



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 35 OF 2012

(Being an appeal from the judgment delivered by Hon. J. M. Munguti SRM at Machakos on 17th June 2010 in Machakos CMCC No. 1142 of 2009)

DAVID MUTUA.....1ST APPELLANT

MBUTHIA SAMUEL.....2ND APPELLANT

VERSUS

DORCAS WAYUA MUSYOKA.....RESPONDENT

JUDGMENT

1. The 1st Appellant David Mutua and the 2nd Appellant, Mbuthia Samuel were sued in the lower court by the Respondent Dorcas Wayua Musyoka for damages arising from a road traffic accident.
2. The 1st Appellant was sued as the beneficial owner of motor vehicle KAU 651J while the 2nd Appellant was sued as the registered owner of the said motor vehicle. The Respondent's case was that she was a fare paying passenger in the said motor vehicle on 14th June, 2009 which motor vehicle was allegedly driven negligently, veered off the road and overturned, thereby causing the Respondent bodily injuries.
3. The claim was denied by the Appellants who blamed the Respondent as having caused the accident solely and/or substantially.
4. When the case proceeded to hearing, the parties recorded a consent judgment on liability at 10% against the Respondent and 90% against the Appellants. The case proceeded for assessment of damages.
5. The Respondent (PW1) gave evidence detailing her injuries. Dr. Judith Kimuyu (PW2) testified on behalf of Dr. Musau Virginia who filled in the P3 form and made the medical report dated 4th August, 2009.

The Respondent sustained the following injuries according to the medical report:

- (i) Two cuts in the forehead – 3cm with bleeding.
- (ii) Blunt injury to the right shoulder.

- (iii) Blunt injury to the left thigh.
- (iv) Deep cut wound on the right leg. About 10cm below the knee with bleeding.
- (v) Multiple bruises on the right ankle joint.
- (vi) Blunt injury to the chest-right upper aspect.
- (vii) Blunt injury to the left wrist joint.
- (viii) Fracture of the right clavicle .
- (ix) Fracture of the left distal radius.
- (x) Fracture of the left ulna styloid process.

6. The doctor in her evidence also referred to the treatment notes and the x-ray report form (*exhibit 1a and 1b*). The entries made at the back of the x-ray request form reflected the fractures sustained. The further treatment notes (*exhibit 2*) also reflect the application of the plaster of paris over the left wrist joint.

7. The doctor's examination revealed that the Respondent had a deformed right clavicle and reduced movement of the right wrist and multiple scars on the forehead and right wrist.

8. The Appellant's side did not call any witnesses during the trial. The trial magistrate made an award of Ksh 300,000/= General Damages and Ksh 13,190/= special damages. After taking into account 10% contributory negligence, judgment was entered for Ksh 281,171/= plus costs and interest.

9. The Appellant's were dissatisfied with the said judgment and appealed on both quantum and liability. The Appellants had raised four grounds of appeal. However during the submissions, the same were coalesced into only one ground, that is the issue of quantum only.

10. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

11. The Appellants issue with the award of quantum was that the injuries reflected in the P3 form and the medical report were not reflected in the treatment notes. It was argued that the medical report had exaggerated the said injuries. However, the further medical report (Exh.2) reflects application of plaster of paris over the left wrist joint. The x-ray request from (Exh. 1B) reflects fractures of the right clavicle and fractures of the radius and ulna. It would have therefore required a second medical opinion to counter the opinion of the doctor who made the medical report. Having failed to adduce any such evidence, the submissions regarding the exaggeration of the medical report have no basis.

12. The quantum of damages is in line with the award of damages in comparable cases. As stated by the Court of Appeal in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A. M. Lubia and Olive Lubia [1982-1988] 1 KAR 727** at p. 730:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either 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 this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

13. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of June, 2015

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JUDGE