



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 273 OF 2003**

**TRANS ENERGY (K) LIMITED.....APPELLANT**

**VERSUS**

**ANN WAMBUI KIRIGI .....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the Judgment of Hon. Mr. R. Nyakundi SPM delivered on the 18<sup>th</sup> June, 2003)***

This old appeal has been pending for quite some time. The record does not show why this is the case but the record of appeal was filed on 7<sup>th</sup> March, 2007 while the supplementary record was filed on 15<sup>th</sup> June, 2017. The appeal is from the judgment of the lower court delivered on 22<sup>nd</sup> April, 2003 following a trial where the plaintiff had been injured as a result of a road traffic accident.

The supplementary record of appeal contains the amended Memorandum of Appeal and the appeal is limited to the award of general damages and special damages. It is the appellant's case that the award of Kshs. 700,000/= general damages was excessive and not in consonance with injuries sustained by the plaintiff. The appellant also complained that the award of Kshs. 42,231/= special damages was in contravention of the Stamp Duty Act, Cap 480 Laws of Kenya.

On those grounds the lower court was faulted for not taking into consideration the submissions on behalf of the appellant. Both counsel have filed submissions and also cited some authorities which I have on record. This case was decided in year 2003.

The appellate court may interfere with or disturb the award made by a lower court if that court proceeded on wrong principles or misapprehended the evidence or the said award is inordinately low or too high in relation to the injuries sustained by the party. It is also a common approach that comparable injuries should attract comparable awards.

Going by the medical reports presented in evidence, the respondent suffered a ruptured liver with internal haemorrhage, bruised right arm, callos fracture of the left arm and two deep cuts on the forehead with concussion and loss of consciousness which lasted for over 12 hours.

The accident took place on 7<sup>th</sup> October, 1997. The medical reports produced were from Presbyterian Church Hospital dated 3<sup>rd</sup> November, 1997, the other is by Dr. P.S.B.O Otiato dated 17<sup>th</sup> December, 1997 and another one by Mr. Yusuf Kondwawwala dated 7<sup>th</sup> August, 2000. No other report was available thereafter.

The lower court cited several authorities to come up with the award in the Judgment. In arriving at that award the court observed as follows,

**“Having read the cases cited and the awards made therein, I have also considered the evidence by the plaintiff and the medial report by both doctors Otiato and Kondwawwala who examined the plaintiff. I have also given credence to the time since the awards were made the nature of injuries in the cited cases the inference to be drawn is that the plaintiff suffered multiple injuries ..... the plaintiff has hyper-pigmented scars which are ugly and unsightly. The wrist ankle has a deviation which has degenerative changes in life later.**

**Taking all factors into account, I assess general damages for pain and suffering and discomfort at Kshs. 700,000/=.”**

Dr. Otiato's medical report was prepared two and half months after the accident while that of Mr. Kondwawwala was prepared about 3 years and 3 months from the date of the accident. Mr. Kondwawwala made the following observations,

**“OPINION: Mrs. Kirigi sustained three main injuries – ruptured liver, lacerations on her fore head and a fractured left wrist. The ruptured liver was a serious injury but was well taken care of. The operative scar is sound and strong. Her occasional abdominal pains are likely to settle down. The lacerations on the forehead have left unsightly, ugly scars and they are**

permanent. The left wrist fracture has healed and the movements of the wrist have recovered fully. The slight deviation is of no significance. However, the old X-rays show that the fracture involved the wrist joint. There is therefore a possibility of a mild degenerative changes in that joint later on in life.”

The cited cases included Nairobi HCCA No. 65 of 1984 Lewis Kimani Wainyaki vs. Jean Susan and another where an award of Kshs. 290,000/= general damages was made for a ruptured liver with haemorrhage. In HCCC No. 2273 of 1989 Peter Kithikii Kitunguu vs. Josphat Paul Otieno an award of Kshs. 150,000/= general damages was made for fracture of the arm.

In HCCC No. 310 of 1991 Benjamin Kabwere Ngunyo vs. Hamisi Salim an award of Kshs. 300,000/= was made for head injuries with concussion. See also HCCC No. 2427 of 1990 Agnes Makinga vs. Stephen Njuguna Gatuai where the plaintiff sustained a fracture of left humerus and a ruptured spleen both requiring operation. The court awarded Kshs. 200,000/= in November, 1993.

A combination of injuries sustained and awards made in different cases placed before the learned trial magistrate, would appear to have justified the award made therein. Going by the assessment given by the last medical report prepared by Mr. Kondwawwala and considering that some pain and deficiencies were still evident three years after the accident, I am persuaded that the award was not inordinately high to attract the intervention of this court. The trial court approached the subject by applying the correct principles and I have no reason therefore to interfere with that award.

On special damages the issue of stamp duty was raised in the submissions. The plaintiff was never questioned during the trial about the issue and submissions can never take the place of evidence. It is a cardinal requirement that special damages must be specifically pleaded and strictly proved. The receipts produced by the plaintiff met the standard required in law. There is no merit in that ground. The end result is that this appeal is dismissed with costs to the respondent.

*Dated, signed and delivered at Nairobi this 20th day of March, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**