



**No.2996**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NUMBER 105 OF 1999**

**AKAMBA PUBLIC SERVICES LIMITED.....APPELLANT**

**VERSUS**

**BETTY KALONDU MUTISO.....RESPONDENT**

**(Being an appeal against judgment of the Acting Senior Resident Magistrate at Machakos Miss Torrorey delivered on 23.7.1999 in Machakos SPMCC NO.130 OF 1999)**

**JUDGMENT**

The appeal is limited to the quantum of damages payable to the respondent. The respondent was injured following a road traffic accident on 26<sup>th</sup> January, 1998 as she travelled along Mombasa-Nairobi road in motor vehicle registration number KAH 652 E. owned by the appellant. As a result she sustained the followings injuries:

- Cut on the top of the scalp
- Blunt injury to the chest
- Swolen and tender right elbow
- Swolen left leg.

By a plaint dated 8<sup>th</sup> October, 1998 and lodged in the Senior Resident Magistrate's Court at Kangundo, the respondent sought from the appellant general damages for pain, suffering and loss of amenities she underwent as a result of the accident. She also sought costs of the suit as well as interest. The suit was defended. The case proceeded to hearing on 28<sup>th</sup> May, 1999 and only the respondent testified. At the end of the respondent's case, the appellant closed its case without calling any witnesses. During submissions, the respondent asked to be awarded KShs.300,000/= as general damages whereas the appellant counter proposed KShs.180,000/-.

The trial court after evaluating the evidence on record as well as respective submissions entered

judgment for the respondent against the appellant on liability at 100% and made an award of general damages of KShs.230,000/-. The appellant was dissatisfied with the award aforesaid. Consequently it mounted this appeal on a single ground to wit:

***“.....The learned Senior Resident Magistrate misdirected herself on the issue of quantum of damages when she assessed general damages at KShs.230,000/- which sum is definitely excessive considering the injuries sustained by the respondent.”***

When the appeal came before **Lenaola J.** for directions on 24<sup>th</sup> September, 2009, he directed that the appeal be canvassed by way of written submissions. By the time however, the written submissions were filed and exchanged, the judge had left the station on transfer. The task of writing and delivering the judgment then fell on **Waweru J.** who had succeeded him. On 16<sup>th</sup> December, 2010, **Waweru J.** indicated that he would deliver the judgment on 17<sup>th</sup> June, 2011. This however, never came to pass as he too subsequently left the station. On 17<sup>th</sup> November, 2011, he returned the file to the station stating that he could not write the judgment due to his busy schedule in his new division in the High Court of Kenya at Nairobi. He requested me to decide on the fate of the appeal.

On 30<sup>th</sup> November, 2011 I invited the parties to the appeal to address me on the way forward. They were all however in agreement that since they had all filed and exchanged written submissions, I should proceed to act on the same, craft and deliver the judgment. I then so ordered.

I have read and carefully considered the written submissions and authorities cited. It is quite apparent that the respondent suffered what is commonly referred to in medico-legal parlance as soft tissue injuries. Although the two medical reports by **Drs. Patrick Lumumba** and **Ashwin Madhiwala** are at variance on some aspects of the injuries, the bottom line is that the respondent suffered soft tissue injuries. In its written submissions, the appellant has stated that KShs.100,000/- would have been a fair award considering the injuries. Therefore the trial court erred in law by awarding a sum of KShs.230,000/-. On the other hand, the respondent takes view that the award was reasonable and fair estimation guided by the submissions of counsel.

It is a general principle of law that an appellate court should not disturb or interfere with an award of damages by the trial court, unless it is so inordinately high or low as to represent an erroneous estimate or based on some wrong legal principle or on a misapprehension of the evidence. See **Shavani Vs. City Council of Nairobi (1985) KLR 516**. It has also been held that comparable injuries should as far as possible attract comparable awards keeping in mind, that in awarding damages, the court exercises discretion and each case must be looked at in its peculiar circumstances as it is near impossible for persons to suffer the same and exact injuries in separate accidents. Further, the court is enjoined to uphold the policy of the law that compensation for injuries suffered is not akin to punishment of the offending party. Again there is need for courts to restrain themselves from granting run away awards in damages.

Applying the above principles and having read and considered the record of appeal as well as respective written submissions, I am satisfied that the award of KShs.230,000/- at the time was inordinately high. It did not represent a reasonable and fair award in the circumstances of the case. In my view, the learned magistrate misdirected herself when she decided to strike a middle ground on the damages prayed for by the respondent, i.e. KShs.300,000/- in her oral submissions and that for the appellant in which it had submitted that an award of KShs.180,000 would have sufficed. The learned magistrate does not seem to show in her judgment the basis for making the award of KShs.230,000/-. Of course a court is not bound to award damages on the strength of counsel's submissions only. The court can award less or more damages depending on the circumstances of a particular case. The submissions of parties to a suit are not binding on a court.

In the circumstances of this case, the respondent sustained soft tissue injuries which were not very serious. That being the case, the award of KShs.230,000/- was manifestly excessive and not in tandem with comparable awards as at the time. Those kind of injuries attracted awards ranging from KShs.10,000/- to as high as KShs180,000/-. In my assessment and having taken into account the element

of inflation and the high cost of living, I would have made an award of KShs.150,000/- as general damages. Accordingly, I allow the appeal and set aside the award of KShs.230,000/- as general damages. Instead I make an award of KShs.150,000/-. The appellant shall have the costs of this appeal.

**Dated and delivered at Machakos, this 13<sup>th</sup> day of January, 2012.**  
**ASIKE-MAKHANDIA**

**JUDGE**