



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 147 OF 2013**

**SAID ABDULLAHI.....1<sup>ST</sup> APPELLANTS**

**GELIDO TINNA ADOO.....2<sup>ND</sup> APPELLANTS**

**VERSUS**

**ALICE WANJIRA.....RESPONDENT**

*(Appeal from the original judgment and decree of P. Nditika (PM) in Milimani Commercial Courts, CMCC No. 1512 of 2011, delivered on 20<sup>th</sup> February 2013)*

**JUDGMENT**

1. The Respondent, **Alice Wanjira**, sued, the appellants **Said Abdullahi** and **Gelido Tinna Adoo** for injuries she suffered due to the negligence of the appellants and or his servant. She claimed that on 17<sup>th</sup> May 2010, she has alighted from a matatu at the OTC stage and was in the process of crossing to the other side of the road when she stopped at the pavement of Oilibya petrol station, a matatu registration number KAT 281H coming from Race Course road made u-turn near the petrol station and in the process hit her on the right side causing her to fall. When the matter came up for hearing in the trial court, the Magistrate found the appellants liable 80% liable and the respondent 20% liable and awarded the respondent a sum of kshs 492,980/= as damages.
2. The Appellants, aggrieved by the Trial Court's decision filed this appeal on the following grounds:
  1. *The Learned Magistrate award is so manifestly high that it is a wholly erroneous estimate of the injury suffered by the respondent;*
  2. *The Learned Magistrate erred in law and in fact in finding that the respondents entitled to general damages of kshs 600,000/= that was too high in view of the injuries suffered by the respondent;*
  3. *The Learned Magistrate erred in law and in fact in filing to consider the defendant's submissions on quantum;*
  4. *The Learned Magistrate erred in law and in fact in failing to consider conventional awards for general damages in cases similar injuries;*
  5. *The Learned Magistrate erred in law and in fact in making an award for special damages that had not been strictly proved.*
  6. *The Learned Magistrate erred in law in filing to give any reasons whatsoever for the award, judgement and determination on award.*

This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held inter alia as follows:

*"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."*

3. The respondent's case, was that on the material day she alighted at O.T.C and crossed the road after which she stood at the pavement . She claimed that while standing on the pavement, a motor vehicle registration number KAT 281H hit her on the right side causing her to fall and as a result her right hand was injured. She averred that she reported the accident to the police who referred her to hospital. She said that she went to Nairobi outpatient centre and Kenyatta National Hospital and was also examined by **Dr. Maina Ruga**, who also gave evidence in court that he examined her and established that she had suffered a fracture of the right humerus bone, which was a severe harm and spiral fracture. He also stated that the level of permanent incapacity is 10% that was standing
4. The appellants' case was presented by **Dr. Isaac Nderitu** who examined the respondent and ascertained that she suffered a fracture of right humerus but concluded that she had healed well and that in two years time the fracture will heal.
5. I have re-evaluated the evidence as adduced in the lower court. When the matter came before me, the parties recorded a consent order to have the matter disposed of by way of written submissions which submissions I have taken into consideration. The issue of liability was settled and the only matter in contention is the quantum.
6. The appellants submitted that the Magistrate failed to be guided by conventional awards or court decisions prevailing at the time as a result of which he awarded excessive award of kshs 600,000/= for a single fracture of the right humerus. They referred to the case of **Luke Osoro & another vs Daniel K. Cheruiyot [2008] eKLR**, where the plaintiff upon suffering a fracture of the right humerus and soft tissue injuries, was awarded kshs 250,000/=. They further contended that the Magistrate contravened Order 21 Rule 4 of the Civil Procedure Rules that requires judgement to provide reasons since he did not provide reasons for his decision. They argued further that failure to provide reasons affects the merits of the decision and despite the Magistrate stating that he had considered the submissions and authorities, he did not categorically state which submissions and authorities persuaded and guided him in reaching at his decision
7. The respondent on the other hand submitted that the trial court gave reasons for the award and explained that it was guided by the evidence on record and relevant authorities. She averred that the during trial the appellants did not call any witness nor did they file any documents. She referred to the medical report adduced in court by **Doctor Maina Ruga** , which report particularised her injuries as a fracture of the right humerus midshaft spiral, swelling, deformity and pin on the midshaft are of the right humerus and tenderness of the right arm and assessed her permanent incapacity at 10%. She asserted that the court considered the evidence and the authorities cited and exercised it's discretion in awarding a sum of kshs 600,000/= and just because the judgement was not lengthy does not mean reasons were not advanced. She argued that the award of kshs 600,000/= was sufficient compensation commensurate to the injuries sustained. She referred to the case of **Loise Njoki Kariuki vs Bendricon Wamboka Waswa & another [2013]eKLR** where the plaintiff sustained compound fractures of humerus right upper arm and fractures of bones of the right forearm. The court awarded kshs 1,500,000/= as general damages. In another case of **Mwaura Muiruri vs Suera Flowers Limited & another [2014] eKLR**, the plaintiff suffered multiple soft tissue injuries communicated fractures of the right humerus upper compound and compound fractures of the right upper leg. The court awarded kshs 1,900,000/= as general damages. She contended that considering the rate of inflation, the award was fair and this court should not interfere with the lowers court discretion.

8. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. The grounds of appeal as raised by the appellant all touch on the quantum which they claim was excessive and that the special damages awarded by the trial court were not proved. I have perused the evidence as adduced in the trial court. There is the medical report by **Doctor Maina Ruga** that show that the respondent suffered a fracture of the right humerus midshaft spiral. He opined that she was temporary incapacitated for three months and that the pain on the right arm is expected to subside gradually over a period of two years. He assessed the level of permanent incapacity at 10%. Another medical report from **Dr. Theuri I.N**, concurred with that of Dr. Min Rug that the respondent suffered a right humerus fracture.
9. According to the medical reports, it is evident that the respondent suffered from fracture of right humerus midshaft spiral. The appellants have proposed general damages between Kshs 200,000 to kshs 250,000/= in reference to the case of **Luka Osoro & another (supra)**. The respondent on the other hand has proposed that the sum of kshs 600,000/= awarded in the trial court was fair in the circumstances and has referred to the cases of **Loise Njoki Kariuki (supra) and Mwaura Muiruri (supra)** to justify the award. Looking at the submissions of the parties in the Lower Court, the appellant relied on the case of **Kisii Bottlers Limited vs Josephine Akinyi Mikwabe [2011] eKLR**, where the court maintained kshs 220,000/= as compensation for a fracture of the humerus bone of the right arm alongside other soft tissue injuries. He also relied on the case of **East Choice Co. Ltd & Another vs Hellen Nungari Ngure [2011] eKLR**, where the plaintiff who had suffered fracture of the shaft of the humerus, bruised right small finger and soft tissue injuries to the chest anterior walls, he was awarded kshs 180,000/=. The respondents submissions do not outline the case law relied on to justify the Kshs 750,000/ that they sought.
10. The respondent suffered a fracture of the right humerus midshaft spiral. The question arising therefore is whether the Kshs 600,000/= general damages awarded was excessive in the circumstances. Looking at the cases relied on, which includes **Kisii Bottlers Limited vs Josephine Akinyi Mikwabe [2011] eKLR, East Choice Co. Ltd & Another vs Hellen Nungari Ngure [2011] eKLR and Luke Osoro & another vs Daniel K. Cheruiyot [2008] eKLR**, I find them relevant. In the authorities quoted by the respondent, the parties therein suffered severe injuries that cannot apply in this particular case. In the case of **Loise Njoki Kariuki (supra)**, the plaintiff suffered compound fractures of her humerus of the right upper arm and fractures of the right upper limb which caused her arm to be amputated. In the other case of and **Mwaura Muiruri (supra)**, the plaintiff suffered multiple lacerations on the face, soft tissue injuries on the chest cage, communicated fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right leg upper and lower 1/3 tibia Fibula.,
11. Having considered the injuries sustained by the respondent and the damages that were awarded, the age of the cited authorities and the injuries suffered in those authorities, the date of the accident and the rate of inflation on the Kenya Shilling, I am of the view that an award of kshs 300,000/= for general damages is adequate compensation for the appellant.
12. On the issue that special damages were not proved, according to the court proceedings as contained in the Record of Appeal, there were documents that were produced as exhibits, however those exhibits have not been captured in the record of appeal. The only available documents that I have seen include the police abstract and Medical Report prepared by **Doctor Maina Ruga**. The Doctor testified that the medical report cost kshs 6,000/= while the respondent claimed that she paid kshs 100 for the Police abstract. In that case, the special damages proved in this case is a total of kshs 6,100/=.
13. In the end, I find that the sum of kshs 600,000/= awarded by the trial Magistrate as general damages was excessive in the circumstances. The appeal as against the quantum is allowed. Consequently the award of ksh.600,000/= is set aside and is substituted with an award of kshs 306,100/= less 20% bringing the net award to kshs 244,880/=. The respondent shall have the costs of the appeal and suit.

**Dated and delivered in open court this 22<sup>nd</sup> day of April, 2016.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellants

.....for the Respondent