



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 194 OF 2011**

**CHINA WU YI COMPANY LIMITED.....APPELLANT**

**VERSUS**

**ANDREA GITHINJI GITONGA.....RESPONDENT**

*(Being an appeal for the Judgment delivered by Mrs.Obara S.R.M dated 26<sup>th</sup> October 2011 in Nyahururu Principal Magistrate Civil Case Number 356 of 2009)*

**JUDGEMENT**

1. The appeal before the court is against the award of general damages to the respondent **Andrea Githinji Gitonga** by the trial court following a traffic road accident on the 8<sup>th</sup> September 2009 whereof the respondent sustained bodily injuries. The trial court awarded a sum of Kshs. 300,000/= damages for pain and suffering that the appellant, China Wu Yi Company Limited states is excessive and does not reflect the nature of injuries sustained by the respondent. The court is urged to set aside the award and reduce the same.

This being the first appellate court, I am mandated to re-evaluate the evidence adduced in the trial court and come up with my own findings and conclusion – See - **Selle -vs- Associated Motor Boat Co.(1968) EA 123.**

The Respondent in his plaint dated 15<sup>th</sup> December 2009 particularised injuries he sustained as follows:

- **multiple facial bruises**
- **Blunt injury to the right shoulder**
- **Blunt injury to the right knee**
- **Fracture of the third rib**
- **Humero – clavicular displacement(R<sup>+</sup>)**

Present complainants then were:

- **Recurrent headaches**
- **Recurrent pain on the right shoulder**
- **Recurrent chest pains**
- **recurrent pains on the right knee.**

2. Two medical reports on the respondents injuries were prepared by Dr. W.H Ngari. dated 25<sup>th</sup> October

1009 and by Dr. M.S. Malik dated 22<sup>nd</sup> September 2010.

Dr. W.H. Ngari 's report stated the following injuries:

- **Multiple bruises on the face**
- **Fracture right third rib posteriorly adjacent to the scapular bone side.**
- **There was no fracture displacement**
- **Soft tissue injuries right shoulder joint**
- **Fracture confirmed by CXR No. 3796/09**

He made a prognosis that the degree of injuries was grievous harm, no permanent incapacitation incurred and the pains and discomforts should be over in six months from date of examination.

Dr. M.S. Malik in his report stated the following injuries:

- **an abrasion on the right temporal area of the head**
- **pain in the chest**
- **pain in the right shoulder**
- **an abrasion on right knee.**

He presented complaints as pain in the upper back. His opinion was that the respondent had sustained soft tissue injuries, was admitted in hospital for one day and that his shoulder joint X-ray did not show any fracture or dislocation but still complained of pain in the upper back.

He stated:

***“although his discharge summary and first medical report both state that he sustained a fracture of his third rib posteriorly, the X-Ray of the shoulder which was presented for this report (which shows some of the ribs on the right) does not show this fracture,”***

It was his conclusion that the Respondent suffered total incapacity of a temporary nature for a period of one week followed ya partial incapacity of a temporary nature for a further period of one week, and that he had suffered no permanent physical disability.

3. In the trial court, the respondent by his Advocate's submissions proposed a sum of Kshs.500,000/= as general damages for pain and suffering and in support cited several authorities among them **Tajdin Shamshudin Tejpart & Others -vs- Ashraf Daudi Hasham MSA HCCC No. 89 of 1999. James Kimondiu v-s Anne Wahome & Another NBI HCCC No. 472 of 1991 and Otieno Musa Ochieng -vs- Bwana Mkuu Mohamed MSA HCCC NO. 958 of 1991.**

In all the above cases, the injuries sustained by the plaintiffs were fractures and dislocations of the clavicle and fractures of the ribs and scapula. General damages ranged between Kshs.250,000/= to Kshs.340,000/= in the period 1993 – 2005.

4. The Appellant in the trial court proposed a sum of Kshs.100,000/= and relied on two authorities, **Jeremiah Kodiah Ingache -vs- Modern Furniture House HCCC No. 1761 of 1987** were the court in 1989 awarded Kshs.75,000/= for deep cuts on the left occipital areas, minor abrasions on forehead and soft tissue injuries on the chest and neck, and **Paul Chacha Kitia -vs- Pius Gmuer HCCC No 224 of 1987** – a sum of **Kshs.90,000/=** was awarded in 1989 for soft tissue injuries (full report not provided).

5. In its judgment, the trial Magistrate rendered itself that after considering the authorities and time lapse since the authorities above were decided, a sum of Kshs.300,000/= was fair and reasonable damages of pain and suffering.

6. The appellant's submissions before this court are that the trial court failed to resolve the nature of the respondents injuries as the two doctors differed on the same and so not clear on which report the trial

court relied on to assess the damages, that it failed to determine the nature of injuries and thus arrived at an erroneous estimate of damages. On the other hand, the respondent submitted that the two medical reports were considered together with the authorities tendered. To clear this issue of the respondents medical report – whether Dr. Okere's report or Dr.W.H. Ngari's report, I have perused the trial court's proceedings. The Respondent, Andrea Githinji Gitonga testified on the 30<sup>th</sup> March 2011.

