



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 29 OF 2012**

**GEORGE KINYANJUI T/A CLIMAX COACHES.....1<sup>ST</sup> APPELLANT**

**EQUITY BANK LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HASSAN MUSA AGOI.....RESPONDENT**

***(Being an appeal from the original judgment of D. A. Alego, Principal Magistrate in Eldoret  
CMCC No. 693 of 2010 delivered on 6<sup>th</sup> March 2012)***

**JUDGMENT**

1. The 1<sup>st</sup> appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 6<sup>th</sup> March 2012. The appellant has lodged a memorandum of appeal dated 15<sup>th</sup> March 2012. The appeal relates only to quantum of damages. The liability of the appellant for negligence had been settled by consent in the lower court at the ratio of 90% to 10% in favour of the respondent.
2. The appellant contends that the learned trial magistrate erred by awarding the respondent general damages of Kshs 800,000. The appellant's case is that the award was exorbitant. The appellant contends that the learned trial magistrate misapprehended the medical evidence; and, applied wrong principles. The appellant also claimed that the trial court disregarded his final submissions. The appellant relied on written submissions filed on 28<sup>th</sup> September 2015.
3. The appeal is contested by the respondent. There is no cross-appeal. In brief written submissions filed on 26<sup>th</sup> October 2015, the respondent stated that the award of damages was proportionate to the injuries. The respondent referred to the medical report by Dr. S. Aluda at page 66 of the record. It showed that the respondent suffered severe injuries including two loose teeth; fracture of the left clavicle; and, fractures of the 4<sup>th</sup> and 5<sup>th</sup> left ribs. In a nutshell, the respondent's case is that the judgment of the lower court should be upheld.
4. On 27<sup>th</sup> October 2015, learned counsels for both parties informed the court that they were relying entirely on their written submissions. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
5. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have

neither seen nor heard the witnesses. See Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.

6. It is not contested that the respondent was injured in a road traffic accident on 9<sup>th</sup> May 2010. Liability was settled by *consent*. The respondent testified that he suffered the following injuries: two loose teeth; blunt trauma to the neck and chest; fracture of the left clavicle; fractures of the 4<sup>th</sup> and 5<sup>th</sup> left ribs; blunt trauma to the spinal column and right scapula area; and, dislocation of the left shoulder joint. PW2, Dr. Rono, testified that a bandage was placed to connect the clavicle while the fractures to the ribs were managed conservatively. The dislocation was reduced and a figure 8 applied. The respondent was given analgesics. He produced the discharge summary (exhibit 2).

7. PW3 was Dr. Samuel Aluda. His medical report is dated 15<sup>th</sup> May 2010 (exhibit 3). He confirmed the injuries. He said the injuries were fresh but continuing to heal. The pain was expected to decline with the use of analgesics. He said a full prognosis of the fractures would be made at a later date.

8. There is another report by Dr. Theuri dated 15<sup>th</sup> March 2011 (defence exhibit 1). It is a second opinion obtained by the appellant. The report was produced by *consent*. Dr. Theuri found *no* dental injury. The doctor noted that the respondent suffered a shoulder dislocation, fracture of the left clavicle and fractures to the 4<sup>th</sup> and 5<sup>th</sup> ribs mid shaft. I am thus satisfied that the respondent suffered fractures and multiple *soft tissue* injuries.

9. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Kemfro Africa Limited & another v Lubia & another [1987] KLR 30, Akamba Public Road Services Ltd v Omambia Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

10. From the respondent's testimony and that of PW2 and PW3, and Dr. Theuri's report, the respondent suffered severe injuries which included fracture of the left clavicle; fractures of the 4<sup>th</sup> and 5<sup>th</sup> left ribs mid shaft; dislocation of the left shoulder joint and multiple soft tissue injuries. He suffered a lot of pain. I however find that the award of general damages of Kshs 800,000 was *manifestly* high.

11. In Kennedy Kosgey v Kormoto General Agencies, High Court, Eldoret, Civil Appeal 36 of 2011 [2014] eKLR, the appellant had suffered blunt trauma to the chest, fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5%. An award of Kshs 400,000 was upheld on appeal. In Haron Cheron v Eastern Produce (K) Limited, High Court, Eldoret, Civil Appeal 92 of 2013 [2014] eKLR, the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and, a fracture of the right olecranon of the right ulna at the elbow joint. An award of Kshs 350,000 was upheld on appeal.

12. The respondent had submitted in the lower court for an award of Kshs 1,000,000. His counsel cited the decision of Mitey J in Joseph Mwai v Kenya Bus Services Ltd High Court Civil Case 1954 of 1997 (unreported) where Kshs 660,000 was awarded. The appellant's view on the other hand was that Kshs 200,000 was sufficient. That would be too low an award in this case. Considering the *injuries*, the *pain*, the rate of inflation and the precedents, an award of Kshs 450,000 is *sufficient*. I will *not* disturb the award on special damages of Kshs 2,100. They were specifically pleaded and strictly proved. See Kampala City Council v Nakaye [1972] E.A 446.

13. In the result, the judgment of the lower court dated 6<sup>th</sup> March 2012 is hereby *set aside*. Judgment is now entered in favour of the respondent against the appellants as follows-

a) Liability is apportioned by consent at 10% to 90% in favour of the respondent.

b) General and special damages are assessed at Kshs 452,100 *less* 10% *contributory negligence* which is to say Kshs 406,890.

c) I award the respondent costs in the lower court and interest. Costs of the appeal are at the discretion of the court. In the interests of justice I order that each party shall bear its own costs in this appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 19<sup>th</sup> day of January 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:-***

Mr. Oduor for Ms. Mbugua for the appellants instructed by Kairu & McCourt Advocates.

Mr. Misoi for Mr. Andambi for the respondent instructed by Andambi & Company Advocates.

Mr. Lesinge, Court clerk.