



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII
Civil Appeal 55 of 2007**

JECONIA OTIENO OBONGO APPELLANT

VERSUS

MICHAEL OUMA YAOKE RESPONDENT

JUDGMENT

The appellant's case in the lower court was that on 28th December 2003, while travelling as a fare paying passenger in motor vehicle Reg. No. **KAB 548 U**, the same collided with the respondent's motor vehicle registration No. **KAQ 472 A**. As a result, the appellant sustained a fracture of the left lower one third of the tibia bone. He was admitted at Matata Nursing & Maternity Home for four days and was discharged on 31st December 2003. When he was examined by Dr. P.M. Ajuoga on 8th March 2004, the appellant was still unable to walk without support and had mild residual pains on the left leg.

At the request of the respondent's insurer, the appellant was referred to Dr. V.V. Lodhia of Eldoret who re-examined him on 29th November 2006. He confirmed the aforesaid injuries. However, the appellant's leg had healed well and he had no permanent disability.

The learned trial magistrate awarded the appellant general damages in the sum of Kshs. 70,000/= . Parties had recorded judgment on liability at 80:20 in favour of the appellant.

The appellant was dissatisfied with the sum of Kshs.70,000/= that was awarded to him and preferred an appeal to this court. He stated, *inter alia*, that the amount awarded was inordinately low as to present a miscarriage of justice.

On the other hand, the respondent argued that the general damages awarded by the trial court were reasonable and commensurate with the injuries sustained by the appellant.

In **BUTT –VS- KHAN** [1981] KLR 349 at page 356, it was held that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to present an entirely erroneous estimate. It must be shown that the 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.”

Before the trial court, the appellant and Dr. P.M. Ajuoga testified and produced his medical report. The medical report by Dr. V.V. Lodhia was also produced by consent.

At the close of the trial it was ordered that written submissions be filed by 20th March 2007. On 19th March 2007 the appellant's advocate filed his written submissions. It appears that the respondent's advocate did not file any submissions. The appellant's counsel urged

the trial court to award a sum of Kshs. 280,000/= as general damages. He cited the case of **AFRED MUTHEE –VS- MAREBA ENTERPRISES LTD.**, HCCC No. 199 of 1991 at Nairobi where the plaintiff sustained fracture of the tibia at the middle one third and was awarded general damages of Kshs. 150,000/=.

In his judgment, the learned trial magistrate did not make any reference to the appellant's submissions and neither did he cite any authority in support of the sum of Kshs. 70,000/= he awarded as general damages. There is therefore no evidence that he considered the submissions made by the appellant and the sum awarded is not buttressed by any authority. The learned magistrate did not also consider the nature and extent of the appellant's injuries and compare the same with awards made in other similar cases. Whereas assessment of damages is a matter of exercise of discretion, the same must be exercised judiciously. The authority that was cited by the appellant's counsel before him was quite relevant although it had been decided a number of years before the trial.

I am therefore satisfied that the learned trial magistrate's assessment of damages ought to be disturbed. Taking into consideration the nature of the appellant's injuries, the authority cited before the trial court and awards made in similar cases, I am inclined to enhance the sum payable to the appellant for general damages. In **NGWE MWALILI –VS- WILSON MURUO KERI**, HCCC No. 3217 of 1989 at Nairobi, the plaintiff suffered a fracture of the left leg, abrasion on the left forearm and a cut on the forehead. Mwera, J. awarded general damages in the sum of Kshs. 250,000/=. The judgment was delivered on 24th March 1993. In this appeal, I am of the view that a sum of Kshs. 250,000/= is reasonable compensation as general damages for pain, suffering and loss of amenities. I have also taken into account the incident of inflation in making the aforesaid award.

I allow this appeal, set aside the assessment of damages by the trial court and substitute therefor an award of Kshs. 250,000/= as general damages on full liability. Upon apportionment of liability as agreed by parties, that is 80:20 in favour of the appellant, the appellant is now awarded a sum of Kshs. 200,000/= plus costs and interest thereon.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL, 2010.

D. MUSINGA
JUDGE.
15/4/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Minda HB for Mr. Ochillo for the Appellant

N/A for the Respondent

Court: Judgment delivered in open court on 15th April, 2010.

D. MUSINGA
JUDGE.