



**No. 180**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 123 OF 2008**

**SIBIAH**  
**ONDIEKI .....APPELLANT**

**-VERSUS-**

**SAMUEL**  
**OCHILLO.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the Judgment and decree of R.M Wewa in Chief Magistrate's court**

**at Kisii CMCC No. 511 of 2007 Dated 9<sup>th</sup> July, 2008)**

This is an appeal from the judgment of the subordinate court (**S.R Wewa R.M**) delivered on 9<sup>th</sup> July, 2008. The appeal is basically on assessment of damages as can be gathered from the grounds of appeal advanced in the memorandum of appeal dated 6<sup>th</sup> August 2008 and filed in court on the even date. They are as follows:-

***“1. That the learned trial magistrate erred in law and in fact in awarding Kshs. 30,000/= damages after***

*making a finding that the applicant had proved his case under (sic) a balance of probability.*

**2. That the learned trial magistrate erred in law and in fact (sic) awarding Kshs. 30,000/= when the injuries sustained by the applicant were serious.**

**3. That the learned trial magistrate decided the case against the weight of evidence on record.**

**4. That the learned trial magistrate erred in law and fact in failing to assess the extent of the injuries as sustained by the appellant.**

**5. That the learned trial magistrate erred in law and fact in failing to take into consideration the evidence of the appellant and the medical report as appertains the injuries sustained.”**

On 3<sup>rd</sup> October, 2008, the appellant was from Kisii going home aboard a Nissan Matatu registration Number KAY 085Y. She did not however reach her destination as the said matatu was soon thereafter involved in a road traffic accident at Kegati stage along Kisii-Keroka road. The accident according to the appellant occurred when the respondent, his driver, servant and or agent so negligently drove, managed and or controlled his motor vehicle registration number KAL 521L that he caused or permitted the same to collide into the matatu in which the appellant was travelling in from behind. As a consequence the appellant was seriously injured, suffered pain and damage. She was after the accident taken to Kisii District Hospital where she was treated for 2 days as an outpatient. Later he filed the suit whose judgment is the subject of this appeal.

As expected the respondent denied the appellant's claim. He denied that the appellant was a lawful passenger in the matatu and or that the said accident arose solely due to his negligence or recklessness or of his agent, worker, servant and or driver. The respondent further denied the particulars of negligence attributed to him, his driver, servant, worker, agent and or employee. He finally denied the particulars of injuries sustained and that the appellant was entitled to damages.

When the suit came up for hearing in the subordinate court, the appellant testified giving details of how the accident occurred and the injuries she sustained. The defence adopted the evidence it had tendered in CMCC No. 509 of 2007 in this case by consent of the parties involved. The learned magistrate having evaluated the evidence tendered by both sides, the written submissions and the law found for the appellant on both liability and quantum. On liability the learned resident magistrate was of the view that the respondent was wholly to blame for the accident. She delivered herself thus **“...The defendant drives (sic) concedes to the fact that he hit the M/V KAY 085Y. The rule of keeping a distance was not observed. The m/v did not have a defect which would have caused it (sic) not to apply the brakes and avoid the hitting (sic). I do find that from my considered view the defendant is to blame for the accident. The negligence has been proved. I do find that the plaintiff's case is proved on a balance of probability. I do enter judgment in favour of the plaintiff as against the defendant at 100% liability. The plaintiff was a passenger, she was not in control of any motor vehicle....”**. She then proceeded to award the appellant Kshs. 30,000/= as general damages having held the view that **“..... the injuries are relatively soft tissue in nature. There is no permanent disability other than visible scars ....”**.

When the appeal came up before me for directions on 15<sup>th</sup> June, 2010, it was agreed among other directions that the same be heard by way of written submissions. Subsequently both the appellant and respondent filed and exchanged written submissions which I have carefully read and considered alongside authorities cited.

