



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 461 OF 2015**

**CHARLES GICHUKI.....APPELLANT**

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

**EMILY KAWIRA MBUBA.....1<sup>ST</sup> RESPONDENT**

**CHABARI ASFORD.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgement of Hon. M. Chesang, Resident Magistrate**

**delivered on 8<sup>th</sup> day of September 2015 in Nairobi CMCC No. 2409 of 2014 )**

**JUDGEMENT**

1. Emily Kawira Mbuba, the 1<sup>st</sup> respondent herein, filed a compensatory suit against Chabari Asford and Charles Gichuki, the 2<sup>nd</sup> respondent and the appellant respectively for the injuries she sustained in a road traffic accident which occurred on 23.3.2014 along University Way. The 2<sup>nd</sup> respondent and the appellant defended the suit. Hon. Maisy Chesang, learned Resident Magistrate heard the suit and in the end she gave judgment in favour of the 1<sup>st</sup> respondent and awarded her a sum of ksh.400,000 as general damages.

2. The appellant was dissatisfied with the award on quantum and was therefore prompted to file this appeal whereof he put forward the following grounds:

**i. THAT the learned trial magistrate erred in fact and in law in holding the 2<sup>nd</sup> defendant 100% liable without any compelling and clear evidence.**

**ii. THAT the learned trial magistrate erred in fact and in law assessing general damages at ksh.400,000.00 which was excessive in light of the injuries sustained by the respondent and the evidence material placed before the court.**

**iii. THAT the learned trial magistrate erred in law and in fact by relying wholly on the evidence adduced by the plaintiff/respondent and disregarding the 2<sup>nd</sup> defendant's/appellant's submissions on quantum.**

**iv. THAT the learned trial magistrate erred in law and in fact by failing to properly assess the degree of injuries that the plaintiff/respondent sustained in line with the paramount provisions of The Insurance (Motor Vehicle Third party Risks) Act cap 405 of the Laws of Kenya and available on judicial authorities on similar injuries.**

**v. THAT the learned trial magistrate erred in law and fact by failing to consider the appellant's/2<sup>nd</sup> defendant's defence.**

**vi. THAT the learned trial magistrate erred in law and fact in that she took into account irrelevant factors and left out a relevant one and proceeded to award an amount which is inordinately high that it must be a wholly erroneous estimate of the damages.**

3. When the appeal came up for hearing, learned counsel recorded a consent order to have the appeal disposed of by written submissions. I have carefully perused the grounds of appeal and the rival submissions and it is apparent that the appellant is basically challenging the award on quantum.

4. It is the submission of the appellant that the award of ksh.400,000 is inordinately high and should therefore be adjusted downwards. The appellant argued that the award is not commensurate with comparable awards.

5. The appellant pointed out that comparable injuries should attract comparable awards. The appellant further argued that the learned Resident Magistrate did not consider the relevant factors and instead took into account irrelevant factors which led to the pronouncement of an excessive award. The appellant was of the view that an award of ksh.100,000 would have been a reasonable award for the soft tissue injuries the 1<sup>st</sup> respondent suffered.

6. The appellant cited the following cases in support of his proposal to convince this court to set aside the award of ksh.400,000 and substitute with an award of ksh.100,000/=

**i. PHYLIS KAWINZI KITHOKA VS GRACE WAYUA MWANZA (2017) eKLR the respondent had sustained posterior neck pains, pain and tenderness of the lower back as well as pain and tenderness of the left foot on stepping and swelling around the left ankle joint. She had been awarded ksh.90,000 in general damages by the trial court which was upheld by Justice P. Nyamweya on appeal on 14<sup>th</sup> February 2017.**

**ii. JOHN NDUNGU VS MICHAEL W. OCHIENG (2015) eKLR**

**The injuries sustained here were inclusive of blunt trauma to the scalp, neck, chest, spinal column, left arm and lower limb.**

**The respondent was also tender in those regions. The injuries were said to have been severe but they continued to heal and based on that information, a general damages award of ksh.100,000 was made on 1<sup>st</sup> October 2015.**

**iii. PHILIP MUSYOKA MUTA VS. STEPHEN KIOKO MUSA (2014) eKLR**

**In this appeal the trial magistrate had awarded ksh.180,000 as general damages for the following injuries:**

- **Bruises on the face,**
- **Blunt injury to the neck and throat,**
- **Blunt injury to the chest**

**Which was award was set aside and substituted with one of ksh.100,000 on 22<sup>nd</sup> May 2014. Reasonably, that was four years ago and a more recent case is as hereunder;**

**iv. MUMIAS SUGAR COMPANY LTD VS JULIUS ABUKO SHIBIA (2015) eKLR**

**In this case, an award of ksh.200,000 was set aside for a lower one of ksh.100,000 for soft tissue injuries namely blunt injuries to the head and neck, the right shoulder and the back.**

This award was made in February 2015.

