



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 302 OF 2013

BETWEEN

1. RICHARD KIRIMI

2. SILAS MUTHURI MUGUONGO.....APPELLANTS

AND

MERCY KATHAMBI.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon .D. Wangechi, Ag. SRM, in Tigania SRMCC
No.114 of 2006 dated 29th August 2013).*

JUDGMENT

The respondent herein, **MERCY KATHAMBI**, was the plaintiff in the Tigania Senior Resident Magistrate's Court Civil Case Number 114 of 2006. She had filed a claim for general and special damages after motor vehicle KAC 242 S which she was travelling in had a self involving accident. The second appellant was the driver of the said motor vehicle at the material time while the first appellant was the registered owner.

On 8th July 2013 the parties through their respective counsel informed the court that they had agreed liability to be apportioned at 100% against the appellants. The court therefore proceeded to with the trial for the purposes of awarding damages. The award was as follows:

(a) General damages Kshs.800 000/=

(b) Special damages Kshs.3 200/=

The appellants were aggrieved by the award of the general damages and filed this appeal. In the Memorandum of Appeal the appellants set out eight grounds of appeal can summarized into one ground as follows:-

The learned trial magistrate erred in law and in fact by giving an excessive award in view of the injuries suffered.

The respondent prayed that the award of the trial magistrate be upheld.

When the matter came for directions on 10th February 2011, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and

exchanged .

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

MERCY KATHAMBI, the respondent herein testified that after she was involved in the accident on 22nd August 2003, she sustained injuries and was taken to hospital unconscious. She was admitted in Meru General Hospital for one week. she was transferred to Chogoria P.C.E.A Hospital where she stayed up to 9th December 2003 when she was discharged. This was a period of about 3¹/₂ months hospitalization.

Dr. JAMES GITONGA (PW1) in his evidence confirmed that the respondent was semi comatose (unconscious) when she was taken to Meru General Hospital. He further said that she sustained the following injuries:

- (a) Injuries on both upper limbs on the back and on the left region.
- (b) Fracture of the right radius.
- (c) Haematoma over the left hip area.

The following treatment was given:

- (a) Application of the plaster of Paris on the right arm for six weeks.
- (b) Draining of the haematoma on the left hip.

At the time of examination, he said she complained of pain on the left hip joint on carrying a load and on long walk. When he examined her he found the following:

- (a) A scar on the left chin.
- (b) A scar with keloid on the right hip area.
- (c) a mal-union of the right radius fracture causing deformity of the right wrist joint compromising its functions as she is a right handed person.

His prognosis was that she is likely to suffer post traumatic osteoarthritis.

It is for these injuries the respondent was awarded Kshs.800 000/= which the appellants are contesting on allegations that it is too high.

The case of **KEMFRO AFRICAN LTD t/a MERU EXPRESS SERVICES LTD [1976]** sets out the principles to be applied by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court. The appellate court must be satisfied that the Judge (in this case the learned magistrate) in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

I have considered all the submissions and authorities cited by both parties in the lower court and in this appeal. The authorities relied upon by the appellants were more than ten years old and the injuries sustained thereon were not a severe as in the instant case. I have not been persuaded to interfere with the award of the learned trial magistrate. Consequently, the appeal is dismissed with costs to the appellant.

DATED at MERU this 28th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE