



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 490 OF 2014**

OMAR SAID.....1<sup>ST</sup> APPLICANT/APELLANT

KINUTHIA WILFRED WAWERU.....2<sup>ND</sup> APPLICANT/APELLANT

- V E R S U S -

GEORGE KARONGO KAMAU .....RESPONDENT

*(Being an appeal from the judgement of the Hon. C. Obulutsa (Mr).Ag Chief Magistrate delivered on the 21<sup>st</sup> October 2014 in CMCC 5130 of 2012)*

**JUDGEMENT**

1) George Karongo Kamau, the respondent herein, filed a compensatory suit before the Chief Magistrate's Court, Milimani Commercial Courts, against Omar Said and Kinuthia Wilfred Waweru, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively for the injuries he sustained as a result of a road traffic accident involving the 1<sup>st</sup> appellant's motor vehicle registration no. KBJ 322Y along Limuru Road near Belgium Embassy on 12.8.2010. The appellants filed a defence to deny the respondent's claim. The suit was heard and determined in favour of the respondent. The appellants were found wholly liable and the respondent awarded ksh.2,660,716 being special and general damages. The appellants were aggrieved hence this appeal.

2) On appeal, the appellants put forward the following grounds:

- 1. The learned trial magistrate erred in fact and in law in failing to consider the defendants' evidence which was clearly on record.***
- 2. The learned trial magistrate erred in law and in fact in awarding quantum on general damages of kshs.2,500,00 and special damages which is inordinately high in the circumstances***
- 3. It is proposed to ask the court for the following orders that:***
  - a. This appeal be allowed with costs.***
  - b. The whole judgment against the defendants delivered by Hon. C. Obulutsa (Mr) Ag. Chief Magistrate be set aside and the suit be dismissed with costs to the appellants.***
  - c. This honourable court be pleased to make such other and further orders as it may deem fit and just in the circumstances of the court.***

- 3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Being the 1<sup>st</sup> appellate court, I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions.
- 4) The grounds of appeal mainly turn on the twin issues namely: liability and quantum. It is the submission of the appellant that the learned acting Chief Magistrate erred when he found the appellants 100% liable for the accident yet the respondent had tendered evidence, which was not corroborated. The appellants pointed out that the accident involved multiple collision of motor vehicles registration nos. KVA 679, KBJ 322Y, KAR 069D, 40 UN 133K and KMCA 247W. The appellants have argued that the respondent did not disclose to the trial court in his evidence that there were multiple collision of many cars hence the trial magistrate should have treated the respondent's testimony with caution since the same contained gaps. The appellants further accused the learned ag. Chief Magistrate for failing to interrogate the issue touching on multiple collision which had not been sufficiently addressed or interrogated through evidence in –chief or by cross-examination. It is the appellants' averment that the trial magistrate ought to have found that the question of negligence had not sufficiently been proved as against the appellants.
- 5) It is argued that the respondent merely mentioned motor vehicle registration no. KBJ 322Y yet the accident involved more than one motor vehicle. The appellant pointed out that the driver to motor vehicle registration KVA 679 was blamed for the accident in the subsequent traffic case hence the trial magistrate should have been cautious in determining the question of liability. The respondent on the other hand is of the view that he discharged the burden of proof on the question of liability at the trial.
- 6) Having considered the rival submissions and having re-evaluated the case that was before the trial court, it is clear that the appellant was a fare paying passenger aboard motor vehicle registration no. KBJ 322Y. In the evidence he tendered before the trial court, the respondent stated that the driver of the motor vehicle he was travelling on veered to the other lane while speeding and failed to avoid a collision with an oncoming vehicle. The respondent said that he was seated next to the driver and witnessed the events preceding the accident. Kinuthia Wilfred Waweru, the 2<sup>nd</sup> appellant herein, who was also the driver of motor vehicle registration KBJ 322Y did not turn up for the hearing to controvert the respondent's evidence. The trial magistrate therefore relied on the testimony of the respondent to determine liability. The respondent specifically stated that the 2<sup>nd</sup> appellant was solely to blame for the accident. The appellants did not present any evidence to assign contributory negligence on the respondent's part. The record shows that at some stage the appellants applied to enjoin the owner of motor vehicle registration no. KVA 697 as a third party. However, they abandoned their application when the suit came up for substantive hearing. The court was therefore not expected to prosecute the application on behalf of the appellants.
- 7) The appellants summoned the evidence of a police officer (DW1) who testified and blamed the driver of motor vehicle registration no. KVA 697. It was alleged that the driver of the aforesaid motor vehicle was convicted by a traffic court. The trial court cast doubt on the veracity of the evidence terming the same as hearsay. There was no way the trial magistrate could apportion liability on a stranger to the proceedings. The decision on liability cannot therefore be faulted.
- 8) On quantum, the trial court awarded the respondent ksh.2,500,000 and ksh.160,716 as general and special damages respectively. On appeal, the appellants only challenged the award for general damages for pain and suffering where the respondent was awarded ksh.2,500,000/=. It is the submission of the appellants that the aforesaid award is excessive, inordinately high and not commensurate with the injuries suffered.
- 9) The respondent on the other hand is of the view that the award is not excessive but appropriate in the circumstances. It is argued that the trial magistrate properly assessed the award taking into account all the relevant factors.
- 10) According to the medical report produced by Dr. Okoth Okere, the respondent sustained a fracture of the left femur with an amputation of the lower leg below the knee. The respondent also suffered profuse haemorrhage. The record shows that the respondent had asked to be paid ksh.3,000,000/=. He relied on

two authorities in which this court awarded between ksh,2,000,000/= and ksh,2,100,000/=. The appellants are of the submission that given the authorities relied upon by the respondent, the trial court was not justified to award a figure higher than what was awarded in other comparable cases. The appellants proposed the figure to be reviewed and scaled downwards.

11) I have perused the judgment of the trial court and it is clear that the trial magistrate found the proposal by the respondent of ksh.3,000,000/= to be on the higher side and that of the appellants of kshs.800,000/= to be on the lower side. The cases which were cited which I found to be relevant to this appeal are two. First, is the case of Jackson **Mutuku Ndeti =vs= A. O. Bayusuf & Sons Ltd (2007) eKLR** where this court awarded ksh.2,000,000/= as general damages for near similar injuries.

Secondly, is the case of **Daniel Kosgei Ngelechei =vs= Catholic Trustee Registered Diocese of Eldoret & Another (2013) eKLR** where this court awarded ksh.2,100,000/=

It is important to note that the first case was decided about 10 years ago in 2007, while the second case was decided four years ago. Taking into account the inflationary trends, I think an award of ksh.2,500,000/= in the circumstances cannot be said to be excessive nor inordinately high. Consequently the trial magistrate too come to the correct decision on quantum.

12) In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 23<sup>rd</sup> day of June, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

..... for the Respondent