



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 94 OF 2014**

**BETWEEN**

**AKAMBA PUBLIC ROAD SERVICES LIMITED ..... APPELLANT**

**AND**

**MAUREEN AKINYI ABOK ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. E. Obina, PM in the Chief Magistrates Court at Kisumu in Civil Case No. 453 of 2013 dated 5<sup>th</sup> August 2014)***

**JUDGMENT**

1. There is no dispute that the respondent was travelling in a bus owned and operated by the appellant company on 28<sup>th</sup> December 2010. She was injured as a result of the said bus colliding with another bus along the Kisumu-Nairobi Highway. She filed suit against the appellant claiming general and special damages for the injuries sustained. The issue of liability was agreed at 85:15 against the appellant. This appeal is therefore on the issue of quantum only.
2. According to the plaint filed on behalf of the respondent, she sustained a degloving scalp injury, a fracture of the C1 vertebra and right temporal wound. She was treated at various hospitals and claimed a total of Kshs. 356,171.43 in special damages. After hearing the matter, the learned magistrate awarded Kshs. 3,000,000/- general damages and the special damages claimed making a net sum of Kshs. 2,852,745.72 when subjected to the agreed contribution.
3. Mr Nyamweya, learned counsel for the appellant, submitted that in assessing the damages, the learned trial magistrate did not take into account the authorities submitted on its behalf which bore a close relationship to the injuries sustained by the respondent. He thus contended that the sum awarded was excessive. He suggested that a sum of Kshs. 1,300,000/- as reasonable in the circumstances.
4. Mr Maube, learned counsel for the respondent, submitted that the award was fair and reasonable taking into account the nature of injuries sustained by the respondent. He contended that the learned magistrate took into account the fact that the injuries were very serious and led to permanent disability.
5. As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the

assessment is based on no evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727, *Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014]eKLR and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).

6. I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind that damages should not be inordinately high or too low and that are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts and these decisions are taken into consideration as guides, an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shilling at the time of the judgment.
7. The nature and extent of the respondent's injuries was not disputed as her testimony was not contested by cross-examination. The respondent produced medical reports, treatment notes, discharge summaries and receipts for the various hospital attendances without objection. In her testimony she stated, in part, as follows;

*I was thrown out of the window. I hit my head and suffered multiple cuts. (cuts shown on the head). My spinal cord at the back crushed (witness still has a neck brace). I had general body aches. I just lay there .... The police took us to Naivasha District Hospital. .... I was taken to Aga Khan Hospital Nairobi where I stayed for 10 days. .... I had a serious injury on the head. I attended daily dressing. I could not sit. I would be taken to hospital on a pick up on a mattress.... I was operated on twice. My head was operated on. The bone that holds the body to the head was fractured. That is why I have a neck brace until now. .... I am not fully healed. I am in great pain. I cannot co-ordinate my body movement because of the injury suffered from the spine .....*

8. Following this evidence, the respondent proposed an award of Kshs. 5,000,000/- by calling in aid the case of *Jane Odhiambo Akwiri v Al Husnan Motor & Another* KSM HCCC No. 55 of 2005 (UR) where the learned judge awarded Kshs. 2,500,000/- in 2011 for fractures of T11 and T12, paralysis of the lower limbs, loss of sensation from T1 downwards, loss of urine and stool control and loss of sexual function. On the other side, the appellant submitted that Kshs. 500,000/- was a reasonable award and relied on the case of *Damaris Wanthi Mustoka v Hussein Dairy Limited & Another* MSA HCCA No. 110 of 1999 (UR) where the plaintiff sustained a fracture of vertebra L1 with displacement (L1/L2) and the narrow disc space, fracture subluxation of the lumbar spine and injury on the chest. The plaintiff was awarded Kshs. 250,000/- in 2012.
9. Mr Nyamweya complained that the learned magistrate did not consider the appellant's submissions. However, the judgment is clear that the learned magistrate considered the parties submissions but was guided mainly by the nature of injuries particularly given that at the time of hearing, the respondent had not recovered in view of the gravity of the injuries. Further, the cases cited by the parties bore little relation to the injuries sustained by the respondent. The decision cited by the appellant was on the lower side while that cited by the respondent was on the higher side. It was the duty of the advocates to guide the court by citing relevant cases. Neither of them should complain if the court does the best it can in the circumstances.
10. I cannot say the award was inordinately high to constitute an erroneous estimate of the damages or that the learned magistrate erred in principle to invite this court's interference.
11. The appeal is dismissed with costs to the respondent.

**DATED and DELIVERED at HOMA BAY this 29<sup>th</sup> day of June 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyamweya instructed by Archer and Wilcox Advocates for the appellant.

Mr Maube instructed by Bruce Odeny and Company Advocates for the respondent.