



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 20 OF 2017**

**MOGAKA SYDNEY T/A KENYA BUS SERVICES.....APPELLANT**

**VERSUS**

**FAITH NDUNGE NYUNDO.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Maseno PMCC NO.226 of 2016 by Hon. D.A.Okundi (SPM) dated 19.5.16)**

**JUDGMENT**

**1. FAITH NDUNGE NYUNDO (*hereinafter referred to as respondent*) sued MOGAKA SYDNEY T/A KENYA BUS SERVICES (*hereinafter referred to as appellant*), in the lower court, claiming damages for injuries she suffered on 20.8.11 when appellant's motor vehicle registration number KBD 001 V Isuzu Bus (*hereinafter referred to as the bus*) that she was travelling in was involved in an accident due to the negligence of the driver as a result of which she was injured.**

**2. Defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.**

**3. Judgment on liability was entered by the consent of parties at 80:20% in favor of the respondent as against the appellant. In a judgment dated 19.5.16, the learned trial magistrate awarded the respondent general damages in the sum of Kshs. 450,000/- which sum was reduced to Kshs. 360,000/- after apportionment of liability.**

**The Appeal**

**4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 20.1.18 filed a Memorandum of Appeal which set out 2 grounds of appeal to wit:**

***1. The learned trial magistrate erred in law and fact in awarding the plaintiff Kshs. 450,000/- as general damages which amount is so manifestly excessive as to constitute an erroneous estimate of the loss suffered by the plaintiff***

***2. The learned trial magistrate erred in law and fact by failing to analyze and compare the precedents cited by both counsels***

**SUBMISSIONS BY THE PARTIES**

**5. On 12<sup>th</sup> April, 2018, this court directed that the appeal be canvassed by way of written submission which the parties dutifully filed.**

## **Appellant's submissions**

6. As regards liability, appellant urged the court to find that the award of damages was excessive and reduce it to Kshs. 250,000/-. He cited the following authorities: -

- i. **Jacob Omulo Onyango & 2 others v Jubilee Jumbo Hardware Limited [2017] eKLR**, where a 2<sup>nd</sup> plaintiff suffered injuries to the head, chest, dislocated right shoulder and bruises on his hand and 3<sup>rd</sup> plaintiff suffered head injury with torn wound around the scalp, on occipital region, dislocation left shoulder, multiple bruises on the trunk, blunt chest injury, dislocation lumbar spine, deep cut right lower limb with multiple lacerations, dislocation of the pedis with damage to the nerve and sprained right hand and each was awarded Ksh. 220,000/-
- ii. **Samuel Muthama v Kenneth Maundu Muindi [2009] eKLR** where the court awarded Kshs. 380,000/- for blunt injury to the head with loss of consciousness for about four hours, Blunt injury to the neck, Cut on the scalp, Injury to the right eye with periorbital oedema, Blunt injury to the chest and back, Blunt injury to the low back with spondylolisthesis L2 (compression of the L2 vertebra) and Small cuts on the dorsum of the right hand.

## **Respondent's submissions**

7. Respondent submitted that plaintiff suffered serious injuries and that the sum awarded was fair compensation.

## **Analysis and Determination**

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Mbogo v Shah & Another (1968) EA 93** and **Selle & Another v Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court. This appeal revolves quantum.

9. Doctor Okombo's report shows that respondent suffered the following injuries sustained:

- Injury to the chest
- Injury to right hand
- Injury to back with compression of spine at L2

The injuries healed with scars on left shoulder, left elbow, right elbow, right knee and left knee.

10. At the lower court, respondent asked for Kshs. 800,000/- and cited In **Mathew Zablon Shigadi vs Muloya Construction Ltd, Mombasa HCCC No. 595 of 1988** where the Court in awarding Kshs 390,000/- as general damages took into account the fact that the Plaintiff's spine developed post-traumatic osteoarthritis.

11. Appellant offered Kshs. 80,000/- and cited **Sturrock Shipping (K) Ltd v Mnengwa Moka Maselwa [2007] eKLR** where plaintiff was awarded Kshs. 180,000/- for head injury-concussion; contused wound left side and contusion on the chest and pelvis.

12. The principle of law on whether a court on appeal can disturb the quantum of damages was well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727** . At page 730 Kneller J.A. said: -

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing***

*the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*

13. I have considered the record of appeal and the submission by both parties. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered which the advocates here did not. The learned trial magistrate in her wisdom relied on trial court in her own ***Samuel Muthama v Kenneth Maundu Muindi (Supra)*** whose injuries were more serious than those suffered by the respondent herein. On that ground, I find that the learned trial magistrate erred.

#### **DISPOSITION**

13. Accordingly, I allow this appeal only to the extent of setting aside the award of damages of Kshs 450,000/= and substituting it with an award of damages of Kshs 300,000/ - which is subject to the agreed liability ratio of 80:20%. Appellant is also awarded 80% costs to the appeal.

**DATED, DELIVERED AND SIGNED THIS 31<sup>st</sup> DAY OF July 2018**

**T. W. CHERERE**

#### **JUDGE**

#### **Read in open court in the presence of-**

<b>Court Assistant</b>	- Felix
<b>For Appellant</b>	- N/A
<b>For Respondent</b>	- Ms. Omolo