



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 78 OF 2010**

JOHN MBURU MWANGI .....1ST APPELLANT

SHER MOHAMMED HUSSEIN .....2ND APPELLANT

VERSUS

JANE WARUINU KANORU ..... RESPONDENT

**JUDGMENT**

This judgment is the outcome of the appeal against the judgment of **Honourable Kaniaru, learned Senior Principal Magistrate** delivered on 26.04.2010 vide Muranga C.M.C.C.NO. 44 of 2009. The Appellants herein put forward the following grounds in their Memorandum of Appeal:

1. **The learned trial magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration upon the defence counsel's objection that the treatment notes should be produced by their makers.**
2. **The learned trial magistrate erred in law and in fact in failing to appreciate that the Plaintiff had failed to prove that she had sustained injuries as a result of the accident.**
3. **The learned trial magistrate erred in law and in fact in failing to appreciate that there was no nexus between the treatment documents relied upon by the Plaintiff and the accident she claimed to have been involved in.**
4. **The learned trial magistrate erred in law and in fact in awarding the Plaintiff Kshs. 100,000/= as general damages which amount is excessive and manifestly high in the circumstances as the amount is an erroneous estimate of the loss/damage suffered by the Respondent.**
5. **The learned trial magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration upon the defence counsel's written submissions and the cases cited on similar injuries in respect of the same matter thereby awarding the Plaintiff manifestly high general damages.**
6. **The learned trial magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and in fact by relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.**
7. **The learned trial magistrate erred in law and in failing to dismiss the suit of Plaintiff who was not involved in the accident at all.**

When this appeal came up for hearing, the Appellant's learned counsel successfully obtained an order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Before delving deeper into the merits or otherwise of the appeal, let me set out the background of this appeal. **Jane Wairimu Kanoru**, the Respondent herein was involved in a road traffic accident on 6.8.08 along Makuyu- Muranga road while on board motor vehicle registration **No. KBA 188G**. The Respondent was a fare paying passenger. The accident involved motor vehicles registration No. **KBA 188G** and **KAM 932A**. The Appellant then sued the the Appellants herein seeking for damages for the injuries she sustained as a result. The suit was heard and determined as earlier stated by **Hon. Kaniaru**, the learned Senior Principal Magistrate who awarded the Respondent Kshs. 100,000/= as general damages and Kshs. 2,500/= as special damages.

It is the submission of the Appellant that the Respondent did not tender any credible evidence to establish that she suffered any injury as a result of the accident. The Appellant discredited the treatment notes produced by the Respondent during the hearing of the case claiming the maker was not called to produce the same. The Appellant urged this court to find that the production of the treatment notes was against the provisions of **Section 35** of the **Evidence Act**. It said that the Clinical Officer who produced the treatment notes was not the maker neither did he treat nor examine the Respondent. It is their contention that his evidence was hearsay. The learned Senior Principal Magistrate was faulted for ignoring the evidence of DW1 a medical records officer which showed that the Respondent was treated on 15.12.2008 and not on the material date alleged. The Respondent on the other hand urged this court to reject this ground of appeal since there was no objection to the production of such evidence. I have looked at the record and it is clear that Patrick Mwangi (PW3), a Clinical Officer based at Muranga District Hospital testified and produced the Respondent's treatment card. PW3 stated that the Respondent was treated on 6.8.2008. PW3 was allowed to produce the treatment card when the Appellant and their counsel did not raise any objection. I do not understand why the Appellants waited only to raise the issue on appeal. I am convinced the Appellants lost the opportunity when they failed to object to the production of the evidence at the earliest stage. They waived that right hence they cannot be allowed to do so at this stage. I dismiss this ground.

The Appellant has alleged that the learned trial magistrate ignored the evidence of DW1 which showed that the Respondent was treated on 15.12.2008 and not on 6.8.2008. I have examined D.W.1's evidence and it is apparent that D.W.1 admitted that at times the hospital staff make mistakes while recording. He also admitted that it is possible the Respondent could have been treated earlier than 15.12.2008. I have examined the judgment of the trial court and it is clear that the learned Senior Principal Magistrate did not ignore DW1's evidence. In fact he analyzed the same in detail and came to the conclusion that the same was wanting and in-conclusive hence unreliable. I see no merit in the objections, the same is dismissed.

The other ground raised on appeal is that the award of Kshs. 100,000/= for soft tissue injuries was inordinately high and far apart compared to other awards for near similar injuries. The Appellants urged that an award of Kshs. 30,000/= was the most reasonable figure. The Respondent was of the view that the award is neither high nor erroneous. I have carefully re-evaluated the evidence and it is clear in mind that the learned Senior Principal Magistrate analyzed the authorities cited to him, considered the submissions of both sides before making his award. I have also re-considered the cases cited and I am satisfied that the award of Kshs. 100,000/= as general damages for the injuries the Plaintiff suffered represents a fair assessment of damages. I am also convinced that the Respondent proved her case on a balance of probabilities.

In the end, I see no merit in the Appeal. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered this 23rd day of August, 2013**

**J.K. SERGON**

**JUDGE**

In open court in the presence of Wanyoike for Appellant

N/A for Respondent