



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 6 OF 2010

(Being an appeal from the judgment of Mr. Soita, Senior Resident Magistrate in Molo Civil Case No. 154 of 2008 delivered on 22/12/2009)

FAST CHOICE CO. LTD.....1ST APPELLANT

MORRIS KINYANJUI MWANGI.....2ND APPELLANT

VERSUS

HELLEN NUNGARI NGURE.....RESPONDENT

JUDGMENT

This appeal arises from the judgment of Mr. Soita, Principal Magistrate, Molo in Civil Case No. 154 of 2008, delivered on 22/12/2009. The issue of liability was settled in Molo PMCC No. 156/08 at 100% against the appellants. The court only assessed the damages and made an award of Kshs.450,000/- in general damages. Being aggrieved by the said award, the appellant lodged this appeal raising three grounds:-

1. That the learned trial magistrate erred in law and in fact by awarding manifestly excessive amount of general damages of Kshs.450,000/-;
2. That the learned trial magistrate erred in law and in fact by using wrong principals in the assessment of damages;
3. That the learned trial magistrate erred in law and in fact by wholly disregarding the medical reports put before the court.

The appellant therefore prays that the appeal be allowed and this court do re-assess the general damages and reduce them. This being the first appellate court, this court has a duty to re-evaluate the evidence adduced before the trial court and reach its own findings and conclusions.

In the plaint the respondent pleaded that she suffered the following injuries:-

1. **Communuted simple fracture of the shaft of the right humerus middle 1/3;**
2. **Bruised right small finger;**
3. **Soft tissue injuries of the chest and anterior wall.**

Two medical reports prepared by Dr. Mahida and Dr. Wabore were rendered in evidence. Dr. Wabore's report was dated 12/6/09. The doctor observed that the respondent was 80 years old at the time and that the recovery was slow due to her advanced age. The respondent would have however partial temporary incapacity, he assessed her to have suffered 15% total permanent incapacity and that it would expose her to a docile life and complications. Dr. Mahida examined the respondent on 16/11/09 and assessed her age at 67 years. He opined that the respondent suffered a minor injury to the right arm, chest and right small finger, the fracture of the right arm has healed well. Dr. Mahida did not see the injury to the small finger as it was not mentioned in the treatment notes. He concluded that the respondent suffered partial incapacity of a temporary nature and has not suffered any permanent physical incapacity. It is noteworthy that Dr. Wabore examined the respondent only 3 days after the accident whereas Dr. Mahida examined the respondent one year 5 months later and I find that Dr. Mahida's report would be more reliable as to how the respondent healed. This is supported by the findings in the P3 form in which Doctor Wabore found the respondent to have suffered mere harm. The medical treatment chit also shows that the respondent was only treated on two occasions. Apart from the simple fracture to the right humerus, the others were soft tissue injuries. I wish to point out that Dr. Wabore's observations on the respondent's age was erroneous because the copy of the identify card was produced and it indicates that she was born in 1942. She was 66 years old at the time of the accident. Ms Chepkurui, counsel for the appellant therefore suggested that an award of Kshs.150,000/- is reasonable.

In opposing the appeal, Mrs Gatei submitted that the award was reasonable as the respondent suffered a fracture and she could not have completely healed. It was a permanent disability and that Dr. Mahida's report is biased and that the court should therefore not interfere with the award.

It is trite law that an appellate court will only interfere with an award of damages made by the trial court where the award is based on wrong principles or if the award is so inordinately high or low as to be a wholly erroneous estimate. See **MECOL LTD V. GEOFFREY NJOROGE KABUU NRB CA 30/05** and **KEMFRO LTD T/A MERU EXPRESS SERVICES V. LUBIA & ANOTHER (1987) KLR 30**.

In the trial court the appellant had relied on the case of **PIUS MUIA SIHOSI V. JAMES MUDANYA NRB HCC 2069/88**, where the plaintiff suffered a fracture of the distal at the right radius of the right forearm and 2 minor injuries to the neck and an award of Kshs.130,000/- was made in 1989. It also relied on **CHRISTINE SYOMBUA MUTUA V. DAVID KAMAU HCC 54/93**, where an award of Kshs.150,000/- was made for fracture of the humerus, bruises and abrasions; **JACOB OCHOLA V. BHANGRA SAW MILLS LTD HCC 3178/88**, where an award of Kshs.75,000/- was made for a fracture of the neck of the left humerus and bruises. The appellant relied on the case of **YAWA TSUMA V. HIGHWAY CARRIERS LTD hcc 210/1990** where an award of Kshs.450,000/- was made for the plaintiff suffered a fracture of the shaft femur of the right leg and fracture of the right humerus. It healed with shortening of the leg and malunion. I find that the injuries sustained by the plaintiff in the last case were much more severe.

Having taken into account the comparable authorities that have been cited, I do find that the award made by the trial court was excessive in the circumstances. The injuries were assessed as harm. Save for the simple fracture which healed well, the other injuries were minor. In my judgment, I will reduce the award and allow an award of Kshs.180,000/- as general damages. The appeal is therefore allowed in that regard and the respondent will have judgment against the appellant for Kshs.180,000/-, costs of this appeal to the appellant and costs in the lower court to the respondent. Interest be assessed from the date of judgment in the trial court. It is so ordered.

DATED and DELIVERED this 7th day of October, 2011.

R.P.V. WENDOH
JUDGE

Ms Gichuki holding brief for Mr. Onyinkwa for the appellants.

Ms Opiyo holding brief for Mrs Gatua for the respondent.

Kennedy – Court Clerk.