



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 193 OF 2011

CHINA WU YI COMPANY LIMITED.....APPELLANT

VERSUS

ANN AKALE AKORI.....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)*

### JUDGMENT

1. This appeal arises from the judgment of the trial court in **Nyahururu PMCC No 356 of 2009** that for purposes of hearing was consolidated with **PMCC NO. 357 of 2009**, in the same court subject of **Appeal No.194 of 2011** in this court.

Both appeals are against the award of general damages to the Respondents as awarded by the trial Magistrate.

The appellant was dissatisfied with the awards as being too high as to be an erroneous estimate of the damages as opposed to the nature of injuries sustained by the Respondents in the road traffic accident on the 8<sup>th</sup> September 2009.

2. In **HCA No. 194 of 2011, China Wu Yi Company -vs- Andrea Githinji Gitonga** this court has rendered itself of the principles and test that ought to be applied by an appellate court in deciding whether or not to disturb the trial courts discretion in the assessment of damages. I need not repeat them here.

I shall go straight to the evaluation of evidence on the nature of injuries and interrogation as to whether this court ought to interfere with the award of the damages awarded to the respondent.

3. The Respondent's injuries are stated in the following medical reports:

Dr. Ngare, W.H. Medical report dated 17<sup>th</sup> December 2009 states the injuries as follows:

- **Cut wound occipital head 5cm long, above posterior neck 5cm and right ear lobe 5cm**
- **Bruises medial left knee joint area**

- **None displaced fracture occipital bone – fracture confirmed by X-ray skill numbers 3799 of 8<sup>th</sup> September 2009 at Ol-Kalou hospital.**

Was admitted at Ol'kalou unconscious and same day transferred to Nakuru Provincial hospital, and discharged on 16<sup>th</sup> September 2009.

- Doctors conclusion and prognosis is that:
  - **the degree of injuries is grievous harm**
  - **she sustained temporary incapacitation, not been able to resume her duties.**
  - **Headaches and other discomfort forms were expected to be over in 6-9 months.**

4. Dr. S.M. Malik medical report dated 22<sup>nd</sup> September 2010

- **a cut on the back of head**
- **a cut on the back of right ear**
- **abrasions on the right knee**
- **Admitted at Ol Kalou hospital Later transferred to Nakuru Provincial hospital and discharged after a week**
- **Complaints: occasional headaches and pain in the right knee joint**
- **X-ray dated 8<sup>th</sup> September 2009 of the skull showed no fracture or soft tissue abnormalities and shadow labelled in previous medical reports as a fracture of the occipital bone is actually a suture line between the bones of the skull – no fracture of the bone.**
- **Doctors opinion was that she lost consciousness from concussion of the brain for a few hours. X-rays did not show any fractures. Stitches were removed and wounds healed.**
- **Conclusion–she suffered total incapacity of temporary nature for a period of two weeks followed by a partial incapacity of a temporary nature for a further one week. She suffered no permanent physical disability.**

5. During the respondents testimony before the trial court on the 14<sup>th</sup> September 2011, the respondent produced her treatment card from Ol'Kalou hospital dated 1<sup>st</sup> October 2009 and Discharge Summary dated 16<sup>th</sup> November 2009 from Nakuru Provincial Hospital, and the above two medical reports by consent. It is upon the above documents that the two Doctors prepared the medical reports.

6. On quantum of damages for pain and suffering, the Respondent, by her Advocates submitted a sum of Kshs.800,000/= as reasonable damages while the appellant submitted for a sum of Kshs.150,000/= as fair compensation. The trial court awarded sum of Kshs.350,000/= in damages for pain and suffering.

The appellant submits that the award of Kshs.350,000/= is excessive and urges this court to set it aside and reduce the same. It is contended that injuries contained in Dr. Ngare's report do not tally with those in Dr. Malik's report, and that the trial magistrate did not address the difference in the two medical reports. It is further submitted that the trial magistrate did not indicate how she arrived at her finding that the injuries sustained by the respondent were severe yet there were differences in the two medical reports and therefore, the damages awarded by the trial court were based on no evidence and/or misapprehension of the evidence on record.

