



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 108 OF 2012**

**SHEM SHITUYI .....APPELLANT**

**V E R S U S**

**REXON SHIYONGA .....RESPONDENT**

*(Appeal from the decision of [P. ACHIENG, SRM] in the Chief Magistrate's Court Kakamega in Civil Case No.387 of 2011)*

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

The respondent was involved in a road traffic accident on the 28.6.2011 along the Kakamega Webuye road. He filed civil suit no. 387 of 2011 before the Chief Magistrate's Court Kakamega. Parties agreed on liability whereby it was apportioned at the ratio of 30:70 in favour of the respondent. The respondent was awarded general damages of Kshs.500,000/=. This triggered the appeal whereby the appellant in his grounds of appeal contends that the damages awarded are inordinately excessive, the trial magistrate did not consider damages awarded by superior courts in relation to similar injuries and that the court misdirected itself in assessing the nature of the injuries suffered by the respondent.

Parties agreed to argue the appeal by way of written submissions. The appellant contends that the respondent suffered laceration wounds to both elbows and blunt trauma to the back. Dr. Andai who prepared a medical report for the respondent assessed the injuries as serious soft tissue injuries of the back. The appellant has fully healed and his evidence that he puts on a belt on the back to assist him walking was not supported by any medical evidence. Counsel contends that the trial magistrate misapprehended the evidence on record relating to the injuries sustained by the respondent. Several authorities have been cited by the counsel for the appellant showing instances where the High Court has reduced damages awarded by the subordinate court. The appellant is of the view that an award of KShs.150,000/= is sufficient compensation.

Counsel for the respondent fully supports the award by the subordinate court. Counsel contends that Dr. Andai classified the injuries as serious soft tissue injuries of the back with chances of developing post traumatic osteoarthritis of the lumber spine. The doctor was of the view that the respondent would suffer 20% physical disability. Counsel maintains that the authorities relied upon by the appellant are more than nine years old and therefore outdated.

This is an appeal purely on the assessment of damages awarded to the respondent. The record of the trial court shows that only the respondent testified and parties consented on liability. The respondent was admitted at the Kakamega Provincial General Hospital from the date of accident 28.6.2011 and discharged on the 21.7.2011. According to the medical report by Dr. Charles Andai the injuries sustained were blunt injury to the back and lacerations to both elbows. Skin traction was done and this is noted from the treatment notes from the Kakamega Provincial Hospital. According to doctor Andai the respondent suffered 20% physical disablement and could suffer lumber spine complication in future. The respondent informed the court that he used to be a driver but he does not work due to health reasons. It is not clear whether those reasons are related to the accident.

Before the trial magistrate the appellant proposed an award of KShs.60,000/= as general damages and relied on some authorities. The respondent sought an award of KShs.1,000,000/= as general damages. From the medical evidence it is clear to me that the injuries sustained by the respondent are not mere soft tissue injuries similar to the ones relied by the appellant before the trial magistrate. The

respondent was hospitalized for about three weeks and skin traction was done on his back. It is my view that the medical evidence did not clearly establish the alleged future incapacitation of the respondent. It is also clear that there was no fracture of the spine and it is possible that the skin traction was intended to cover a wound whose dimension was not given in the medical notes. This makes the appellant conclude that the injuries were soft tissue in nature and have fully healed. The respondent himself gave scanty information and to his current medical situation. The trial magistrate in her judgment indicated that she had considered the authorities relied upon by both parties and assessed general damages at KShs.500,000/=. The appellant has cited the case of STANLEY MAORE V GEOFFREY MWENDA Nyeri Court of Appeal Civil Appeal No.147 of 2002. In that case the accident victim sustained injury to the right shoulder, injury to the chest and back and left leg. He complained of back pain and pain on the left hip. He had not completely healed and required prolonged anti-inflammatory treatment with physiotherapy. The Court of Appeal assessed injury at Kshs.100,000/=.

Although the injuries sustained by the respondent are soft tissue injuries the same are a bit serious, compared to normal soft tissue injuries. However, I find that the assessment by the trial magistrate was a bit high taking into account the medical evidence on record. The authority of Stanley Maore case is almost ten years old and those injuries are less severe than those sustained by the respondent. I will set aside the award of the trial magistrate and replace it with an assessment of general damages of KShs.400,000/=. I do take into account the fact that the respondent may in future suffer disability or require treatment as per the doctor's advice.

In the end I will allow the appeal and assess general damages at KShs.400,000/= less 30% contributory negligence. Each party shall meet his own costs of the appeal.

Delivered, dated and signed at Kakamega this 19<sup>th</sup> day of June 2014

**SAID J. CHITEMBWE**

**J U D G E**