



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVILA APPEAL NO. 108 OF 2012

MAURICE ONYANGO OKULL.....APPELLANT

VERSUS

PHEOBE ODHIAMBO OMBORI.....RESPONDENT

JUDGMENT

1. This is an appeal by **Maurice Onyango Okull** against **Phoebe Odhiambo Ombori** from the judgment and/or decree of Honourable Mr. D.K. Kemei Senior Principal magistrate in Migori in case No. 110 of 2009 delivered on 4th July, 2012. In his MEMO OF APPEAL he sets out the following grounds of appeal:-
 1. *That the learned trial magistrate erred in making a finding and arriving at an award of damages which is inordinately too high as to represent on erroneous estimate of damages payable.*
 2. *That the learned trial magistrate erred in applying wrong principles and failing to take into account material facts in arriving at an erroneous award.*
 3. *That the learned trial magistrates erred in law and in fact in disregarding the appellant's submissions and erred on all points of fact and law in as far as the award of damages is concerned.*
 4. *That the learned trial magistrate erred in law and infact in only considering the respondent's submissions.*
2. This case began as a plaint by the plaintiff/appellant. The plaintiff stated that on or about the 14th January, 2009 she was lawfully walking off the verge of the road along Migori-Muhuru road when motor vehicle registration number KAZ 424Z was so negligently driven and/or managed by the Defendant his agent and/or servant that it lost control and violently knocked the plaintiff down, hence causing him sustain severe bodily injuries.
3. During the proceedings the plaintiff gave her testimony reiterating what is in para.4 of the plaint as PW1. The defendant gave a list of 3 witnesses but called none. The parties hereto recorded a consent on liability at the ratio of 30%: 70% in favour of the plaintiff.
4. The trial court was then left with the determination of Quantum of general damages. The medical report, exhibit 4 was tendered in evidence. Dr. Idagiza A Akidiva itemized he injuries as herebelow:
 - *Blunt trauma on the neck.*
 - *Contused lumbar sacral region*

- Chest contusion(marked on the left)
- Contused knee
- Compound fracture left tibia
- Fractured pelvis.

He put the injuries at 15% of her body.

5. In assessing quantum, the plaintiff relied on the case of **KTDA vs. James Ateka, Kisii HCCC. NO. 113 OF 2005**the court was more persuaded by the above case where the court in that case awarded kshs. 650,000 in general damages. The trial magistrate increased this figure to kshs. 700,000 which what he awarded. The appellant was aggrieved by the said judgment and preferred an appeal to this court. The defendant was gunning for kshs. 30,000 by relying on the case of **Elias Munioki vs. Said Juma Chiti, Mombasa, HCCC. NO. 53 OF 1990.** This court took into account what the court said in the case of **Kipkebe Limited vs. Moses Kauni Masaki, Civil Appeal No. 127 of 2004,** D. Musinga said: that is:

“It is trite law that award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and either extravagant or oppressive. The trial court has to be guided by such factors as previous awards for similar injuries and such other relevant factors”.

6. This court, is further being conscious of its role as the first appellate court as stated in **Selle vs Associated Motor Boat Co. Ltd 1968 E.A. 123,**

“has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that”.

7. This court finds that the trial magistrate in awarding the figure of kshs. 700,000 was exercising his discretion having seen both the plaintiff and heard the doctor testify, and this court will not interfere with this find. The final figure is kshs. 700,000 in general damage, plus kshs. 90,050 for special damages, totaling to kshs. 720,050, less 30% contribution, it comes to kshs. 574,015/-.
8. Accordingly, this appeal must but fail. The judgment/order/Decree of the learned trial magistrate be and is hereby upheld.
9. It is so ordered.

Dated and delivered at **KISII** this 23rd day of January, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

No appearance of O.M. Otieno for the appellant.

Bunde holding brief for Abisai for the respondent

Edwin Mongare Court Clerk.