



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL NO. 194 OF 2009**  
**JOSEPHAT MWANIKI KIRERU.....APPELLANT**  
**VERSUS**  
**PENINAH MUTHONI NDIRU.....RESPONDENT**  
**(Being an appeal against the Judgment and Decree of Hon. N. Shiundu**  
**(SRM) in Eldoret Chief Magistrate's Court Civil Case No. 536 of 2008**  
**delivered on 6th November, 2009)**

**JUDGMENT**

The Respondent herein was the Plaintiff in Eldoret Chief Magistrate's Court Civil Suit No. 536 of 2008. She sued the Appellant for general damages, special damages of Kshs. 94,942/=, costs and interests.

Her case was that on the 5th November, 2007 she was travelling in motor vehicle registration number KAT 537D Toyota G. Touring owned by the Appellant along Nyahururu road when at Ndaragwa the said vehicle was negligently driven or managed that it overturned thereby occasioning severe injuries to her.

Under Paragraph 5 of the plaint, she particularized the injuries as follows:-

- (i) The forehead was swollen and tender with bruises.**
- (ii) Blunt trauma to the chest which was tender.**
- (iii) The left shoulder was swollen and tender.**
- (iv) A fracture of the left clavicle.**
- (v) The left elbow was swollen and tender with multiple cut wounds.**
- (vi) A degloving wound on the left foot.**
- (vii) The left knee was swollen and tender with bruises.**

The trial Magistrate found the Appellant liable for negligent driving at 100%. She then awarded general damages of Ksh. 400,000/=, special damages of Ksh. 11,812/= plus costs of the suits and interests

thereon.

The Appellant was dissatisfied with the Judgment and has appealed against both the finding on liability and quantum. The Memorandum of Appeal dated 30<sup>th</sup> November, 2009 and filed on 3rd December, 2009, raises the following grounds of appeal:-

- 1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.**
- 2. The learned trial Magistrate erred in awarding damages which were inordinately high vis-a-vis the injuries alleged /suffered.**
- 3. The learned trial Magistrate generally applied wrong legal principles in assessing quantum of damages.**
- 4. The learned trial Magistrate erred in awarding special damages that were not proved.**
- 5. The Respondent's case was not proved on balance of probability as is required by law.**
- 6. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.**

Parties filed written submissions. M/s. Kibichiy & Co., advocates for the Appellant filed submissions on 18th December, 2012. They submitted that there was sufficient evidence that the Defendant was not 100% to blame due to the fact that the Plaintiff on cross-examination admitted that there were potholes on the road which fact was supported by DW1 (Defendant) that he hit a pothole as he tried to avoid an on-coming vehicle which pulled to his lane as it avoided hitting an antelope. They submitted that it was an error on the part of the Magistrate to wholly apportion liability on the Appellant when indeed the Defendant had admitted he took necessary measures to avoid the accident. It is also their submissions that, pursuant to paragraph 10 of the defence and on a without prejudice basis if any accident occurred (albeit it is denied) the same was occasioned by reasons beyond human control.

On quantum, they submitted that an award of Ksh. 400,000/= was excessive and sought to rely on the following case law;

Kitale HCCA. No. 12 of 2007

Shah Ramji Punja Limited -Vs- Peter Wanjala Kilwake

In which Judge Koome awarded Ksh. 180,000/= on 12th November,

2010 for more severe injuries than in the instant case.

2. Francis Njenga Mbugua -Vs- Priscilla Wanjiru Kaminya — in which Judge Angawa awarded Ksh. 10,000/= as general damages for similar injuries.

3. Kemfro Africa Limited t/a Meru Express Services (1976) & Another -Vs- Lubia. & Another (No.2) in which the Court of Appeal gave grounds for interference with quantum of damages awarded by a trial court.

M/s. Gicheru & Company Advocates for the Respondent submitted that the Respondent being a fare paying passenger did not have control of the motor vehicle and could not therefore contribute to the occurrence of the accident, a position stated in Eldoret HCCA. No. 73 of 1995 - Cyrys Gachanga Muya and 4 Others -Vs- Abbas Mohammed & Another as follows:-

**"I find liability at 100% against the defendants jointly and severally as the Plaintiffs and**

**passengers did not contribute to the causing of the accident as they had no control over the manner of driving of the said vehicle. Secondly, knowing that the tyres were not in good order it was negligent on his part to drive at a speed without due care and attention."**

They submitted that, in evidence in chief the Defendant admitted that the road was rough with pot holes and that he spotted an on-coming car which he tried to avoid a head on collision with as a result of which he landed in a pot hole and the car overturned. They said that this amounted to an admission of liability on the part of the Defendant and urged the court to hold him liable at 100%.

