



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 26 OF 2013**

**JOEL SIMATWA.....APPELLANT**

**VERSUS**

**SAMMY KIPSANG YEGO.....RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate Honourable A. Alego*

*in Eldoret Civil Case No. 485 of 2011, dated 19<sup>th</sup> February, 2013)*

**JUDGMENT**

The respondent instituted a suit vide a plaint dated 25/07/2011 and filed in court on the same date against the appellant alleging that he was involved in an accident on 5/8/2010 and as a result he sustained severe bodily injuries. The court heard and determined the case in favour of the respondent with liability having been agreed upon by consent at the ration of 80%-20% in favour of the plaintiff. The court awarded Kshs. 700,000/- less 20% to the plaintiff in general damages (Kshs. 560,000.) and special damages of Kshs. 41,500/-.

The appellant appeals against the judgment and decree on quantum.

**APPELLANT'S CASE**

The appeal is based on the grounds that; the award in general damages was excessive; the magistrate misapprehended the injuries suffered by the respondent and took into account irrelevant facts in assessing damages and awarding the same; the learned magistrate erred in law in applying the wrong principles in awarding damages.

The award, it is averred by the appellant, was excessive as it was not reasonable in the circumstances taking into account the injury that the respondent suffered. The magistrate failed to put into consideration the principle of stare decisis and put forward an excessive award. He relied on the authority of Shaban vs. City Council of Nairobi cited in the case of *Stanley Mugambi & Another vs John Kiraithe (2006) eKLR* on damages. The case of Kimatu Mbuvi t/a Kimatu Mbuvi & Brothers vs Augustine Munyau Kioko (2006) eKLR wherein damages for more severe injuries were awarded at kshs. 300,000/-, was also cited.

**RESPONDENT'S CASE**

The respondent relied on the case of *Nairobi HCCC No. 594 of 1993 – Robert Kamaru Muchina v Esther Wangui Munyuri & Anor* where the court awarded kshs. 450,000/- where the plaintiff had similar injuries.

The respondent also relied on the case of *Kenya Pipeline Company Limited v Lucy Njoki Njuri (suing as the legal representative of the Estate of John Wamae (deceased) [2016]* wherein the court held that the appellate court's interference with regard to the quantum of damages can only be justified where the trial court can be found to have applied the wrong principles. The trial magistrate explained how she arrived at the decision.

**ISSUES FOR DETERMINATION**

**WHETHER THE TRIAL COURT AWARDED GENERAL DAMAGES THAT WERE EXCESSIVE**

The plaintiff sustained the following injuries;

- a) Head injury and concussion
- b) Scalp and face swollen with tender bruises and laceration
- c) Fracture of the right tibia and fibula
- d) Soft tissue injuries

*Dr Aluda* concluded that the injuries sustained were very severe and that the scar will remain a permanent feature of the body. The fracture had healed with some deformity that will remain a permanent feature on his body. The patient recovered with post traumatic arthritis of the right ankle joint and recurrent episodes of memory loss. The degree of permanent incapacity was 15%.

The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**, set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

The Appellant has not shown that the court applied the wrong principles in arriving at the challenged quantum. The case law relied on by the appellant does not contain similar injuries and is distinguishable from the facts of this case. I therefore find the appeal in want of merit and is hereby dismissed with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 26<sup>th</sup> day of September, 2019**

In the presence of:

Mr. Kome holding brief for Mr. Songok for the appellant

Mr. Yego for the Respondent absent

Ms. Sarah ...Court Assistant

**Mr. Kome :-**

We pray for 30 days stay.

**COURT:**

Stay is granted as prayed

**S.M GITHINJI**

**JUDGE**