7. The 1<sup>st</sup> respondent urged this court to dismiss the appeal on the basis that the award of the trial court is reasonable and not excessive nor extravagant or oppressive. The 1<sup>st</sup> respondent further argued that the trial court was guided by previous awards for similar injuries. The 1<sup>st</sup> respondent relied on the following cases to support the retention of the award.

**i. LUCY NTBUKA –V- BERNARD MUTWIRI & OTHERS (2017) eKLR where the plaintiff was awarded ksh.500,000/=**

**ii. VINCENT CHERUIYOT RONO –V- MOMBASA MAIZE MILLERS LTD (2006) eKLR where the plaintiff was awarded ksh.400,000/=**

**iii. FRANCIS OCHIENG & ANOTHER –V- ALICE KARANJA (2015) eKLR where the plaintiff was awarded ksh.350,000/=**

8. The principles to be considered by the appellate court in determining an award given by a trial court were restated in **Kemfro Africa Ltd t/a Meru Express & Another vs= A. M. Lubia & Another (no. 2) (1987) KLR 30** as follows *inter alia*:

**“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant 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 damages.”**

9. Having re-evaluated the case that was before the trial court and having considered the rival submissions, it is not in dispute that the 1<sup>st</sup> respondent suffered the following injuries:

- a. Blunt injury (tender) face-right side
- b. Blunt injury (tender) shoulders.
- c. Blunt injury (tender) chest anteriorly
- d. Blunt injury (tender)left thigh

10. The aforesaid injuries are soft tissue injuries. The trial Resident Magistrate in awarding the 1<sup>st</sup> respondent a sum of ksh.400,000/= as general damages, stated that she took into consideration the injuries sustained, the submissions of the parties and the authorities cited. She further pointed out that the appellant had proposed inordinately low figures by relying on cases decided more than 10 years ago and in respect of injuries which were not comparable. She formed the opinion that the awards proposed by the 1<sup>st</sup> respondent were also high and the cases cited were not similar.

1. I have re-evaluated the submissions made before the trial court.

It is apparent that the 1<sup>st</sup> respondent proposed to be awarded a sum of ksh.600,000/=. She relied on two cases. The first case is that of **Lucy Ntibuka =vs= Bernard Mutwiri & others (2005) eKLR** where the claimant was awarded ksh.500,000/=. In this case, it is noted that the claimant had suffered soft tissue injuries which had fully healed and the claimant occasionally suffered headaches on and off. The injuries were noted as head injuries, lacerations on the lateral side of the eye and lacerations and cut wound on the left arm.

12. The second case is that of **Vincent Cheruiyot Rono =vs= Mombasa Maize Millers Ltd (2006) eKLR** in which the claimant was awarded ksh.400,000/= for a deep cut on the face, multiple pain on both legs, arms and shoulders, abrasion on the lower chin, back ache and chest pain.

It is clear from the above cited cases that the claimants suffered soft tissue injuries.

13. On the other hand the appellant submitted that an award of ksh.60,000/= was sufficient compensation for general damages. The appellant argued under Schedule 39 of the Insurance (Motor Vehicle Third Party Risks) Amendment where the degree of disablement for soft tissue injuries is 2% of ksh. 3million which translated to ksh.60,000/=. The appellant referred to the case of **Samuel Mburu N. Ngaari & 4 others =vs= Wangiki Wangare & Another Nairobi H.C.C.C. no. 173 of 2008 (unreported)** in which the court awarded the claimant ksh.50,000/= for sustained abrasions and bleeding which were basically soft tissue injuries.

14. It is apparent from material placed before this court that the authorities cited by the 1<sup>st</sup> respondent are in respect of more serious injuries than those obtaining in this case.

15. On appeal, the appellant introduced new authorities which the trial magistrate had no benefit to refer before assessing damages. This court is reluctant to take into account decisions which were never cited before the trial court to impugn the decision of the trial magistrate on assessment of damages. I will therefore consider the decisions cited by the parties before the trial court.

16. The appellant cited **Samuel Mburu N. Ngaari & 4 others =vs= Wangiki Wangare & Another (supra) where ksh.50,000/=** was awarded for abrasions and bleeding. The injuries in the cited authority appear to be less serious than those obtaining in this appeal.

17. Upon weighing the competing arguments and the authorities relied upon, I am convinced that the award of ksh.300,000/= is reasonable and commensurate with the injuries suffered.

18. In the end the award of ksh.400,000/= given by the trial court is set aside and is substituted by an award of ksh.300,000/=.

19. In the circumstances of this appeal, I think a fair order on appeal is to order, which I hereby do, that each party bears its own costs of the appeal. The respondent to have costs of the suit based on the award on appeal. The award to attract interest at court rates from the date of judgment before the trial court until full settlement.

**Dated, Signed and Delivered in open court this 30<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents