



thereafter, the respondent could not recognize her and upto the time she testified, the respondent was not oriented mentally.

The respondent called **Dr. Joseph Embenzi** (P.W.2), then attached to Moi Teaching and Referral Hospital, who testified that the respondent had been admitted at the hospital's casualty section following a road traffic accident on 6<sup>th</sup> August, 2003. According to P.W.2, the respondent was in a confused state. She was treated and on discharge continued treatment as an outpatient. He produced the discharge summary record in respect of respondent.

On being cross examined, P.W.2 testified that the respondent was hallucinating and confused and that she had suffered **"brain concussion leading to affected vision"**

Next in the witness stand was **Dr. Samuel Aluda** (P.W.3). He testified that the respondent suffered occasional headaches, severe loss of memory and was disturbed. He opined that the respondent had suffered 80% permanent disability and could not improve.

For completeness of medical evidence, I have seen P Exh.1 which is a medical report prepared by **Dr. V. Chitchoukin** on the respondent. The record is not clear when the report was produced. But since it was referred to in the appellant's submissions before the learned Chief Magistrate and by the learned Chief Magistrate in his Judgment, it may have been admitted in evidence without objection. The said doctor concluded that the head injury which the respondent sustained was not serious initially but developed complications within one month in form of loss of cognition. At the time of examination, the respondent was **"not able to look after herself, to do simple home work."** **Dr. Chitchoukin** assessed the level of permanent disability at 75%.

Apart from the said medical report, the appellant offered no evidence.

The learned Chief Magistrate considered the injuries sustained by the respondent as detailed by the two medical reports. He also considered the cases relied upon by counsel. Having done so, he concluded that an award of Kshs 1,500,000/= would adequately compensate the respondent.

I have re-evaluated and re-analyzed the same evidence and the submissions made to me by counsel. In my view, the medical reports produced demonstrated that the respondent sustained a severe head injury. Although she was aged about 30 years at the time of examination, she was not able to look after herself and perform simple home work. She also had severe loss of memory and according to **Dr. Aluda**, she was mentally disturbed and did not know what was going on around her. At the trial, the said doctor testified that the respondent could not improve with time.

In those premises, I concur with the learned Chief Magistrate that the respondent suffered injuries of a severe nature which left her at least 75% permanently disabled. The learned Chief Magistrate before making the award being challenged expressly stated that he had considered the authorities cited to him and the medical evidence adduced at the trial. In **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini –vrs- A.M. Lubia & Olive Lubia [1982-1988] 1 KAR 727 at page 730, Kneller J.A.** rendered himself as follows:-

**"The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account, a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. (See Ilango =vrs= Manyoka [1961] E.A. 705, 713; Lukenya Ranching & Farming Co-operative Society Ltd =vrs= Konkoto [1970] E.A. 414, 418 419").**

Counsel for the appellant, at the trial urged the learned Chief Magistrate to consider the case of **Lewis Kimani Waiyaki =vrs= David Cottle & Another (Civil Appeal No. 65 of 1984)** where an award of Kshs 400,000/= was made to a 38 year old plaintiff who had suffered a head injury resulting in brain damage

leading to loss of concentration and memory. Unfortunately, the full report or judgment was not availed to the Chief Magistrate. The extract availed however indicates that the plaintiff, in the said case, suffered far less severe injuries than the respondent herein. The extract availed does not suggest that the plaintiff in the said case suffered 75% permanent disability or that he was mentally disturbed and could not help himself, which is the case for the respondent. Besides, that award was made way back in 1988 - over 23 years ago. In the premises, I find and hold that the said case was not of much assistance to the learned Chief Magistrate. In my view, the learned Chief Magistrate received better guidance from the case of *John Maseno Ngala & Another =vrs= Dan Nyaramba Omare [Nakuru C.A. No. 320 of 2002]* (UR). There, the plaintiff suffered the following injuries:-

“ (1) Severe head injury, fractures of the base of the skull with moderate brain damage.

(2) Severe neck trauma with damage to the roots of the left brachial plexus resulting in complete paralysis of the left shoulder and left arm muscles”.

An award of Kshs 2,000,000/= was made to the plaintiff therein as general damages. That award was upheld by the Court of Appeal. It is significant that the plaintiff therein suffered 40% permanent disability and a second medical report stated that the plaintiff looked normal mentally.

In this appeal, the appellant has placed reliance on the case of *Elphas Wanire Makin =vrs= Excellent Security Services Ltd, [Mombasa HCCA No. 39 of 1998]* (UR). In that case, Onyancha J. awarded the appellant/plaintiff Kshs 500,000/= as general damages for pain suffering and loss of amenities. There, the appellant/plaintiff had suffered a head injury that had depressed the skull fracturing it on the vertex. A huge bone chip fell inside the cranium and led to post-traumatic convulsions with left sided hemi-paresis. The effect of which was low libido occasional numbness on the left side of the body as well as reduced sensation on the side. Sight at night was also reduced. It is not clear whether the appellant suffered any permanent disability and if so, of what severity. The learned Judge could also not award general damages beyond what the Lower Court could have awarded.

In all the above premises, I have come to the conclusion that the appellant has not demonstrated that the learned Chief Magistrate's award was wrong or that it was based on wrong principles or was so manifestly excessive that the application of a wrong principle may be inferred. (See *Kigaragari =vrs Aya [1985] KLR 273*).

In the result, I order that this appeal be and is hereby dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS  
8<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**F. AZANGALALA  
JUDGE**

**Read in the presence of:-**

- (1) **Mr. Songok** for the appellant and
- (2) **Mr. Kitur** holding brief for **Manani** for the Respondent.

**F. AZANGALALA  
JUDGE  
8/08/2011**