



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CIVIL APPEAL NUMBER 5 OF 2016**

**SAMSON MACHARIA MWANGI .....1<sup>ST</sup> APPELLANT**

**FRANCIS KAMAU MWANGI ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**ABDIFATAH MOHAMED KHALIF ..... RESPONDENT**

**JUDGMENT**

The appeal herein is specifically against the decision of quantum on general damages. The amount awarded in general damages to the plaintiff is kshs.800,000/- of which the appellants alleges in their memorandum of appeal that it is excessive and in want of support by law and facts.

The foundation of this suit by the plaintiff came about out of a Road Traffic Accident in which the plaintiff was involved in on 18.10.2010. That day he boarded a bus from Lodwar, registration number KBG 790E, heading to Kitale. When they reached Sebit at 2.00am the bus lost control out of high speed at which it was driven, and overturned. The plaintiff was injured as a result. He was rushed to Cherangani Hospital in Kitale. He was admitted there from 18<sup>th</sup> to 19<sup>th</sup> of October, 2010. He had suffered a fracture of nasal bone, bruises on the face with cuts and lower spine, of which was referred to as epiduritis at level of vertebra 7 and 2. He later on travelled to Russia for studies and on 20.4.2011 he was hospitalized at Sarator University Hospital in Russia and treated for spondylitis, thoracic vertebra 7 and 2. He was discharged on 22.6.2011. The said injuries were as a result of the said accident. The Respondent is himself a doctor and indicated at the time of offering evidence that he was still on medication as he had not completely healed. He was unable to perform simple procedures for surgical as his right hand was weak and shaking. His lower back was still in pain and could not use normal ancient toilets. Doctor Samuel Chege Njenga indicated that he was incapacitated to 45%.

The plaintiff in his submissions proposed a sum of kshs.2,000,000/- in general damages and cited two authorities as follows:-

**1. James Ngugi Gakunju versus William Njau Kamau, Nairobi civic case number 2561 of 1998 eKLR.** In this case the award was 400,000/- for multiple soft tissue injuries and a fracture of the nasal bones.

**2. Douglas Mwangangi versus Joseph Mundia Kuria, Nairobi HCCC No. 1853 of 1998 eKLR** in which the court awarded a sum of 443,463/- in general damages for injuries of the nasal bones.

The defendant on their part proposed a minimal figure of kshs.90,000/- and relied on the cases of **Pamela Ombiya Okinda versus Kenya Bus Services Limited HCCC Number 1309 of 2002.** In this case the

plaintiff had suffered a blunt injury to the head without loss of consciousness, blunt injury to the neck, a cut to the throat, blunt injury to the left shoulder and back, blunt injury to the chest, blunt injury to the forearm and deep penetrating wound on the same leg. An award of kshs.150,000/- in general damages was sustained.

In the other case of *Moses Gerald Odongo versus Julius Birundu Mokaya, Civil Appeal Number 32 of 2002* where the plaintiff suffered a cut wound on the lower hip, loosening of two teeth and injuries on the chest and lower limbs, the court sustained an award of general damages of 50,000/-.

I have considered the pleadings, evidence adduced, and submissions by both parties. While I mostly agree with the trial court in its consideration in arriving at an award of kshs.800,000/- in general damages, there is one aspect where the court erred in its finding. The plaint by the plaintiff dated 30<sup>th</sup> November, 2010, in paragraph 7 particularizes injuries he sustained as follows:-

- i. Head bruise on the nasal bridge
- ii. Soft tissue injuries on the head.
- iii. Soft tissue injuries on the face
- iv. Fracture nasal bridge
- v. Soft tissue injuries behind the right ear
- vi. Soft tissue injuries on the right shoulder
- vii. Deep cut wound on the left wrist joint
- viii. Soft tissue injuries on the left leg
- ix. Soft tissue injuries on the left knee joint.

The alleged back injury of which was disclosed by way of evidence, to the effect that the plaintiff suffered spondylitis, thoracic vertebrae and epididitis at level of vertebra 7 and 2, were not specifically pleaded.

In the case of *Malawi Railways Limited versus Nyasulu [1998] MWSC*, the Court stated as follows in relation to pleadings:-

***“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings ..... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he had to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ‘Any Other Business’ in the sense***

***that points other than those specific may be raised without notice.”***

Given the said finding, it is well pronounced that the said back injuries of which were not specifically pleaded amounts to “**Any Other Business**”, and ought not to have been considered by the trial magistrate in award of general damages.

I have as well considered the holding in the case of *Shabani versus City Council of Nairobi (1985) KLR 516*. Here the court held that:-

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or is a misapprehension of the evidence.”***

In this case, considering the back injuries which were not pleaded is a wrong principle in law.

I will therefore right the wrong by deducting an amount which in my view could have been awarded in consideration of the said back injuries. The amount in my view is fairly 250,000/-. I therefore vary the award in general damages to 550,000/-. To the said extent the appeal succeeds. Cost goes to the appellant.

Judgment read and signed in the open court in presence of Mr. Ambani holding brief for M/S Adhiambo for the Appellants and in the absence of the Respondent this 31<sup>st</sup> day of January, 2017.

**S. M. GITHINJI**

**JUDGE**