



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 141 OF 2009**

**PHILIP MUSYOKA MUTUA ..... APPELLANT**

**VERSUS**

**STEPHEN KIOKO MUSA ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief's Magistrate's Court at Machakos of Hon J.M. Munguti S.R.M in Chief Magistrate Civil Case No. 1162 of 2007 dated 16<sup>th</sup> July 2009)*

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*(Before B. Thurania Jaden J)*

**J U D G M E N T**

1. The appeal arises out of Road Traffic Accident which occurred on 21/9/2007 in which the Respondent was injured while travelling as a passenger in motor vehicle Registration No. **KWZ 423**. A consent judgment on liability was entered at 90% against the Respondent.
2. On quantum, the parties relied on written submissions and documents produced. A medical report by **Dr. Ndambuki** reflects that the Respondent was examined on 27/11/2007 and found to have sustained the following injuries:-
  1. **Bruises on face.**
  2. **Blunt injury to the neck and throat.**
  3. **Blunt injury to the chest.**
3. The Respondent was treated as an outpatient. **Dr. Ndambuki's** conclusion was that the Respondent complained of headaches and was at risk of post traumatic chronic head injury complication.
4. A subsequent report made by **Dr PM. Wambugu** on 11/8/2008 reflects injuries sustained by the Respondent as "**blunt chest trauma**". The doctor's opinion was that the injuries were soft tissue and minor in nature and no incapacitation had occurred. The trial magistrate awarded Kshs. 180,000/= as General Damages.
5. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings.
6. The appeal is basically on quantum. The Appellant's complaint is that **Dr. Wambugu's** report was prepared eleven (11) months after the accident as opposed to **Dr. Ndambuki's** report which was prepared two (2) months after the accident and reflected more serious injuries.
7. In the lower court, the Respondent's counsel had submitted for an award of Kshs.280,000/= as General Damages. Reliance was placed on the following two authorities:-
  - i. **Gitonga Njeru Thara –vs- Albert Gitaari Mugera Nrb HCCC 4987 of 1992** where on 2/7/1993, an award of General Damages of Kshs.180,000/= was made for injuries

- involving a scalp wound and contusions to the back, chest, left shoulder and left hand.
- ii. **Harrison Peter Odek –vs- J. Lyons & Co. Ltd Nbi HCCC No. 3736 of 1989** wherein on 22/10/93, an award of General Damages of Kshs.150,000/= was made for blunt injuries to the head and the right eye resulting in swelling, bruises on the lower limbs, left knee and hairline crack of left tibia.
8. It is observed that the injuries in the cited authorities were more severe than in the instant case but were also over 14 years old and the incidence of inflation could not be ignored.
  9. The Appellant had submitted for a sum of Kshs.70,000/= and referred to the following authority:-
    - i. **James Kevogio Mole & Another –vs- Kenya Bus Services Ltd Nbi HCCC 2163 of 1991** where the Plaintiff’s injuries were described as cut wound over the left eyebrow, soft tissue injury to the chest, deep abrasion over the left hand and soft tissue injury to the right flack. The award of damages made therein in 1992 was Kshs.30,850/=. The cited authority is also quite old.
  10. In all the cases cited the injuries are however comparable to the injuries in the case at hand. However As held by the Court of Appeal **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:-

**“It is trite law 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 first instance.**

**The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only 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 an entirely erroneous estimate.”**

11. In the case at hand, I agree with the Appellant’s counsel’s submissions that the trial court seems to have given more weight to the earlier report by **Dr. Ndambuki** instead of **Dr. Wambugu’s** report which came eleven (11) months after the accident when the Respondent was expected to have recovered. Taking into account the authorities cited, the incidence of inflation and the injuries sustained, an award of Kshs.100,000/= on a 100% basis as General Damages is reasonable.
12. Consequently, I set aside the award of Kshs.180,000/= made by the lower court and substitute the same with an award of Kshs.100,000/=. Since the measure of success in the appeal is partial, each party to bear own costs of the appeal.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 22<sup>nd</sup> day of May 2014.

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**B. THURANIRA JADEN**

**JUDGE**