



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**(Coram: Azangalala, J.)**

**HCA NO. 135 OF 2008**

**FRED WAFULA:.....1<sup>ST</sup> APPELLANT**  
**KEN-KNIT (K) LTD:.....2<sup>ND</sup> APPELLANT**

**=VRS=**

**FAUSTINE IVELIA NAMUNYU:.....RESPONDENT**

***(Being an appeal from the judgment of the Senior Principal Magistrate (W.N. Njage), dated 3<sup>rd</sup> April, 2008 in Eldoret Chief Magistrate's Court in CMCC No. 121 of 2006)***

**JUDGMENT**

This judgment is in the appeal lodged by **Fred Wafula** (hereinafter “**the 1<sup>st</sup> appellant**”) and **Ken-Knit (K) Limited** (hereinafter “**the 2<sup>nd</sup> appellant**”) from the judgment and decree of the Senior Principal Magistrate (**W. N. Njage**), dated 3<sup>rd</sup> April, 2008 in Eldoret chief Magistrate's Court Civil case No. 121 of 2006: **Faustine Ivelia Namunya**, pleaded that while travelling as a lawful passage in motor vehicle registration number KAD 920 A on 13<sup>th</sup> April, 2005, the 1<sup>st</sup> appellant drove the said vehicle so negligently and/or recklessly that he lost control thereof and overturned thereby seriously injuring the respondent. In the particulars of negligence she alleged that the 1<sup>st</sup> appellant drove the said vehicle at an excessive speed carelessly, recklessly and without due regard and attention to other road users. In the particulars of injuries, she stated that she had blunt trauma to the scalp, chest and the right shoulder was swollen.

The appellants denied the respondent's claim particularly the negligence alleged and the injuries. In the alternative they alleged that it the accident occurred at all then the same was wholly caused and/or substantially contributed to by the negligence of the respondent particulars whereof were listed.

At the trial, the respondent testified and called **Patrick Kiprono Chelanga** (PW2) a clinical officer then at Uasin Gishu District Hospital. The respondent testified, *inter alia*, that on the material date at 1:00pm she was going home while riding in the said motor vehicle which was being driven by the 1<sup>st</sup> appellant when on Kaptagat - Eldoret road, an accident occurred because of the high speed the 1<sup>st</sup> appellant drove the said vehicle; he lost control and the vehicle rolled several times. She lost consciousness for a brief period and was taken to Uasin Gishu District Hospital where she was treated and discharged. She had been injured on the head, chest and shoulders. Later, she saw **Dr. Aluda** who prepared a medical report of her injuries. She produced the report as Ex. 3(a). She also produced treatment notes from Uasin Gishu

District Hospital as Ex. 1. She blamed the 1<sup>st</sup> applicant for the accident.

PW2 told the trial court that the respondent was indeed attended to at Uasin Gishu Hospital after a road traffic accident on the material date. He added that she was treated for an injury on the right shoulder.

The 1<sup>st</sup> appellant testified at the trial. She denied that the respondent was his passenger in the said vehicle on the material date. He however acknowledged that he had an accident on Eldoret - Kaptagat road when he was overtaking a trailer. He blamed the driver of the trailer, contending that he was himself careful and not driving at a high speed.

The Learned Principal Magistrate analysed the evidence which was adduced before him and believed the respondent that she was indeed a passenger in the said vehicle on the material date and further that the said vehicle was driven by the 1<sup>st</sup> appellant negligently and at a high speed thereby losing control of the vehicle. In the premises he held that the respondent had proved her case against the appellants as required in law and held them 100% liable.

After considering submissions made before him including relevant authorities cited to him he awarded the respondent Kshs. 120,000/- general damages for pain suffering and loss of amenities.

The appellants were not satisfied and have appealed to this court on (3) grounds which in the main challenge the Learned Magistrate's findings on liability and the award of damages, contending that those findings were not supported by evidence.

This is a first appeal. I am therefore duty bound to reconsider and re-evaluate the evidence which was adduced before the Learned Magistrate and draw my own conclusions. In doing so, I should bear in mind that I did not see or hear the witness testify and should give allowance for that. It is also trite that as an appellate court, I should be slow to disturb findings of fact of the trial court (**see Peters -Vs- Sunday Post Limited [1958] E.A. 424.**)

It's my duty therefore to examine with care whether the findings of fact by the Learned Magistrate were not based on evidence adduced before him or whether there was a misapprehension of the evidence or whether the Learned Magistrate applied wrong principles in arriving at those findings of fact. The respondent, as already observed, testified that she got involved in an accident along Eldoret - Kaptagat road while riding as a passenger in the said motor vehicle which was being driven by the 1<sup>st</sup> appellant at a high speed. She told the court that the 1<sup>st</sup> appellant was overtaking another vehicle and as he did so, he lost control of the said vehicle which rolled several times. She was injured on the head, chest and shoulder. She adduced medical evidence of those injuries.

The 1<sup>st</sup> appellant denied that the respondent was a passenger in the vehicle he was driving on the material date. The Learned Principal Magistrate did not believe the appellant on that aspect of the evidence. The Learned Magistrate had before him the police abstract which indicated that the respondent was involved in the accident on the material date in the said motor vehicle which was, at that time, being driven by the 1<sup>st</sup> appellant and was owned by the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant, in his testimony before the Learned Magistrate, admitted that he was a driver of the said vehicle when it was involved in the accident. There was therefore sufficient material upon which the Learned Magistrate found that the respondent was in the said vehicle. The medical evidence confirmed that the respondent was indeed injured as a result of a road traffic accident. There was therefore evidence that the respondent was injured in the accident. Having found that the respondent was injured while riding in the said vehicle, as a passenger, there was no way she could have contributed to the negligence. Indeed the appellants did not blame her but blamed another driver whom they did not join in the suit. In those premises, the Learned Magistrate was entitled to find the 1<sup>st</sup> appellant 100% liable for the accident. Accordingly, I dismiss the appeal against findings on liability.

With regard to quantum, the Learned Magistrate considered, the injuries sustained by the respondent as stated by herself and as documented in the medical reports accepted in evidence. He also considered previous decisions of the High Court on comparable injuries. He also considered the submissions of

counsel before arriving at his award of Kshs. 120,000/- as general damages for pain suffering and loss of amenities resulting from the injuries. It is significant that the appellants had proposed a figure of Kshs. 80,000/- and the respondent Kshs. 150,000/- an adequate compensation for the damage the respondent suffered.

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low (**see Butt -Vs- Khan [1982 – 88] KAR 5.**)

I am unable to detect any failure on the part of the Learned Magistrate to properly apply the above principles. That being my view of this appeal, I find and hold that the Learned Trial magistrate came to the correct decision on all issues laid before him and there are no grounds to fault him. This appeal is accordingly without merit and is dismissed in its entirety.

The respondent shall have the costs of the appeal.

**DATED AND DELIVERED AT ELDORET  
THIS 6<sup>TH</sup> DAY OF DECEMBER, 2011**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

**Mr. Okoth for the appellant.**

**F. AZANGALALA**

**JUDGE**

**6<sup>TH</sup> DECEMBER, 2011.**