7. I have looked at the medical reports produced as exhibits by the respondent before the trial court, and stated them in Paragraph 2 above. Doctor Ngare's report is dated 17<sup>th</sup> December 2009 and not 11<sup>th</sup> December 2009 as submitted by the appellant.

I have stated in **Civil Appeal No. 194 of 2011 - China Wu Yi Company -vs- Andrea Githinji Gitonga** that there are other independent documents that the court can rely on to resolve differences in the two medical reports. These are the treatment notes and discharge summaries from the hospitals where the respondent was treated before the two medical reports were prepared.

8. The respondent's discharge summaries from Ol'Kalou District Hospital and Nakuru Provincial Hospital and dated 16<sup>th</sup> September 2009 are independent documents. Notes taken while the respondent was in the hospital ward show that she was being treated and investigated for a compound fracture of the occipital, cut wound on the occipital surface behind the ear and a none-displaced fracture occipital.

Dr. Ngare in preparation of his medical report referred to the Discharge Summaries and the X-ray of the skull taken at the Ol'Kalou hospital where the respondent was first treated after the accident.

This court has no reason to put any doubts on those primary medical records before the two medical reports were prepared. Even without the medical reports, save for the medical terminologies, the court can ably rely on the treatment cards, treatment notes, X-ray reports and discharge summaries to determine the nature and extent of injuries and proceed to assess damages. This court is therefore satisfied that the medical report by Dr.Ngare represents a fair narrative nature and extent of the respondents injuries.

9. Dr. Malik relied on the same documents from the two medical facilities. His only quarrel is on the X-ray results taken at the Ol'Kalou hospital on the 8<sup>th</sup> September 2009. He states that in consultation with an unknown and undisclosed consultant Radiologist, he came to the conclusion that the respondent did not sustain any fracture. The best the doctor could have done was to take another X-ray of the respondent's skull to ascertain whether indeed there was a fracture or not. The doctors opinion, in my considered opinion, is based on no evidence on the matter of the fracture.

10. The trial Magistrate, in exercise of her judicial discretion, considered the authorities relied upon the severity of the injuries, lapse of time and inflation trends and assessed damages at Kshs.350,000/=. The only fault by the trial magistrate in arriving at the above amount as submitted by the appellant is failure to resolve the difference in the nature of the injuries contained in the two doctors medical reports.

This issue I have addressed above. It is therefore now a none issue. The court has found relying on the treatment notes from Ol'Kalou hospital and Nakuru Provincial Hospital, and notwithstanding the two medical reports that, the respondent did sustain a fracture of the occipital.

11. Having so found, is the sum of Kshs.350,000/= excessive in the circumstances of the case?

The Respondent submits that the damages awarded were consumerate to the injuries sustained. He supported his assertions by citing the case **Sila Tiren & Another -vs- Simon Ombati (2014) e KLR** where the Respondent sustained a head injury, fracture of the base of the skull and temporal bone. The court on appeal reduced the trial court's award of Kshs.750,000/= to Kshs.450,000/= in March 2014.

The injuries sustained by the respondent in the above case are closely comparable to those sustained by the respondent in this appeal.

I have also considered the case **Dickson Ndung'u Kirembe & Another -vs- Theresia Atieno and 4 Others (2014) e KLR**. In this case, on appeal, the court reduced an award of Kshs.600,000/= damages to Kshs.400,000/= in March 2014 for injuries to the head, chest left ankle, compound fracture of the left tibial fibula and other soft tissue injuries.

The court is satisfied that award of the trial court was in tandem with recent and comparable awards. It is neither too high nor too low as to represent an erroneous estimate of the damages. I find no reason to

interfere with the said award.

12. The upshot of the above and for reasons given, the appeal is without merit. It is dismissed with costs.

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

**JANET MULWA**

**JUDGE**