



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 171 OF 2012**

**ROSE MASILA .....1<sup>ST</sup> APPELLANT**

**ALI BABA KENYA LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ELIZABETH MUKAMI KILONZI.....  
.....RESPONDENT**

**(An Appeal arising out of the judgment of P.N. Gesora SPM delivered on 25<sup>th</sup> September 2012 in Machakos Chief Magistrate's Court Civil Case No. 1141 of 2012)**

**JUDGMENT**

The Appellants were the original Defendants in Civil Case No. 1141 of 2012 at Machakos Chief Magistrate's Court, and have appealed against the judgment of the learned trial Magistrate which was delivered in the said suit on 25th September 2012. The trial magistrate awarded the Respondent total damages of Kshs 355,000/=, being Kshs. 350,000/= as general damages and Kshs. 5,000/= for special damages, less Kshs 35,500/= as the Appellants' 10% contribution.

The Appellants have now moved this Court through a Memorandum of Appeal dated 13<sup>th</sup> October 2012 and filed in Court on 22<sup>nd</sup> October 2012, wherein the has raised the following grounds of appeal:

1. That the learned trial magistrate erred in fact and in law by making an award on general damages which was manifestly excessive given the injuries sustained by the Plaintiff and the relevant case law.
2. That the learned trial magistrate applied wrong principles of law in assessing general damages hence arriving at manifestly excessive damages.
3. That the learned trail magistrate erred in fact and in law by ignoring the Appellants' submissions in his judgment without proper reason to do so.

The Appellants are praying for orders that the appeal be allowed, and the trial Court's judgment on quantum be set aside and substituted with a fair judgment on quantum that this Court may deem fit.

**The Facts and Evidence**

The brief facts of this appeal are that the Respondent instituted a suit in the trial court by filling a plaint dated 15<sup>th</sup> December 2011, seeking special damages of Kshs 5,000/= for medical related expenses and general damages, for injuries she suffered as a result of an accident that occurred on 2<sup>nd</sup> September 2011 involving motor vehicle registration number KBN 232G while she was passenger therein. She claimed that the said motor vehicle was owned by the Appellants and was at the time being negligently driven by the Appellants' driver, servant and/or agent, and gave particulars of the said negligence. The particulars of injuries that the Respondent stated she suffered were a blunt injury to the head, blunt injury to the low back, blunt injury to the left eye and a wedge fracture on the thoracic spine between T10 and T11.

The Appellants filed a Defence dated 31<sup>st</sup> January 2012 in the trial Court, wherein they denied that the Respondent was a lawful passenger in motor vehicle registration number KBN 232G, or that the same was driven negligently. They also denied the particulars of negligence alleged by the Respondent, and in the alternative, averred that the accident was inevitable and/or was solely caused by the negligence of the Respondent, and gave particulars thereof. The Appellants further denied the particulars loss, injuries and damages particularized in the Plaint.

The parties entered a consent in the trial court on liability which was agreed on the ratio of 90:10 in favour of the Respondent. It was also agreed by the parties that the two medical reports filed by a Dr. Wambugu and a Dr. Mutunga be admitted as part of the trial court record. The parties also filed written submissions on the issue of quantum of damages.

### **The Issues and Determination**

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. I am not called upon to determine liability as it is not disputed, and this Court will therefore only determine the issues raised on quantum.

In an appeal on the quantum of damages, the appellate court will only interfere where trial court 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 not based on any 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**).

The Appellants' and Respondent's learned counsel filed written submissions on the present appeal. M. Masika & Company Advocates for the Appellants argued in submissions dated 7<sup>th</sup> May 2016 that the medical report by Dr. Wambugu dated 18<sup>th</sup> April 2012 should be used to aid the Court in the assessment of damages as it was the latest report, and that the considering the injuries sustained by the Respondent and the fact that the same were completely healed, the award of general damages of Kshs 350,000/= was too high.

The Appellants also submitted that the injuries cases relied on by the Respondent in the trial Court were not similar to those in the present case, and were more serious. Lastly, that the trial magistrate erred in not taking into account the cases cited by the Appellants which were comparable, and reliance was placed in this regard on the decisions in **Socfint Co. Ltd vs Margaret Waitherea Mbugua (2010) eKLR** and **Sokoro Saw Mills vs Grace Nduta Ndungu (2010) e KLR** in this regard.