On quantum, counsel for the Respondent submitted that the damages awarded were adequate and court should uphold them taking into account that the Respondent sustained severe injuries which left permanent scars on her body. They relied on the following two cases:-

1. Eldoret HCCC. No. - Cyrus Gachanja Muya & 4 Others -Vs- Abbas Mohammed & Another (found at 1999 @KLR)
2. Nairobi HCCC. No. 469 of 1997 - Limo Rashid -Vs- The Hon. Attorney General

I have accordingly considered the respective submissions together with the cited case law. The issues for determination lie under two limbs only namely, liability and quantum. But before I dwelve into them it is important to mention that the Appellant filed his defence on 21st October, 2008 in which he denied that any accident occurred on the material date and that he was negligent for any injuries sustained by the Respondent. Under paragraph 4 of the defence, the Appellant denied the Respondent was a pedestrian on the road before she was allegedly knocked down by the Appellant's motor vehicle. He averred that (on a without prejudice) if any accident occurred, the same was caused by circumstances beyond his control. He averred that the motor vehicle registration number KAT 537D was in good working condition and was carefully driven.

In reply to the defence, the Respondent denied the Appellant's allegations in toto and reiterated what she had stated in the plaint.

### **LIABILITY**

The Respondent was the only witness in the Plaintiff's case. She testified that on the material date she was travelling from Eldoret to Karatina aboard motor vehicle registration No. KAT 537D owned by the Defendant (Appellant) who was over speeding and he tried to overtake on a stretch where there were potholes which caused the car to overturn, roll and she was, as a result injured. She said both herself and the Defendant were taken to Nyahururu District Hospital and later at Moi Teaching & Referral Hospital for treatment. She said she sustained bruises to the face, left shoulder, chest, thigh (where skin grafting was done) and on the left leg. She said she was admitted at Moi Teaching & Referral Hospital. She produced a treatment note and discharge summary as P. Exhibits 1 and 4 respectively. According to the Plaintiff, the Defendant was over speeding and he failed to see the potholes when overtaking.

In cross-examination, the Plaintiff said he asked the Defendant to stop over speeding. She confirmed that the scene of the accident had pot holes.

The Appellant testified as DW1. He confirmed he owned the subject motor vehicle KAT 537D and he left Eldoret on 5th November, 2007 for Nyahururu to attend a funeral. He stated that from Nyahururu, he took the Nyeri road towards Ndaragwa. He said it was drizzling but the visibility was clear. He said he was moving at a speed of about 80Km/hour. He testified that about 10 Km from Ndaragwa, an antelope suddenly appeared from the bush in front of a car he was following. That there was also an oncoming vehicle. He said that all drivers tried to avoid hitting the antelope and it is then one of them crossed to his lane and as he was trying to avoid hitting it, his car skidded and he rolled several times.

In cross-examination DW1 confirmed that the Respondent was his passenger and that the accident occurred as he tried to avoid a head-on collision with an oncoming vehicle. He said that although he tried

to apply brakes and avoid the accident he was unable to control the car.

One thing is clear, that the Respondent was a passenger in the Defendant's car as opposed to a pedestrian as pleaded by the Appellant in paragraph 4 of the defence. The plaint is also clear that the Respondent pleaded as a passenger which facts ought to have prompted the Appellant to amend the defence. But it is now undisputed that the car rolled while the Respondent was a passenger and the Appellant its driver. Both parties having conceded to this fact places no burden on the court to determine in what capacity the Respondent sued.

Evidence demonstrates that the Appellant failed to take due diligence in the conditions of a wet and potholed road. Having admitted that there were potholes on the road, the duty of care in driving the car at a low speed was high. As a skewed driver (or deemed thereof) he ought to have known that, when driving on a rough road, the speed of his car must be such that, in the event of an emergency, and on application of brakes, the car would stop. He also knew that with the drizzle, the road was wet and if he drove at a high speed, in the event of an emergency, the brakes would not work. Evidence has it that when he applied the brakes, the car skidded, swerved and rolled several times. This is a clear indication that he was driving at a speed that he could not control the car in case of an emergency. This speed can only be construed to be '*high speed*' given the circumstances. And so I hold that he ought to be held liable for driving the car in a negligent manner. If he was diligent enough no accident would have occurred and I hold that the accident was not caused by circumstances beyond his control, or that it was not inevitable for that matter. It was avoidable.

It was counsel for the Respondents submission that the fact that the Respondent was a passenger could not be held accountable for the accident. I wholly concur with this proposition, as the Respondent was not at all in control of the vehicle when the accident occurred, and so cannot be held to account for the manner in which it was driven.

Having said so, I hold that the trial Magistrate did not misapprehend the evidence before her nor did she rely on wrong principles or facts in finding that the Appellant was liable at a 100%.

## **QUANTUM**

The Plaintiff relied on the following documents:-

- Treatment notes from Moi Teaching & Referral Hospital (P. Exhibit. 1)
- Invoice from the said hospital (P. Exhibit 2)
- Discharge summary from Moi Teaching & Referral Hospital (P. Exhibit 4)
- P3 form issued at Ndaragwa Police Station - which assessed the degree of injury as grievous harm - P. Exhibit 5.
- Medical Report dated 5th July, 2008 by Doctor Aluda - P. Exhibit 7 (a)

P. Exhibit 7 (a) indicates the Plaintiff sustained the following injuries:-

- The forehead was swollen and tender with bruises.
- Blunt trauma to the chest which was tender.
- Left shoulder was swollen and tender.
- A fracture of the left clavicle.
- Left elbow was swollen and tender with multiple cut wounds.

- A degloving wound on the left foot.
- Left knee was swollen and tender with bruises.

The medical report further shows that the fracture was treated by reduction and a plate and screw applied. Wounds were cleaned and dressed. Later skin grafting was done on the left foot. Medication was also prescribed. As at the time of examination (5th July, 2008) the Plaintiff experienced tenderness on the chest, left shoulder, left elbow, left knee and left foot. She had scars on the left elbow, chest and left foot. The doctor described the injuries as serious.

The Discharge Summary (P. Exhibit 4) shows that she was admitted in hospital between 6th and 21st November, 2007, that is a period of about 14 days. In addition, the P.3 form assesses the injuries as grievous. All the above exhibits are indicative that indeed the Plaintiff suffered serious injuries whose compensation should be adequate.

Before the lower court, the Plaintiff had submitted on an award of Ksh. 600,000/= while citing the case of **MARTIN DINDA EVAREST -VS- KENYA TEXTILE CO. LIMITED AND 5 OTHERS MOMBASA HCCC. NO. 707 OF 1995**. In this case, Khaminwa, J awarded Ksh. 600,000/= for pain and suffering for severe concussion and dislocation of humerous, deep laceration right shoulder involving brachial plexus with the paralysis of the right upper limb.

The Defendant on the other hand submitted on an award of Ksh. 100,000/= while citing the following case law:-

- (1), Zipporah Wambui Wambaira & 17 others -Vs- Gachuru Kiogora & 2 others, Nairobi CACA No. 10/2004 in which Plaintiff was awarded Ksh. 100,000/= for fractures.
- (2) KhiIna Enterprises Ltd -Vs- Charles Maina Migwi Nairobi HCCA No. 211 of 2003, wherein Plaintiff was awarded Ksh. 100,000/= for a fracture.
- (3) Peter Njangara Karanja -Vs- George Wainaina Njenga & Simon Gichana Kamau, Nairobi HCCC. No. 2348 of 1995 in which Plaintiff was awarded Ksh. 100,000/= for fracture of right tibia.

I have noted that the Record of Appeal does not contain any of the case law cited by the Defendant (Appellant). I have had to revert to the lower court record to ascertain the figures referred to.

I bear in mind that this being an appellate court cannot interfere with the award of damages unless the same is manifestly too high or manifestly too low or was not based on any evidence. But giving regard to the injuries the Respondent suffered, which I consider as serious and the cited cases, it is my view that the Ksh. 400,000/= awarded was adequate compensation in the circumstances and there is totally no justification for interfering with it.

### **SPECIAL DAMAGES**

The Respondent submitted receipts for the following:-

- (a) P. Exhibit 3 — being receipt No. 025032 dated 26th November, 2007 from Moi Teaching & Referral Hospital for Ksh. 90,812/= which was in payment of the hospital bill and in settlement of the invoice No. 0190772 (P. Exhibit 2) for the same amount.
- (b) P. Exhibit 7 (b) — being receipt dated 5th July, 2008 for Ksh. 2,000/= from Dr. S. L. Aluda for preparation of the medical report.

The said documents were produced without any opposition by the Appellant. It is not clear why and based on what evidence the trial Magistrate awarded special damages of Ksh. 11,812/=. Indeed, she gave no justification for the award save to say "***I enter Judgment for the Plaintiff against the Defendant for.....***"

**special damages of Ksh. 11,812/=**", It is trite law that special damages must be specifically pleaded and specifically proven. The Respondent pleaded for a sum of Ksh. 94,942/= and she proved the sum of Ksh. 92,812/= .This is the sum the trial court should have awarded, which I hereby award.

In the end, and upon evaluating all the evidence on record, this appeal must fail. In addition I order that the Respondent be paid damages as follows:-

(a) General damages ..... Ksh. 400,000/=

(b) Special **damages** .....Ksh. 92,812/=

**TOTAL** **Ksh. 492,812/=**

The Appellant shall in addition pay the costs of the lower court suit and this appeal. In making the payment, the sum of Ksh. 350,000/= already received by the Respondent shall be taken into account.

It is so ordered.

**DATED and DELIVERED at ELDORET** this 28th day of March, 2014.

**G.W.NGENYE - MACHARIA**

**JUDGE**

In the presence of:

No appearance for M/s. Kibichiy & Co. Advocates for the Appellant (duly served with Judgment Notice)

Mr. Onkoba Advocate for the Respondent