



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 44 OF 2013**

**GERALD WACHIRA KIMOTHI.....1<sup>ST</sup> APPELLANT**

**JOHN MUGO WAITHAKA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DAVID WACHIRA WAMBUGU.....RESPONDENT**

**(Being an appeal herein from the judgment of Hon. Wambilyanga (SRM) in Nyeri CMCC No.19 of 2012 delivered on 6<sup>th</sup> August, 2013)**

**JUDGMENT**

**FACTS**

1. The accident occurred on the 24/04/2010 along the Nyeri - Mukuruweini road; the respondent had boarded the appellants motor vehicle registration number KAQ 386D as a fare-paying passenger; when the brakes of the motor vehicle failed causing it to veer of the road, it hit a culvert and overturned;
2. He was treated at Mukuruwe-ini Hospital and Consolata Hospital; the medical report from the latter hospital indicates that the respondent suffered soft tissue injuries arising from a road traffic accident. According to the P3 Form, the respondent suffered blunt soft tissue injuries to the neck with tenderness, blunt trauma to the chest with tenderness and blunt trauma to the abdomen.
3. The appellant was sued as the owner motor vehicle for the injuries the respondent sustained resulting from the accident;
4. The respondent herein pleaded the following injuries in his plaint filed on 27<sup>th</sup> January, 2012:-
  - (i) Right side neck pain and tenderness;
  - (ii) Right lateral chest pain and tenderness on palpitation
  - (iii) Pain and tenderness left thigh.
5. The respondent was awarded damages in the sum of Kshs.300,000/-.
6. The appellants being dissatisfied with the trial Court's judgment on quantum filed this appeal and seek to set it aside; the appellants listed four (4) grounds of appeal in the Memorandum of Appeal dated the 29<sup>th</sup> May, 2013 which are as summarized hereunder;
  - (i) The damages were too high in view of the circumstances;
  - (ii) The trial court failed to consider the appellants submissions on quantum;
  - (iii) The trial court erred in its finding on quantum;
  - (iv) The trial court failed to consider conventional awards for quantum and general damages in similar cases.
7. The parties disposed of the appeal by way of written submissions which were filed and exchanged between the parties; hereunder are the rival submissions made by the respective counsels for the appellants and the respondent;

## **APPELLANTS SUBMISSIONS**

8. The appellants contend that the trial courts finding was based on a misapprehension of the law, facts and evidence in view of the injuries sustained by the respondent;
9. That it was trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries and comparable awards; case law relied on **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013] eKLR**;
10. The award by the trial court was not premised on any quoted authority to justify the said award in the light of the injuries sustained by the respondent; the award of Kshs.300,000/- was inordinately high compared to the injuries suffered and was founded on wrong principles;
11. The court was invited to consider the following authorities and awards;

(i) **Channan Agricultural Contractors Ltd vs Fred Barasa Mutayo [2013] eKLR**; the respondents were injuries to the chest, cut wounds on the head and left leg; summarized as moderate soft tissue injuries; the trial court awarded Kshs.250,000/- as general damages; reduced to Kshs.150,000/- on appeal;

(ii) **George Kinyanjui t/a Climax Coaches & Anor vs Hussein Mahad Kuyale [2016] eKLR**; the trial court made an award of Kshs.650,000/- for soft tissue injuries sustained to the chest, neck, knees and loss of two teeth; on appeal the award was set aside and reduced to Kshs.109,890/-;

(iii) **Dickson Ndungu Kirembe vs Theresia Atieno & 4 Others [2014] eKLR**; the 1<sup>st</sup> respondents injuries were wellings to the neck, tenderness all over the abdomen and back; the trial court awarded Kshs.255,000/-which were reduced to Kshs.127,500/- on appeal;

The 2<sup>nd</sup> respondent sustained injuries to the chest, neck, back, lower limbs, shoulders and had facial lacerations; the trial court awarded Kshs.350,000/- which award was set aside on appeal and was reduced to Kshs.170,000/-;