He produced as exhibits two medical reports. PExh No. 9 is a medical report dated 25<sup>th</sup> October 2009 by Dr. Ngari .W.H of Good Hope Medical Centre, but not dated 30<sup>th</sup> October 2009 as indicated in the proceedings. PExh 11 is a medical report dated 22<sup>nd</sup> September 2010 by Dr. M.S. Malik.

7. Perusal of the proceedings shows that the respondent did not produce a medical report prepared by Dr. C.O. Okere dated 11<sup>th</sup> December 2009 which is the one forming part of the record of Appeal. I have not seen any medical report dated 30<sup>th</sup> October 2009 by any of the doctors. The exhibit marked PExh 9 is the medical report by Dr. W.H. Ngari.

The court will take the said medical report by Dr. Ngari as the one so produced as it is so marked on its face.

The court has noted that in Dr. M.S. Malik's medical report, an X-ray of the right shoulder joint was taken on the 8<sup>th</sup> September 2009. It showed neither fracture, dislocation of the joint, nor fracture of the third rib. It also shows that no full chest X-ray was done.

Dr. W.H. Ngari's medical report indicates that an X-ray (**CXR No 3796/09**) was taken on the 25<sup>th</sup> October 2009 and it confirmed fracture of the third rib posteriorly adjacent to the scapular bone right side.

8. Interestingly, during the hearing and as can be discerned from the proceedings of the 30<sup>th</sup> March 2011 before the trial Magistrate, Mr. Wamasaa Advocate for the appellant did not object to the production of the two medical reports by the respondent. If there were differences in the reports, it would have been prudent for the parties to summon both doctors to explain their findings on whether or not the respondent had indeed sustained a fracture of the 3<sup>rd</sup> right rib in view of the differing medical reports.

9. To answer this question on which medical reports the trial court relied on, this court finds that the medical reports prepared by Dr.W.H. Ngari dated 25<sup>th</sup> October 2009 and Dr. M.S.Malik dated 22<sup>nd</sup> September 2010 where the ones the trial court considered. There are other independent documents that a court can consider to ascertain nature of injuries.

This court has also considered the P3 form and the Discharge Summary from Ol'kalou District Hospital that indicates there having been a fracture of the right third rib. These are the initial treatment records prepared at the health facilities before the two doctors reports. I hold them to be authentic, without any interference from other parties. This court is satisfied that all the medical records taken together offer enough evidence to confirm the respondents injuries, and the fracture.

In **Butt -vs- Khan Civil appeal No. 40 of 1997, Law, J.A** pronounced himself 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. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low.”***

Further, in the case **Kemfro Africa Ltd and Another -vs- A.M. Lubia & Another (1982-1988) KLA** the court of appeal rendered itself that:

***“ In deciding whether it is justified in disturbing the quantum of damages awarded by a trial***

***court, an appellate court must be satisfied that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”***

10. It is trite that assessment of damages is at the discretion for the court, but that discretion has to be exercised judiciously. Such discretion can only be disturbed if it is shown that the court:

1. *took into account an irrelevant factor or*
2. *Left out of account a relevant factor or*
3. *The award is inordinately low or high as to be a wholly erroneous estimate of damages.*

Having considered the nature of injuries sustained by the respondent and confirmed the same by looking at all the medical records including the discharge summary, P3 form and the two medical reports, this court finds that the trial court considered all the relevant factors and evidence as adduced before it.

11. The respondent has urged the court to uphold the trial court's assessment of general damages, and relies on two cases:

**Yunis Malik -vs- Eliud Muriithi & Another Nakuru Hcc No 354 of 2000.** An award of the Kshs.400,000/= was given where the plaintiff sustained fracture of three ribs and the femur.

In **Joseph Ndumia Murage -vs- David Kamande Ndung'u Nakuru HCCC No. 101 of 1996**, an award of Kshs.500,000/= was given for fracture of six ribs and soft tissue injuries – in 2004.

The court has considered the case **Dickson Ndung'u Kirembe & Another -vs- Thereisia Atieno & 4 Others (2014 KLR)**. The third respondent (Esther Akinyi Ochieng) who had sustained injuries to the head, chest left ankle, bruises on forearm and compound fracture of the left tibia/fibula was awarded Kshs.600,000/= which was reduced to Kshs.400,000/= on appeal in March 2014.

The fourth respondent, Eunice Aluoch in the above case, who suffered injuries to the chest, swelling on the right hand and fracture of the distal intercarpal and swellings and bruises on the knee and bruises on the face was on appeal awarded Kshs. 400,000/= also in March 2014.

12. The respondents' injuries were serious. The appellant has not shown this court in what manner the trial court erred in the assessment of the damages. It has failed to persuade the court what irrelevant factor it left out or considered. The test and principles upon which an appellate court may disturb a trial court's assessment of damages have not been met. The award of Kshs.300,000/= by the trial court in this court's view is not too high to be wholly erroneous estimate. It represents reasonable compensation for injuries sustained by the respondent.

13. Having considered all relevant factors, the nature of the injuries, all the medical records and submissions by both counsel, the court arrives at the conclusion that the appeal lacks merit. It is dismissed with costs.

**Date, signed and delivered in open court this 21<sup>st</sup> day of April 2016.**

**JANET MULWA**

**JUDGE**