



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

**AT ELDORET**

**HCCA NO.158 OF 2009**

**ATAMBO** **ALEX**  
**UKWALA SUPERMARKETS LTD.....APPELLANTS**

**VERSUS**

**RONALD CCHANDO.....RESPONDENT**

**JUDGMENT**

This appeal arises from a judgment and decree made by the Hon. A.B Maisiba Senior Resident Magistrate in Eldoret CMCC No. 434 of 2007.

The Counsels for both the Appellants and the Respondent opted to put in written submissions.

**FACTS**

The Respondent in his testimony in the subordinate court testified that he was at a marketplace known as West Market when the Ist Appellant whilst driving motor vehicle registration number KAS 109Z at a high speed and overtaking another vehicle went off the road and knocked him down. As a result of the accident the Respondent sustained the injuries set down hereunder;

- (i) Compound fracture of right tibia and fibula
- (ii) Soft tissue and bruises to the right leg

The Respondent was awarded the sum of Kshs. 400,000/= as general damages. The Appellants being aggrieved with the award filed this appeal and their grounds of appeal are as set out hereunder;

1. That the learned trial magistrate erred in law and in fact in holding the defendant 100% liable without any evidence to that effect.
2. That the learned trial magistrate erred in law and in fact in applying wrong principles while assessing damages.

3. That the trial magistrate erred in law and in fact in awarding damages which were inordinately excessive in the circumstance.
4. That the trial magistrate erred in law and in fact in shifting the burden of proof to the defendants contrary to law.

The Appellant submitted that the award was inordinately excessive and proposed an award in the sum of Kshs.160,000/= as being adequate compensation. Counsel also submitted that the Respondent be held 50% liable as he contributed to the accident as he crossed a busy road before taking any necessary precautions as required of a pedestrian.

Counsel submitted that the trial magistrate had disregarded their submissions and authorities submitted at the trial and relied more on the Respondents authorities.

Their prayer was that the Appeal be allowed and the judgment and decree of the lower court be set aside and the Appellants be awarded costs.

Counsel for the Respondent submitted that the Appellants be held wholly liable at 100% for the accident as the 1<sup>st</sup> Appellant was negligent in that he overtook another vehicle, went off the road and knocked the Respondent. The Respondent's injuries were of a serious nature and he was hospitalised for a period of two months. Counsel further submitted that all these injuries were confirmed by Doctor S.I. Aluda and Doctor Z. Gaya in their medical reports.

Learned Counsel submitted that the award granted by the trial magistrate was not exorbitantly high considering the nature of the injuries. The Respondent's prayer was that the appeal lacked merit and that the same be dismissed with costs.

#### **ISSUES FOR DETERMINATION.**

- i.) Quantum.
- ii.) Liability
- iii.) Whether the trial magistrate used wrong principles in assessing general damages.
- iv.) Whether the award made was exorbitant/high in the circumstances of the case.

#### **THE LAW**

The law is set out in the case of **BUTT vs KHAN 1977 1 KAR 1** where it was held that an appellate court should not disturb an award unless it is inordinately high or low so as to represent an erroneous estimate.

I have perused the Record of Appeal and read the submissions of both Counsels for the Appellant and Respondent.

I have perused the Record of Appeal and I have confirmed that indeed the injuries sustained by the Respondent were of a serious nature and the injuries were proven at trial. I have also perused the following authorities as listed hereunder;

**(a) VERONICA MWONGEL KILONZO –VS- ROBERT KARUME HCC NO. 597 OF 2001 (MOMBASA)**

The injuries sustained were Compound fracture fibula and fibula right fracture dislocation left ankle. Award made for Kshs 500,000/= as general damages.

**(b) ERUSTUS SHEM –VS- KPA HCC NO. 318 OF 1991**

The Plaintiff awarded 400,000/=as general damages for Compound fracture of tibia and fibula.

**(c) DR. SUNNY SAMWEL –VS- SIMON M. MBWIKA & ANOTHER. SAMWEL M. MUNYAO HCC NO. 1063 OF 1989.** The injuries sustained by the Plaintiff were a Compound fracture of right lower leg tibia and fibula. Loss of three lower incisor teeth, soft tissue injuries. Injury to the eye. An award for Kshs 400,000/= was made for general damages.

**CONCLUSION:**

I find that the trial magistrate did not apply wrong principles when making the award and also find the award granted by the trial magistrate to be reasonable and see no reason to interfere with the same.

On the issue of liability I find that the Respondent's witness PW3 PC Kennedy Isazi did not add any value to the Respondents case he merely produced the accident abstract report and testified that he was not the investigating officer.

I find that in the absence of any independent witness there is only the Respondent's evidence as against the 1<sup>st</sup> Appellant's evidence to go by on the issue of liability.

In the interest of justice I shall apportion liability as pedestrians at a marketplace are known to be careless but the driver should have been more diligent. The Appellant shall shoulder 70% contributory negligence and 30% shall be borne by the Respondent.

The Appeal is partly successful on the issue of liability. The judgment and decree of the lower court is hereby set aside and I enter judgment in the sum of Kshs.400,000/= less 30% contributory negligence MAKING A NET OF 280,000/=.

The Respondent shall have costs of the appeal.

Dated and delivered at Eldoret this 13th day of February 2012.

**A.MSHILA  
JUDGE**