



**REPUBLIC OF KENYA**

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

**HCCA NO. 322 OF 2012**

**GABRIEL KARIUKI KIGATHI.....1<sup>ST</sup> APPELLANT**

**GODFREY KIMANI NJERI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MONICA WANGUI WANGECHI..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment and decree of Honourable B.J. Ndeda, Principal Magistrate passed on 22<sup>nd</sup> May 2013 in Thika Senior Resident Magistrate's court Civil suit No. 897 of 2009. The appellants herein Gabriel Kariuki Kigathi and Godfrey Kimani Njeri were the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the court below whereas the respondent herein Monicah Wangui Wangechi was the plaintiff.
2. The Respondent Monicah Wangui Wangechi sued the appellants jointly with one Bolpak Trading Company Ltd as the 3<sup>rd</sup> defendant claiming that on or about the 11<sup>th</sup> day of December 2008 she was lawfully travelling as a passenger along Thika- Nairobi road near Lewis Hospital in motor vehicle registration No, KBC 401V Toyota Premio controlled by one Godfrey Kimani Njeri the 2<sup>nd</sup> appellant herein and owned by the 3<sup>rd</sup> defendant Bolpak Trading Company Ltd when the said motor vehicle was so negligently recklessly and or carelessly driven at a high speed without any due care, regard /or attention by the 1<sup>st</sup> defendant driver, servant and or agent that it lost control and veered off the road and hit a pedestrian causing a road traffic accident as a result of which the respondent herein sustained serious injuries and suffered loss and damage.
3. The 1<sup>st</sup> appellant was sued as the driver of the accident motor vehicle, the 2<sup>nd</sup> appellant as the person in control, possession and or ownership of the accident motor vehicle while the 3<sup>rd</sup> defendant Bolpak Trading Company Ltd was sued as the registered owner of the accident motor vehicle.
4. The respondent maintained that the defendants were solely negligent for the material accident's occurrence and set out particulars of negligence as follows:
  - a. Driving motor vehicle registration KBC 401 V Toyota Premio in a careless manner.
  - b. Driving in an excessive speed in the circumstances of the road.
  - c. Failure to slow down, break, swerve or act in any other reasonable manner to avoid the accident.
  - d. Failure to keep proper look out to other road users or at all.
  - e. Driving in a zigzag manner in the circumstances.
  - f. Driving on the wrong side of the road.
  - g. Failure to take regard of other road users.

- h. Failure to prevent the said accident.
- i. Driving a defective motor vehicle KBC 401 V Toyota Premio.
- j. Driving without due care and attention.

The respondent also sought to rely on the doctrine of Res Ipsa loquitor, the Traffic Act and the Highway Code.

5. The respondent further contended that as a result of the material accident, she sustained the following injuries:
  - a. Fracture of the neck.
  - b. Bilateral rib fractures.
  - c. Bilateral lung contusion
  - d. Injuries to both hands.
  - e. Injuries to both legs.
  - f. Further particulars to be furnished at the hearing by way of a medical report.
6. She also claimed for special damages in the sum of shs 114,515, costs of the suit and interest and any other relief deemed fit to grant by the court.
7. The 1<sup>st</sup> and 2<sup>nd</sup> appellants filed defence dated 20<sup>th</sup> April 2010 denying the occurrence of the accident and all the particulars of negligence attributed to them. They also pleaded alternatively that if any injuries or damages resulted from the alleged accident then they were solely caused or contributed to by the respondent's own negligence in that:
  - a. She failed to put on the safety belt while travelling on motor vehicle KBC 401V.
  - b. Failed to take care of her own safety.
  - c. Travelled in a dangerous manner.
8. The appellants also denied all particulars of injuries and or damage as pleaded by the respondent and urged the court below to dismiss the respondents suit with costs.
9. The respondent filed reply to defence dated 21<sup>st</sup> April 2010 joining issues with the appellant's defence and maintaining/reiterating contents of the plaint as pleaded. The trial court heard the case with only the plaintiff testifying.
10. The defendants/appellants did not call any evidence/witness and closed their case.
11. In his impugned judgment, the trial magistrate found the appellant jointly and severally liable for the accident at 100% and awarded the plaintiff shs 800,000 general damages together with shs 202,623 special damages, costs and interest.
12. Being dissatisfied with the above judgment, the appellants herein filed this appeal on 25<sup>th</sup> June 2012 vide Memorandum of Appeal dated the same day contending that:
  - a. The sum of shs 800,000 general damage for pain, suffering, loss of amenities and ought to be reduced.
  - b. The sum of shs 800,000 is not consistent with the level of damages awarded to the other plaintiffs in similar circumstances.
  - c. The Learned magistrate erred in law and fact when he failed to consider the evidence of the appellants submissions and dismissed the same without giving any reason or at all.
  - d. The appellants prayed that the appeal herein be allowed, judgment of 28<sup>th</sup> May 2012 be set aside, the respondent be ordered to pay costs of the court below; costs of the appeal and such further or other relief as may appear to the court to be just.
13. From the grounds of appeal and submissions by the appellants dated 9<sup>th</sup> July 2015 and filed in court on 21<sup>st</sup> July 2015, the appellant's only challenge the judgment of the lower court on the quantum of damages as decreed by the trial court.
14. The appellant invites this court to review the evidence on record since this is a first appeal, according due regard to both the facts and the law as they emerged. They relied on the case of

**Mukube V Njamiru [1988] KLR 403** cited by the Court of Appeal in **Nzola Sugar Company Ltd V Capital Insurance Brokers Ltd** wherein it was held inter alia that:

*“ A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”* The appellant also cited **Kiruga V Kiruga [1988] KLR 348** where the Court of Appeal cited with approval **Watf V Thomas [1947] 1ALL ER 582** per Sir Charles O’connor that:

*“ It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has indeed jurisdiction to review the evidence in order to review the evidence in order to determine whether he conclusion reached upon that evidence should stand.”*

15. The appellants contended that the trial magistrate failed to appreciate both the facts and evidence placed before him during the time of hearing and in particular, failed to take into account the defendant’s submissions on quantum and the 2<sup>nd</sup> medical report of Dr Bodo and that he only considered the defendants’ submissions in assessing liability. This court was referred to page 69 of the record of appeal and page 68 wherein the trial magistrate stated that he had compared the two medical reports by Dr Jane Ikonya and the other by Dr. Bodo and to him, they were similar. Further, that the trial court ignored Dr. Bodo’s assessment that the respondent had no permanent disability. In addition, the appellants contend that the trial court ignored their submissions at page 48 of the record of appeal line 20 and that he failed to give reasons for dismissing the appellant’s proposal for shs 180,000 without taking into account case law as cited. The appellants urged this court to interfere with the trial court’s award of damages and find the award of shs 800,000 excessive and reduce it, relying on the case of **Osman Mohammed & Another V Saluro Bundit Mohamed CA 3 of 1997** that:

*“Damages must be within limits set by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of the public the vast majority of whom cannot afford the burden, in the form of increased insurance and or increased fees.”*

16. In the appellant’s view, the respondent’s injuries were less serious and that she had healed. They also attached the decisions in case of **Nairobi HCC 2048/94 Francis Shamalla V Kerenge Bus Service**, **Machakos HCC 364/98 Joseph Marulu Mutua V Samuel Njoroge Mwangi**; and **Nairobi HCC 1617 of 1998 Billad Mwangi Gichukui V TM-AM Construction Group (Africa)** urging this court to allow the appeal with costs.

17. In her written submissions dated 5<sup>th</sup> October 2015 and filed on her behalf on 7<sup>th</sup> October 2015 by her advocate, the respondent maintains that the sustained serious injuries which necessitated her hospitalization and the injuries were confirmed by Dr Jane Ikonya and Dr Joan Bodo. She also maintained that the trial magistrate took into account evidence as adduced at the trial, the severity of the injuries, the written submissions of both parties and authorities cited and justifiably awarded the respondent general damages at shs 800,000. Further that the trial magistrate clearly took into account Dr Bodo’s medical report at page 69 of the record of appeal, and that he also considered the parties written submissions.

