



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 30 OF 2011

ISMAEL KAGUONGO.....APPELLANT

VERSUS

BARU KABIRU.....RESPONDENT

*(An appeal against the Judgment made on 23rd February, 2011 by the Hon.Mr. L.Mbugua,
Ag.Principal Magistrate, in Karatina SRMC Civil suit No.13 of 2009, Baru Kabiru =Vs= Ismael
Kaguongo)*

JUDGMENT

On 23rd December 2007, **Baru Kabiru** the Respondent herein, was injured in a road traffic accident involving Motor Vehicle registration no. KAS 485K. It is the Respondent who was knocked down while lawfully walking on the pedestrian side along Mukurueine-Ichamara road. The Respondent filed a compensatory suit against **Ismael Kaguongo**, the appellant herein, the registered owner of the aforesaid motor vehicle. The appellant filed a defence denying the Respondent's claim. When the case came up for hearing before the trial court on 27/07/2010, parties involved recorded a consent order in which the appellant agreed to shoulder 80% contributory negligence while the Respondent shouldered 20%. The case therefore proceeded for hearing on quantum. The Respondent is said to have suffered the following injuries.

- **Fracture of left tibia**
- **Soft tissue injuries on the back**
- **Bruises on the right elbow**

In the end, the Respondent was awarded Kshs.400,000 less 20% contribution. The appellant was aggrieved hence he preferred this appeal.

On appeal, the appellant put forward the following grounds

1. **That the learned Magistrate erred both in law and facts in assessing and awarding Kshs.400,000 on general damages as the same is excessively high.**
2. **That the learned Magistrate erred both in law and in facts in failing to take into account the medical documents before her whilst making the award.**
3. **The learned Magistrate erred both in law and fact in failing to take into account the submissions of both counsels whilst making the award.**
4. **The learned Magistrate erred both in law and fact in making an award on quantum which**

was unsupported by authorities.

When the appeal came up for hearing, a consent order was recorded and adopted by this court to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and took into account the rival submissions. It is the appellant's submission that the award of Kshs.400,000 is not commensurate to the injuries suffered. It is said the medical evidence presented did not in any way show that the respondent had a fracture on the elbow. It is also clear that no surgery was done except for the plaster which was removed after the lapse of 3 months and the respondent never sought for further treatment after that. In view of the afore-going the appellant urged this court to find that the award was high and excessive. It is also argued that the trial Magistrate failed to take into account the two medical documents produced. It is said the reports indicated the injuries had completely healed without any permanent incapacity. On his part, the respondent was of the view that the award was reasonable and within the range of comparable awards hence it should not be disturbed.

After a careful re-evaluation of the evidence, it is clear to me that the trial magistrate took into account the medical reports presented to the court hence she cannot be faulted. The question which needs an answer is whether or not the award was way above comparable awards for similar injuries? The learned Principal Magistrate stated that the Respondent had asked for Kshs.800,000 while the Appellant had proposed Kshs.150,000. It would appear the learned Principal Magistrate did not consider the authorities supplied. I have considered the cases cited. The Respondent had cited the case between **Leonard Kinuthia and William Sirma Kiboros & Another Nairobi H.C.C.C no.37 of 1992 (unreported)**, where this court awarded Kshs.700,000 for more serious injuries. The injured suffered two fractures. The Appellant on his part relied on two cases:

1. **Rebecca Awando =Vs= Taita Taveta Express Services Mombasa HCCC no.577 of 1995 in which this court gave an award of Kshs.180,000 for near similar injuries.**
2. **Jefa =Vs=K.P.A Mombasa HCCC no.721 of 1986 This court gave an award of Kshs.125,000 for near similar injuries in 1992.**

The cases cited by the appellant are in respect of decisions made nearly 20 years ago. That cited by the Respondent was decided 13 years ago. In my estimation and taking into account the passage of time, I think the learned Principal Magistrate's decision is fair and reasonable. It should not be disturbed. For the above reason, I find the appeal to be without merit. It is dismissed with costs to the Respondent.

Dated, Signed and delivered this 16th day of December 2013.

J.K.SERGON

JUDGE