



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 205 OF 2011**

**1. MOTREX CO. LTD**

**2. BENJAMIN KIPHUPA KIMENGEI.....APPELLANTS**

**V E R S U S**

**FIDELIS NJOKI GACHOKA..... RESPONDENT**

*(Being an Appeal from the Judgment and decree of Hon. Ndungu, Senior Principal Magistrate in Nairobi CMCC No. 7743 of 2008 delivered on the 13<sup>th</sup> April, 2011)*

**JUDGMENT**

This is an appeal by the defendants in the lower court against the decree of that court by which the Respondent (who was the plaintiff) was awarded damages following an accident in a road traffic accident involving the Appellants' motor-vehicle along Nairobi- Naivasha Road. According to the Plaint dated 3<sup>rd</sup> December 2008, the Respondent was lawfully travelling as a fare paying passenger in a *Matatu* KAS 193J when the 2<sup>nd</sup> Appellant negligently caused motor-vehicle KAG 773Z to collide into it thereby injuring the Plaintiff.

The Respondent was awarded KShs. 800,000/00 for pain, suffering and loss of amenities, KShs. 900,000/00 for loss of earnings, KShs. 200,000/- for loss of earning capacity and KShs. 151,408/00 for special damages. All these awards were reduced by 20%, parties having agreed and recorded consent judgement on liability at 20% against the Respondent and 80% negligence against the Appellants jointly and severally.

This appeal is against quantum only as the memorandum of appeal dated 3<sup>rd</sup> May 2011 clearly shows. It is now well-established that an appellate court will interfere with a trial court's award of damages only where it can be demonstrated that in assessing the same, the court took into account a matter that it ought not to have taken into account, or that it failed to take into account a matter that it ought to have, or that the award is so high or so low as to amount to a wholly erroneous estimate of the same.

There are seven grounds of appeal. They all disclose three main complaints:-

1. That the award of KShs. 800,000/00 for pain, suffering and loss of amenities was excessive.
2. That the award of KShs. 900,000/- was made without to subjecting the Respondent's earnings to mandatory statutory deductions in arriving at her net monthly earnings thus it was excessive.
3. That the award under the head of loss of future earnings was wrong in law as the Respondent at

the time of trial had fully healed.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the record of the lower court. A medical report dated 27<sup>th</sup> May, 2009 was produced in evidence. It confirmed that the Respondent suffered the following injuries:-

- i. Injury to the right leg with wound which resulted in an open fracture involving the tibia and fibula. Treatment involved administration of analgesics and antibiotics. Surgery where the tibia/fibula was fixed with external fixators. The external fixators were removed when the fracture had adequately healed.
- ii. Injury to the right jaw which resulted in non-displaced fracture of the right mandible. This was treated conservatively.

The Respondent was hospitalized for three weeks. When the fracture had healed, she was put on plaster of Paris to strengthen the bone further which plaster was removed after three months. She had to endure a long course of painful treatment up till 8<sup>th</sup> August 2007. The examination by the doctor revealed that she had healed with scars left on her right leg.

Various cases were cited before the learned trial magistrate. Under the head of general damages for pain, suffering and loss of amenities the Appellants quoted cases decided in 1993 where the Plaintiffs had sustained similar injuries to those in this case and were awarded Kshs. 200,000/- (**NAIROBI, HCCC NO. 4503 OF 1993, JOHN KIMANI KAMAU -VS- STEPHEN WARUI KIARIE** (Unreported), **NAIROBI, HCCC No. 4199 OF 1993 WILLIAM MWANIA -VS- EDWARD KARIUKI** (Unreported)). For the Respondent **MACHAKOS HCCA NO. 12 OF 2005, SAVCO STORES LIMITED -VS- DAVID MWANGI KIMOTHO** (Unreported) was quoted, the plaintiff had suffered fractured left tibia and fibula and deep cut wound on the left forehead. He was awarded KShs. 800,000/00 on 29<sup>th</sup> May 2008 for pain, suffering and loss of amenities.

I am not persuaded that in awarding KShs. 800,000/00 for pain, suffering and loss of amenities the Learned Magistrate took into account any factor he ought not to have, or that he failed to take into account something that he ought to have. Nor am I persuaded that the award was so high as to amount to a wholly erroneous estimate. It is not sufficient that I probably would have awarded a slightly less amount.

Regarding the award of KShs. 900,000/00 for loss of earnings, the same is challenged upon the basis that the Learned Magistrate did not factor in the statutory deductions that the Respondent was subjected to when calculating her monthly net earnings. However, the evidence before the lower court was that though she was earning an average of Kshs. 8,000/- after statutory deductions her net salary was an average of Kshs. 18,000/- due to service charge amounting to Kshs. 10,000/- payable every month. The award for loss of earnings was therefore properly made and assessed.

When it comes to loss of earning capacity, the Doctor indicated in his report that the Respondent had fully healed. This therefore means that the injuries did not lead to total incapacity to work. There is no doubt that the Respondent is leading a useful life especially considering she was in the hotel business in a housekeeping position which does not necessarily require too much exertion on the one leg that sustained injuries. There is no doubt that the Respondent can be employed again in a similar job. She did not manage to prove on a balance of probabilities that as a result of the accident her chances of obtaining employment were diminished. Due to this, the claim must fail.

In the result, the appeal succeeds albeit partially as the claim for loss of earning capacity fails. All the other awards stand as they were properly assessed. The costs shall be borne by the Appellants. It is so ordered.

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

**A.MBOGHOLI MSAGHA**

**JUDGE**