



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 208 OF 2016**

**MARBLE AUTO DEALERS.....1<sup>ST</sup> APPELLANT**

**GASTON JOSEPH NDOGO.....2<sup>ND</sup> APPELLANT**

**- V E R S U S -**

**E O O R N N (Suing as the next**

**Friend of S O – Minor) .....RESPONDENT**

***(Being an appeal from the judgement of Hon. L. Kabaria Delivered***

***on the 4<sup>th</sup> April, 2014 at Senior Principal Magistrate's court***

***at Milimani in CMCC No. 140 of 2008)***

**JUDGEMENT**

1. E O O the respondent herein filed a suit against Marble Auto Dealers and Gaston Joseph Ndogo, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively vide the plaint dated 14<sup>th</sup> January 2008 for general and special damages for injuries sustained by the minor, S O, when he was knocked down by motor vehicle registration no. KAU 128Z. The registered owner of the aforesaid motor vehicle is the 1<sup>st</sup> appellant and was driven by the 2<sup>nd</sup> appellant.

2. The 2<sup>nd</sup> appellant filed its defence dated 29<sup>th</sup> October 2008 and denied the respondent's claim. The 1<sup>st</sup> appellant failed to appear in time and a default judgment was entered against him on the 28<sup>th</sup> August 2010. On 31<sup>st</sup> October 2012, a consent judgement on liability was entered by the parties against the appellant in the ratio of 80:20. The suit was heard and in the end, Hon. Leah W. Kabaria, the learned Senior Principal Magistrate entered judgement in favour of the respondent and against the appellant as follows:

a. General damages for pain & suffering and

loss of Amenities ksh.850,000/=

b. Special damages ksh.56,157/=

Aggrieved by the award, the appellants preferred this appeal.

3. The appellants put forward the following grounds in its memorandum of appeal.

***1. THAT the learned magistrate erred in law and in fact and ended up misdirecting herself in awarding exorbitant quantum of damages of ksh.850,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable rewards granted the injuries allegedly sustained by the plaintiff.***

***2. THAT the learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.***

3. **THAT the learned magistrate's award on damages was so high as to be entirely erroneous.**

4. **THAT the learned magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.**

5. **THAT the learned magistrate erred in law and fact in considering extraneous matters that were not brought before the court by the parties and ended up making erroneous award on damages.**

6. **That the whole judgment on quantum was against the weight of evidence before the court.**

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The appellant put forward a total of 6 grounds of appeal. After a careful consideration of the aforesaid grounds, the same revolves on the singular question touching on the award of general damages for pain and suffering where the court awarded ksh.850,000/=.

6. The appellant submits that the award was not commensurate with the nature of injuries suffered by the minor, S O. It is argued that the trial magistrate failed to appreciate that the injuries suffered by the respondent had healed leaving a permanent incapacitation of 5% as per the medical report by Dr. P.M. Wambugu, and a re-examination which was done two years after the accident by D. W. M. Wokabi who had indicated that there was no permanent incapacitation. The appellants submit that the award was unfair, unreasonable and not commensurate with nature of injuries.

7. It is the respondent's submission that from the proceedings and the resultant judgement, no error on principle was committed by the trial magistrate in making the award. The respondent argued that the evidence was led during trial which was tested by cross-examination and the court reached at a decision based on what had been presented before it. The respondent cited the case of **Mwanasokoni –v- Kenya Bus Services Limited (1985) KLR** where it was stated inter alia as follows:

**“it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.”**

8. The minor S O sustained the following injuries:

i. *Bilateral fracture of the mandible Pananymphyreal region*

ii. *Fracture of the left condylar neck*

iii. *Pain in the jaws*

iv. *Severe malocclusion of the teeth.*

9. The minor male, aged 12 years was involved in a road accident on 12<sup>th</sup> January 2006. On 16<sup>th</sup> November 2007, he was examined by Dr. W. M. Wokabi, whose medical report stated inter alia that:

**“the fractures healed with lower jaw deformity. The chin is a bit offline. There is severe malocclusion of the teeth, which effect will be progressive dental deterioration which may cause permanent loss of the teeth. The jaw deformity cannot be surgically corrected. The pain experienced during cold weather will eventually disappear. There are surgical scars on each side of the lower jaw.”**

10. On 5<sup>th</sup> September, 2009 the minor was again observed by Dr. P. M. Wambugu who stated in his medical report inter alia that:

**“O's injuries are consistent with those due to blunt trauma as may have occurred during the said accident. He sustained skeletal and soft tissue injuries which occasioned him pains and morbidity. The mandibular fractures have since united with a malocclusion of the teeth and a relative mild facial asymmetry. I award him 5% as the degree of permanent incapacitation.”**

11. The learned trial magistrate cited the case of **Kenya Power and Lighting Company Ltd –vs- Zakayo Saitoti Ningola, Nairobi Civil Appeal no. 522 of 2004** where it was stated *inter alia* that damages ought to be assessed so as to compensate reasonably the injured party but not so as to smart the defendant.

12. After a careful consideration of the cases cited and taking into account the rising inflationary trends, I find the award of ksh.850,000/= to be within the range and commensurate with the nature of injuries sustained. In the end the appeal is found to be without merit. It is dismissed with costs to the respondent.

**Dated, Signed and Delivered in open court this 16<sup>th</sup> day of February, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent