial court had awarded Kshs. 1, 400, 000.00 general damages for the injuries, which the appellate court did not find reason to disturb. What emerges, no doubt, is that the injuries in these two cases of *Dorcus Wangithi Nderi vs. Samuel Kiburu Mwaura & another* and *Cold Car Hire Tours Ltd & 2 others vs. Elizabeth Wambui Matheri* were a lot more severe compared with the ones suffered by the appellant in the instant case, and, therefore, the awards made in the two decisions cannot be useful guides in assessing damages in the instant case.

6. For the purpose of the instant appeal, the appellant has not cited any authorities to guide me in determining the matter and she has largely left me to my own devices.

7. My searches have unearthed the decision in *Godfrey Wamalwa Wamba & another vs. Kyalo Wambua* [2018] eKLR, where the appellant had sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip. He was in hospital for three weeks, where he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court had awarded general damages at Kshs. 700, 000.00, which the appellate court upheld. I note though that the injuries sustained by the appellant in that case were a lot graver than in the case before me. In *Jitan Nagra vs. Abednego Nyandusi Oigo* [2018] eKLR, the appellant had sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral knee, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, and a segmental distal fracture to the right femur. The trial court awarded Kshs. 1, 000, 000.00 general damages, which were reduced on 12<sup>th</sup> October 2018 to an award of Kshs. 450, 000.00 on appeal. In *Naom Momanyi vs. G4S Security Services Kenya Limited* [2018] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300, 000.00. In *Wakim Sodas Limited vs. Sammy Aritos* [2017] eKLR, the respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400, 000.00, which was upheld on appeal. In *Vincent Mbogholi vs. Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs. 500, 000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

8. From the review of the recent decisions on the comparable injuries, it would appear to me that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend is to award general damages in the range of Kshs 300, 000.00 to Kshs. 500, 000. I am not persuaded that I should interfere with the outcome at the trial court. As a consequence of the above, the appeal herein fails, and it is hereby dismissed. Each party shall bear their own costs.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15<sup>th</sup> DAY OF August, 2019**

**W. MUSYOKA**

**JUDGE**