A.K. Mutua Advocate for the Respondent filed submissions dated 21<sup>st</sup> April 2016, and urged the court not to interfere with the award of special damages as the same is not contested. On the award of general damages, it was submitted that the soft tissue and skeletal injuries suffered by the Respondent were opined to by both Dr. Mutunga and Dr. Wambugu in their reports. It was submitted that the cases relied

on by the Appellants were irrelevant to the case in hand, and that the Appellants had failed to prove the principles of law set out in **Jabene vs Olenja, Kisumu Civil Appeal No. 2 of 1986** to enable this Court interfere with the award. Reliance was placed on the cases cited in the trial Court namely **Margret Anyango vs C.M. Bigogo, Nrb HCCC No. 325 of 1987**; **Damaris Wanthi Musyoka vs Hussein Dairy Ltd & African Line Transport Ltd, HCCC No. 110 of 1999**; and **Mathew Zablon Shigadi vs Muloya Construction Ltd, Mombasa HCCC No. 595 of 1988**.

I have considered the evidence given in the trial Court and the arguments made by the parties. On the issue raised as to the quantum awarded of general damages, it is not contested by the parties that the Respondent suffered a spinal injury with a wedge fracture on the thoracic spine and soft tissue injuries. The reports that were filed in Court by Dr. Mutunga and Dr. Wambugu also do not differ in any material respect as they both acknowledge that the said injuries were indeed suffered, and that the Respondent will heal completely without any permanent disability.

On the quantum of general damages that is reasonable for these injuries, I agree with the Appellants that the awards granted in the decisions relied on by the Respondent was for much more severe injuries. In **Margret Anyango vs C.M. Bigogo, Nrb HCCC No. 325 of 1987** an award of general damages of Kshs 350,000/= was granted where the back movement was restricted in all directions by the injuries suffered in that case. In **Mathew Zablon Shigadi vs Muloya Construction Ltd, Mombasa HCCC No. 595 of 1988**. the Court in awarding Kshs 390,000/= as general damages took into account the fact that the Plaintiff's spine developed post-traumatic osteoarthritis.

However, I also find that the judicial authorities relied upon by the Appellants namely, **Socfint Co. Ltd vs Margaret Waitherea Mbugua (2010) eKLR** and **Sokoro Saw Mills vs Grace Nduta Ndungu (2010) e KLR** were with respect to lesser injuries suffered by the Plaintiffs in the two cases. In the former case where an award of general damages of Kshs 80,000/= was recommended on appeal, the injury suffered was a sprained ankle that healed; and in the latter case only soft tissue injuries were suffered, and an award of Kshs 30,000/= was awarded as general damages.

Lastly, I note that there were receipts on record as proof of the special damages claimed of Kshs 5,000/= for medical related expenses, which damages were not disputed by the Appellants.

In the premises I find that the learned trial magistrate's award of Kshs 350,000/= as general damages for pain and suffering was not reasonable and was excessive, given that no permanent incapacity was suffered by the Respondent, even after taking into account inflationary factors.

I accordingly set aside the award for general damages by the trial magistrate and revise the said award as follows:-

a) General damages for pain suffering and loss of amenities .....	Kshs. 200,000/=
b) Special damages as pleaded and proved and as awarded by trial court.....	Kshs. 5,000/=
Total damages.....	Kshs 205,000/=
Less 10% contribution .....	Kshs. 20,500/=
<b>TOTAL AWARD</b>	<b>Kshs. 184,500/=</b>

I accordingly allow this appeal only to the extent of setting aside the award of total damages of Kshs 355,000/= and substituting it with an award of total damages of Kshs 184,500/= . The consent as to liability in the ratio of 90:10 is upheld.

I also award 90 % of the costs in the trial court and 90% of the costs of the appeal to the Respondents.

It is so ordered.

**DATED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF AUGUST 2016.**

**P. NYAMWEYA**

**JUDGE**