18. The respondent also maintains that the award of shs 800,000 in general damages was not excessive considering the serious injuries she sustained following the material accident. She relied on **Mehari Tewoldge t/a Mehari Transporters Limited Vs Damu Muasya Maingi, Machakos HCCA 190 of 2008**, **Anne Njeru (minor) V The Headmistress of Machakos Girls and Others Machakos HCC 165/2000**, **Boniface Mwaliwa V Isaac Mwaliwa & Another, Mombasa HCC 17/1997** and **Peter Maina Mwaura v Solomon Kinuthia Mwaura HCC 1081/91** wherein all the cases cited above the courts awarded damages ranging between 1.5 million – 300,000 depending on the severity, with the least bearing only soft tissue injuries. The

respondent also relied on the Court of Appeal decision in **Kemfro Africa Ltd t/a Meru Express Services & Another [1982-1988] KLR 727** wherein the court stated that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at just instance. Further that ***“the appellate court can justifiably interfere with the quantum of damages awarded by the court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an erroneous estimate.”***

19. The respondent urged this court to find that this appeal lacks merit and to dismiss it with costs.
20. As correctly submitted by the appellant's counsel, this being the first appeal, this court is obliged by Section 78 of the Civil Procedure Act to re-examine and re-evaluate the evidence before the trial court and arrive at its own independent conclusion bearing in mind that it never heard or saw the witnesses as they testified. In the present case, only the plaintiff did testify, parties having agreed on production of documents by consent as recorded by the court and filed documents for purposes of assessment of damages only. It therefore follows that this court in determining the merits of this appeal shall examine the plaintiff's oral evidence and documentary evidence placed on record by consent of parties and the evaluation of that evidence by the trial magistrate and establish whether she arrived at a correct decision or she misapprehended the law or facts.
21. Re-evaluating the evidence on record, vis a vis the pleaded facts, it is worth noting that the respondent pleaded the following injuries:
  - a. Fracture of the neck.
  - b. Bilateral rib fractures.
  - c. Bilateral lung contusion
  - d. Injuries to both hands.
  - e. Injuries to both legs
  - f. Further particulars of injuries to be furnished at the hearing hereof by way of medical report.
22. The discharge summary from MP Shah Hospital produced as P exhibit 1 shows final diagnosis as incomplete fracture C2, bilateral rib fractures and bilateral lung contusion. The respondent was managed on anti biotics, analgesics and collar and given off duty three weeks on discharge. The P3 form, P exhibit 4 show incomplete fracture C2, bilateral rib fractures bilateral lung contusion. The medical report by Dr Ikonya, P exhibit 6(a) dated 9<sup>th</sup> March 2009 revealed incomplete fracture cervical spine, fracture of the ribs bilaterally and fracture right ankle.
23. At the time of examination the respondent complained of pain on the neck, chest pain and pain and swelling right ankle. The doctor concluded that the respondent sustained severe grievous harm in nature. The injuries were still in the process of recovery and could cause temporary incapacity for two years. She was then still on treatment and physiotherapy and could suffer permanent incapacity of about 20%.
24. On the other hand, the medical report by Dr. Joab Bodo made on 5<sup>th</sup> April 2011 about 2 years after the first medical report by Dr Ikonya revealed that the respondent had suffered injuries involving, incomplete fracture of the 2<sup>nd</sup> cervical vertebra, fracture of ribs 1-5 undisplaced on the left and 2<sup>nd</sup> and 3<sup>rd</sup> on the right and fracture medial malleolus right ankle undisplaced. Doctor Bodo confirmed that the respondent was admitted to hospital on 11<sup>th</sup> December 2008 and continued review as an outpatient. On examination, the respondent had occasional right sided chest pain, fractured ribs had well united, neck movements were normal with normal grip in both hands and the fracture C2 was well united. He concluded that she had no permanent disability.
25. The respondent testified on 2<sup>nd</sup> April 2012 and produced all her documents as filed, confirming the injuries as per discharge summary and the two doctor's medical reports as well as the P3 form. She stated that she still attended hospital.
26. In his judgment at pages 67-70 of the record of appeal, the trial magistrate after finding that the plaintiff (sic) 100% liable for the accident, on quantum he stated (handwritten)-

*“On quantum I have compared (not composed) the two medical reports one by Dr Joan Ikonya and the other by Dr Joab Bondo. To me they are similar, plaintiff sustained fracture of the cervical spine cervical vertebrae, fractures of the ribs 2<sup>st</sup> to 5<sup>th</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> on the right and fracture of the medial malleolus right ankle. Dr. Ikonya assessed permanent incapacitation at 20% and she was hospitalized for 5 days. The defendants counsel proposed kshs 180,000/- for quantum which is clearly very low. The plaintiff has proposed shs 1 million based on relied upon High Court authority e KLR George Otieno V Attorney General.....keeping in mind that no amount of money can compensate for pain, suffering and loss of blood I award the plaintiff shs 800,000/- as quantum....”*

27. The appellants complain that the trial magistrate failed to take into account the defendant's submissions on quantum and the 2<sup>nd</sup> medical report by Dr Bodo. In their view, mere mention by the trial court, that he had considered the two medical reports and found them to be similar was not sufficient consideration and that mere mention of the proposal by the appellant of shs 180,000 was not sufficient. Further, that the trial magistrate failed to consider Dr Bodo's assessment that the respondent had no permanent incapacity and failed to take into account case law.
28. From the above record, this court finds that the trial court was clear that it had compared the two doctors medical reports and found them similar. Indeed, the two doctor's confirmed the respondent's pleaded injuries and how those injuries were managed. However, I am in agreement with the appellants counsel's submissions that the trial magistrate in arriving at the quantum payable did not consider the fact that Dr. Ikonya's report was made nearly two years earlier than Dr Bodo's medical report which showed that the respondent had healed from the injuries sustained save for occasional pain and the fact that she had not suffered any permanent incapacity which had earlier on been assessed by Dr Ikonya at 20%.
29. In addition, the trial magistrate casually dismissed the appellant's proposal without alluding to the authorities that had been submitted and indeed, only referred to the respondent's counsel's authority submitted and concluded that a sum of shs 800,000/- general damages was sufficient, without making any attempt to compare and or contrast those authorities and the injuries sustained by the respective claimants in those decisions .
30. In my view, therefore, the trial magistrate fell into error when he failed to consider the appellant's submissions and authorities on quantum of damages for pain, suffering and loss of amenities. I shall accordingly proceed to examine those decisions relied on by the appellants in their written submissions.
31. In Nairobi HCC 1574/91 **Dorcas Anyango Oyugi V Charles A Okello**, the plaintiff sustained blunt injury to the forehead with haematoma and loss of consciousness for one day, fractures of 2 ribs and dislocation of both knee joints. She recovered fully, but was left with pains in the cheek and lumbar region. She was 50 years at the time of the accident Githithi J (as he then was) awarded her shs 150,000 on 29<sup>th</sup> November 1993.
32. In **Henry Kashope V Kuldip Young Company Ltd & Another Mombasa HCC 526 of 1988, Omolo J** ( as he then was on 6<sup>th</sup> November 1990 awarded shs 170,000/- general damages to the plaintiff aged 40 years who sustained abrasions of the scalp, haematoma around the eye and a perforating injury to the right eye. He underwent an operation called exploration and repair of the right eye. He lost the use of the right eye.
33. In **Mwinyi Ahmed V Liarant A. Khan Mombasa HCC 689/91** the court- Wambilyanga J ( as he then was above ) awarded shs 180,000/- general damage on 19<sup>th</sup> January 1994 to a plaintiff who sustained a head injury concussion, fracture of left fibula, laceration on the left eye, abrasions on the forehead and left shoulder and was hospitalized for 19 days, was aged 39 years, continued as outpatient and the injuries healed with a resultant scar on the left eye brow and mild pain and restricted movement of the left knee at a range of 200degrees.
34. In comparison to the authorities, the respondent supported her proposal for shs 1,000,000 with the decision by Angawa J made on 14<sup>th</sup> February 2006 in **George Otieno V Attorney General and another** wherein the plaintiff/sustained the following injuries, Urethral stricture(long), recurrent UTI, Gatritis and cervical injury with weakness to both upper and lower limbs.

35. The principles for awarding general damages are now well settled. That, an award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered, that the award should be commensurate to the injuries suffered, that the awards in decided cases are mere guides and each case should be treated on its own facts and merit, where awards in decided cases are to be taken into account then the issue of own element if inflation has to be taken into account and that awards should not be inordinately too high or too low.
36. In the instant case, I am reminded that an appellate court should be slow to interfere with awards made by the trial court in its discretion and I should not substitute a figure of my own for that awarded by the court below, simply because I would have awarded a different figure if I had tried the case at first instance. Nonetheless, an appellate court can justifiably interfere with the quantum of damages awarded by the court if it is satisfied that the trial court applied the wrong principles as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent erroneous estimate. (see **Kemfro Africa Ltd t/a Meru Express Services & Another versus A.M.Lubia and Another [1982-88] KLR 727**).
37. Having set out the rival positions as submitted in the lower court, I find that indeed there was no basis upon which the trial magistrate out rightly dismissed the appellant's proposal for shs 180,000/- general damages for pain and suffering and loss of amenities as being too low. He did not examine those cited authorities submitted by the appellants which I have taken the liberty to consider in-depth. Nonetheless, I am not persuaded that the injuries sustained by the respective claimants in those authorities were in any way similar to the injuries sustained by the respondent in the present appeal. In other words, those injuries were soft tissue injuries as opposed to the multiple fractures sustained by the respondent herein. In some other instances the injuries were simply irrelevant like the one relating to loss of use of the right eye or fracture of fibula and lacerations. In addition, the awards in those cases had been made in the period between 1990-1994 over 10 years to the time of the judgment in the lower court subject of this appeal. No doubt, inflation had set in and therefore there was need to consider time lapse.
38. On the other hand, having examined the decision relied on by the respondent and which the trial magistrate too relied on in making his award of shs 800,000/- general damages ( **George Otieno V Attorney General & Another [2006] e KLR**), I find that the plaintiff sustained a gunshot wound through his neck. The bullet went through his ears and affected C4-C5; C3 bone of the spinal code and was found with quadriplegia injuries due to gun shots to his neck and all his limbs were weak. He suffered incapacitating fracture and could only walk on crutches and learn lifting small things like tea cup. He had permanent incapacity at 45 degrees and Angawa J awarded him kshs 900,000 general damages for pain, suffering and loss of amenities on 14<sup>th</sup> February 2006.
39. No doubt, those injuries sustained by the plaintiff in the above decision of **George Otieno V Attorney General & Another [2006] e KLR**, were debilitating and the court in its discretion awarded him 900,000/-. Those injuries compared to the ones suffered by the respondent in this case and the % of permanent incapacity initially assessed by Dr Ikonya which had since diminished at the time of examination by Dr Bodo cannot be compared with the injuries sustained by the plaintiff in the **Otieno v Attorney General** (supra) case. It is therefore not clear on record how the trial magistrate arrived at shs 800,000/- award. I would in the circumstances find that award was unsupported and inordinately high to warrant interference by this court. Comparing the decisions relied on in the lower court and the respondent's decisions contained in her submissions before this court, the ones that were submitted on appeal, I am in agreement that no two injuries can be similar.
40. Accordingly, doing the best I can, I would award the respondent general damages for pain, suffering and loss of amenities a sum of shs 400,000/- taking into account the fact that she had substantially healed from her injuries at the time of hearing of the suit. There is no challenge to the special damages which were pleaded and proved. They remain undisturbed.
41. In the end, I allow this appeal, set aside the judgment of the trial magistrate on quantum of general damages and substitute it with judgment for the respondent for a sum of shs 400,000 general damages. Special damages remain undisturbed. Interest to accrue from date of judgment in the lower court until payment in full. The appellants have partially succeeded. They are awarded half of the costs of this appeal.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of December 2015.**

**R.E. ABURILI**

**JUDGE**