The 5<sup>th</sup> respondent herein sustained multiple cuts on both legs anterior aspect, tenderness on the chest and bruises on the hands; the injuries were nearly similar to the 1<sup>st</sup> respondents; the trial courts award of Kshs.450,000/- was held to be inordinately high and was reduced on appeal to Kshs.150,000/-;

(iv) **Purity Wambui Murithi vs Highlands Mineral Water Company Ltd [2015] eKLR**; the respondent suffered injuries to her left elbow, pelvic region, lower back and left knee due to an industrial accident; the trial court awarded Kshs.700,000/- was set aside on appeal and substituted with a sum of Kshs.150,000/-;

12. The appellants pray that this Court reverses the decision of the lower Court and that the respondent be awarded a sum between Kshs.80,000/= Kshs.100,000/= as damages; and rely on the aforesaid comparable authorities and awards in support of their prayer;

13. The appellants urged the court to allow their appeal.

## **RESPONDENTS SUBMISSIONS**

14. In his submissions to the trial Court, the respondent relied on the case of **Catherine Wanjiru Kingori & Others vs Gibson Theuri Gichubi** – Nyeri High Court Civil Case No. 320 of 1998 wherein the 1<sup>st</sup> plaintiff is described as having suffered injuries to the left ankle, legs and injuries to the chest; Hon.Khamoni J awarded general damages in the sum of Kshs.300,000/=.

15. The respondent herein cited the same authority in the lower court in his submissions and seeks to rely on it in this instant appeal; and submitted that the sum was not inordinately high and that the trial court was guided and bound by the decision of the superior court;

16. The respondent prayed that the appeal be dismissed with costs.

## **ISSUES FOR DETERMINATION**

17. After reading the written submissions filed by the respective Counsels together with the annexed authorities, the only issue found and framed for determination relates to whether the award made for general damages should be disturbed;

## **ANALYSIS**

18. For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in the case of **Butt vs Khan (1977) 1KAR** where Law JA stated that

*“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”*

19. The respondent herein sustained soft tissue injuries which have completely healed; they did not occasion him any permanent disability and have not prevented him from performing any gainful employment;

20. The respondent relied on the case of **Catherine Wanjiru Kingori & Others vs Gibson Theuri Gichubi** – Nyeri High Court Civil Case No. 320 of 1998; this court has had occasion to peruse the said authority at length and has noted that there is no proper description of the injuries sustained by the 1<sup>st</sup> plaintiff therein. One cannot ascertain the degree of severity of the said injuries therein therefore making it difficult to ascertain how the award in the sum of Kshs.300,000/= as general damages was arrived at;

21. The learned trial magistrate awarded Kshs.300,000/= as general damages at the trial but there was no reasoning given for this award; and this court finds with due respect that the learned magistrate's award was inordinately high in light of the evidence on injuries sustained by the respondent.

22. In consideration of the submissions filed in this appeal, the medical report and P3 Form produced before the trial court, this court finds that the award given by the trial court, at the time, was inordinately high in the circumstances;

23. Having taken into consideration the decisions on the comparative injuries and awards referred to hereinbefore in the appellants submissions it is this courts considered view that an award of Ksh.150,000/= would be adequate compensation to the respondent; accordingly the award in the sum of Kshs.300,000/= is hereby set aside and substituted with the sum of Ksh.150,000/=.

24. As such, this ground of appeal is hereby allowed.

#### **FINDINGS AND DETERMINATION**

25. The appeal is found to have merit and it is hereby allowed.

26. The award given by the trial court, at the time, is found to be inordinately high in the circumstances and warrants to be interfered with.

27. The judgment of the trial court on quantum is hereby set aside and substituted with an award for damages in the sum of Kshs.150,000/- plus costs and interest thereon at court rates.

28. Each party shall bear its own costs of the appeal.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 19<sup>th</sup> day of April, 2018.**

**HON.A.MSHILA**

**JUDGE**