



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 218 OF 2015

TIPAPE OLE NKOLEPO.....APPELLANT

VERSUS

MAINA PATRICK.....1ST RESPONDENT

SAMSON MUTUNGI KYALO.....2ND RESPONDENT

(Being an appeal from the judgment of the Hon. Mary A. Ochieng', SRM at Kajiado Law Courts in CMCC No. 136 of 2014 dated 15th April, 2015)

J U D G M E N T

1. **Tipape Ole Nkolepo**, the Appellant herein, filed a compensatory suit before the Kajiado Chief Magistrate's Court against **Maina Patrick** and **Samson Mutungi Kyalo**, the 1st and 2nd Respondents respectively, for the injuries he alleged he suffered when he was knocked down by motor vehicle Registration No. KBP 077W on 16th January, 2014 while he was lawfully walking as a pedestrian along Loitokitok – Emali Road.

2. The Respondents filed a defence to deny the Appellant's case.

3. The suit was heard and determined in favour of the Appellant and against the Respondents as follows: -

i) **Liability was apportioned by consent at 30%:70%**

ii) **General and Special Damages Kshs.450,000/-**

Less 30% contribution (Kshs.135,000/-)

Net Total Kshs.315,000/-

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iii) **Costs and interest.**

4. Being aggrieved, the Appellant preferred this appeal and put forward the following grounds: -

a) The learned magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing damages on pain and suffering and thereby arrived at a very low award on General damages.

b) The learned Magistrate erred in law in failing to properly evaluate the evidence on record, in particular the evidence on permanent incapacity of the appellant and thereby erroneously awarded a low award on general damages.

c) The learned trial magistrate misdirected herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgment on general damages.

5. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submission.

6. I have re-evaluated the case that was before the trial court and also considered the rival written submissions.
7. Though the Appellant put forward a total of three (3) grounds of appeal, those grounds revolve around the question of quantum.
8. It is the submission of the Appellant that the learned principal magistrate erred when she made an award on general damages which was inordinately low and this court was urged to revise upwards the figure awarded.
9. It is the submission of the Respondent that the trial Principal Magistrate considered the relevant factors in assessing damages therefore, this court should not interfere with the award on general damages.
10. I have carefully examined the factors the learned Principal Magistrate took into account in assessing damages. The record shows that the trial magistrate noted that the Appellant suffered a segmental fracture to the left tibia, fracture to the neck of the scapula and a cut wound on the scalp and forearms.
11. The learned Principal Magistrate stated in her judgment that she took into account the injuries the appellant sustained and the authorities submitted to her.
12. She also stated that she took into account the inflationary trends and the high cost of living and assessed general damages at Kshs.450,000/- as being adequate compensation.
13. When determining the questions touching on quantum, this court is guided by various principles before interfering with an award on damages.
14. Those principles were restated in the case of **Butt Vs Khan [1981] KLR 349**, where the court of Appeal held *inter alia*: -

“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 a judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
15. The record shows that the Respondents merely suggested that a sum of Kshs.200,000/- was sufficient but they did not supply any decided cases to support their proposal.
16. The Appellant on the other hand beseeched the trial court to award him Ksh.1,500,000/- and supplied the following two authorities.
17. First, is the case of **Victoria Veneziani Vs. A. a Kawir Transporters & another [2009] eKLR**, in which the plaintiff was awarded Kshs.700,000/- as damages for pain and suffering. In this case, the Plaintiff is said to have suffered a double fracture of the right leg (tibia and fibula), a fracture of the scaphoid, dislocation of the sternum and a deep cut on the face.
18. Secondly, the Appellant also relied on the case of **Ahmed Mohamed Vs Abdhulhafidh M. Banragah, (Mombasa HCCC No. 319 of 2001) (UR)** in which this court awarded Kshs.750,000/- for a fracture of the left tibia and fibula.
19. The first case was decided in 2009 while the second one was decided in 2002. It is obvious that the aforesaid awards were made more than eight years ago. The injuries were near similar to those obtaining in this appeal.
20. In the past decisions it is clear that an award for near similar injuries were between Kshs.700,000/- and Kshs.750,000/-. The learned Principal Magistrate made an award of Kshs.450,000/-.
21. In my view, the figure awarded is apparently low. Had the inflationary trends been taken into consideration, an award of more than Ksh.750,000/- would have been made.
22. In the circumstances of this case, I am convinced that this court is entitled to interfere with the award.
23. I am satisfied that an award of Ksh.900,000/- is sufficient and reasonable for the injuries the Appellant sustained.
24. In the end, the appeal as against quantum is allowed. Consequently, the award of Kshs.450,000/- for general damages is set aside and is substituted with an award of Ksh.900,000/-.
25. On appeal therefore, the Appellant is entitled to the following awards:-

i)	General damages	Kshs.900,000/-
ii)	Special damages	Kshs. 500/-
	Less 30% contribution	<u>(Ksh.270,150/-)</u>
	Net Total	Kshs.630,350

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- iii) *Cost of the Appeal.*
- iv) *Costs of the suit based on the award on appeal.*
- v) *Interest at courts rates from the date of judgment before the trial court until full payment.*

Dated, signed and delivered at Nairobi this 28th day of September, 2018.

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J K SERGON

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondent*