



**Mochama v Nyokwoyo (Civil Appeal 101 of 2010)
[2013] KEHC 3799 (KLR) (18 April 2013) (Judgment)**

MOKAYA MOCHAMA V JULIUS MOMANYI NYOKWOYO [2013] eKLR

Neutral citation: [2013] KEHC 3799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 101 OF 2010**

RN SITATI, J

APRIL 18, 2013

BETWEEN

MOKAYA MOCHAMA APPELLANT

AND

JULIUS MOMANYI NYOKWOYO RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the court below (Miss Njeri Thuku, RM) in which the respondent was found responsible for the accident which occurred along Kisii-Nyamira road on 8th April 2009 involving motor vehicle Reg. No.KAJ 853 C and the appellant. The learned trial magistrate awarded to the appellant Kshs.27,000/= in general damages and Kshs.6,500/= in special damages.
2. The appellant (who was the plaintiff in the court below) being aggrieved by the award has brought this appeal on 2 grounds which are that:-
 1. The learned magistrate erred in law and fact in awarding damages that were manifestly low in favour of the appellant in total disregard of injuries sustained by the appellant.
 2. The learned trial magistrate erred in law and fact in basing her finding on irrelevant matters.The appellant prays that the appeal be allowed with costs and that the award on damages of the lower court be varied, altered and/or increased in such terms as are just.
3. By consent of the parties, the appeal was canvassed by way of written submissions. Both parties filed their respective submissions together with relevant authorities.
4. Learned counsel for the appellant urged the court to find that the trial court applied the wrong principles in making the award and to increase the award of damages to Kshs.70,000/= relying on the



following cases:- Douglas Mwirigi Francis –vs- Andrew Miriti – Meru HCCA No.34 of 2005 where the judge dismissed an appeal where general damages of Kshs.150,000/= were awarded in respect of soft tissue injuries. Lochab Brothers Co. Ltd. –vs- Samwel Kibungei Kiriswo – Eldoret HCCA NO.60 of 2006 where the judge on appeal, after re-evaluating the evidence confirmed the award of Kshs.80,000/= as general damages as earlier found by the trial magistrate. [Josephine Angwenyi –vs- Samwel Ochillo Kisii HCCA No.125 of 2008](#) in which the judge on appeal set aside an award of Kshs.30,000/= and increased the same to a sum of Kshs.70,000/= for injuries that the doctor described as soft tissue injuries.

5. The appeal was opposed. Counsel for the respondent in his written submissions contended that the appellant had not satisfied the principles laid down in *Butler –vs- Butler Civil Appeal No.49 of 1993* as the appellate court can only interfere with an award of damages in very extreme situations and that this is not one such extreme case.
6. Counsel relied on *Socfinaf Company Limited –vs- Joshua Ngugi Mwaura – Civil Appeal No.732 of 2003* at Nairobi, where Justice Visram reduced an award for injuries that were more severe than those of the appellant from Kshs.70,000/= to Kshs.20,000/=. *Evans Babu Njuru –vs- Paul Nyamoteny – Nairobi HCCC No.778 of 1991*, where the plaintiff was awarded Kshs.20,000/= for soft tissue injuries. [Loise Nyambeki Oyugi –vs- Omar Hassan Haji – Nairobi HCCC No.4150 of 1991](#) where similarly the plaintiff had sustained soft tissue injuries which were by description more severe than those sustained by the appellant yet she was awarded Kshs.20,000/=. Counsel therefore submitted that the court's award on quantum was fair in this case.
7. I have considered the entire appeal as well as submissions together with authorities cited. I am bound to re-evaluate the evidence on record in order to come to an independent conclusion. See *Selle & another –vs- Associated Motor Boat Co. Ltd & others [1968] EA 123*.
8. It is the appellant's case that on the 8th April 2009 at 7.30 p.m. he was standing at Jogoo and talking to a person on the left side of the road facing the direction of Kisii town, when he heard a car coming from Nyamira and on turning the left side of the car hit him and he sustained injuries on his right hand, right leg (on the calf), his ribs and his head.
9. He further told the court that the car was moving very fast, and on impact, he fell some distance from the road. He went to hospital on three occasions after the accident and later to the police station where he was given a P3 form and a police abstract.
10. He blamed the respondent for the accident as he was not on the road; he did not attempt to cross the road, the accident happened on the side of the road and the respondent was driving very fast and he did not hoot. On cross examination the appellant stated that he became unconscious for a few minutes after the accident.
11. PW2 was Doctor P.M. Ajuoga, a consultant surgeon at Awendo. He told the court that he examined the appellant on 4th August 2009 and confirmed that the appellant had sustained the following injuries:- Cerebral concussion i.e. lost consciousness for a short duration. * Deep cut wound on the back of his head. * Bruises on the right foreleg. Paragraph 12.

Dr. Ajuoga further testified that at the time of examination the appellant complained of persistent headaches and had an ugly tear on his head. His conclusion was that the appellant suffered severe soft tissue injuries which were healing well and that he would suffer no permanent disability.
13. In reaching the conclusions he made, Dr. Ajuoga relied on the history given by the appellant, treatment notes from Kisii Level 5 Hospital and his own physical examination of the appellant. He confirmed that he charged Kshs.6,500/= for the medical report.



14. PW3 was NO.75026 PC Nathan Mutii attached to Kisii Police Station performing traffic duties. He produced a police abstract and confirmed the accident between the appellant and the respondent who was driving motor vehicle registration Number KAJ 853 C – a Subaru station wagon. The accident occurred along Kisii - Nyamira road near Jogoo. He however testified that at the time of filing suit, the abstract file was not complete because the matter was still under investigation and the investigating officer was on leave.
15. The defendant/respondent testified as DW1. He confirmed the appellant’s testimony but stated that the appellant emerged from the left side of the road and dashed into the road crossing to the right and though he applied brakes, the appellant was knocked down by the left side of the vehicle.
16. He denied that he was driving fast and insisted that since it was at night, and had been raining with poor visibility, he was driving at 50 kph - 60kph. He added that he only saw the appellant when he was 5 metres away and he blamed the appellant for failing to take precautions before crossing the road. On cross examination, the respondent stated that he did not swerve to the right but could not give any reason for not swerving to the right.
17. There cannot be any dispute from the evidence that there was an accident involving motor vehicle Reg. No. KAJ 853 C and the appellant.
18. As a result of the accident, the appellant sustained injuries. As there is no issue on the apportionment of liability, the only issue to be determined by this court is on quantum which the appellant has claimed was excessively low.
19. It is now established that an appellate court cannot interfere with an award of damages by a lower court until the appellant meets out the test set out in Butler –vs- Butler (CA 49 of 1983) being:-
 - a. That the court acted on wrong principles.
 - b. That the court awarded so excessive or so little damages that no reasonable court would.
 - c. That the court has taken into consideration matters it ought not to have considered or not taken into consideration matters it ought to have considered and in the result, arrived at a wrong decision.
20. The injuries sustained by the appellant in this case were classified as serious soft tissue injuries that in my view are comparable to the injuries sustained by the plaintiffs in the cases cited to court by the appellant. In light of the principle set out in the Butler –vs- Butler case, (above) I am persuaded that the award of damages in this case were so low that the same must have been based on incorrect reasoning by the trial court. It appears to me that the trial court did not adequately consider the authorities cited by the appellant in making the award.
21. I am therefore of the view that this is a proper case where I should interfere with the award. The trial magistrate failed to appreciate the fact that the appellant/plaintiff not only suffered minor soft tissue injuries but also suffered a concussion for a few minutes coupled with a head injury. Counsel for the appellant in his submissions has specifically asked this court for an award of Kshs.70,000/= which request I think is not unreasonable.
22. For reasons outlined above, this appeal is allowed; the judgment and decree of the lower court is set aside and in its place I enter judgment in favour of the appellant/plaintiff for Kshs.70,000/= as general damages plus costs (in the lower court) and interest at court rates.
23. The respondent shall bear the costs of this appeal.



DATED AND DELIVERED AT KISII THIS 18TH DAY OF APRIL, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:Mr. B.O. Masese fof Ogari (present) for Appellant
Mr. Nicholas Bosire (present) for Respondent Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