Essentially, the case for the appellant is that the award of general damages was too low as to attract my intervention considering the nature and extend of the injuries she sustained. In rebuttal, the respondent is of the view that the learned magistrate having found that the appellant only sustained soft tissue injuries which had healed well leaving no permanent disability, the award as assessed was in line with authorities cited and as such was more than adequate compensation for the appellant.

This being a first appeal, I am not bound by the findings of fact made by the trial court but I have a duty to re-evaluate the evidence as a whole and reach my own conclusion. I should however be slow to differ with the trial court and this caution is always appropriate. See **Peters –vs- Sunday Post Ltd (1958) E.A 424**, **Selle –vs- Associated Motor Boat Company Ltd (1968) E.A 123** and **Williamson Diamonds Ltd –vs- Brown (1970) E.A 1**.

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court were settled way back in the sixties and seventies in the cases of **Ilango –vs- Manyoka (1961) E.A 705** and **Lukenya Ranching & Farming Co-operative society Limited –vs- Karoloto (1970) E.A 414**. Those principles were recently re-echoed in the cases of **Kemfro Africa Limited t/a Mem Express Service, Gathogo Kanini –vs- A. M Lubia and Olive (1982-1988) 1 KAR 727** and **Zipporah Wambui Wanbaira & 17 Others –vs- Gachuru Kiogora, David Mwaniki Kuria –vs- Kiongora Saw Mills (2004) eKLR**. Those principles are that an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, must be satisfied that either the trial court 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 damage. The case for the appellant is that the award made by the trial court as aforesaid is inordinately low that it must be wholly erroneous estimate of damages. On the other hand the respondent is of the view that damages awarded fitted the occasion. In assessing general damages the general method of approach is that comparable injuries should, as far as possible, be compensated by comparable awards. As stated by **Lord Morris of Borth –y- Gest** in the case of **West (H) & Sons Ltd –vs- Shepherd (1964) A.C 326** at page 345 “.....*But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ....*”.

In this appeal I am being urged to consider the injuries sustained vis a vis the award made by the trial court and make a finding that the award was too low to attract my interference by way of enhancement of the same. According to the medical report by **Dr. P.M Ajuoga** tendered in evidence the appellant sustained:

- Deep cut wound on the back.
- Bruises to both legs
- Bruises to both hands
- Chest contusion
- Cerebral concussion and
- Pain to the back.

It was the doctor’s prognosis that the appellant sustained soft tissue injuries which were healing leaving her with visible scars but with no permanent disability. However, the appellant is a lady and looks count. In my view though the appellant suffered soft tissue injuries, they were not simple soft tissue injuries as they were accompanied by cerebral concussion. In her submissions in the trial court, the appellant had prayed for an award of Kshs. 250,000/= on the basis of **Job Chanzu –v- Joseph Okello & Another, HCCC No. 4494 of 1989 (UR)**. It was case decided by **Githinji J** (as he then was) on 12<sup>th</sup> November,

1993. In the said case the plaintiff though he suffered more or less similar injuries as the appellant herein, he was nonetheless awarded Kshs. 150,000/= as general damages. However, my take on the case is that the plaintiff therein by far suffered very serious soft tissue injuries compared to the appellant. It was not therefore a proper comparison.

As for the respondent, he was of the view that a sum of Kshs. 15,000/= was more than sufficient to compensate the appellant. He relied on the case of **Meshack Ingugi –vs- Synthetic Fibres (K) Limited, HCCC No. 46 of 1991 (UR)**. This case was decided by **But ter-sloss J.** (as he then was) on 30<sup>th</sup> October, 1989. The plaintiff in the case had sustained soft tissues injuries to the chest, right leg and head. He had fully recovered without any residual disability except for a scar on the right leg. My take on this case is that though comparable to the injuries sustained by the appellant herein, nonetheless the injuries were too minor.

It is also instructive that the awards referred to were made almost 20 years ago by the time the trial court was entertaining the case. They were not thus recent court decisions. They could only have been of assistance to the court, if the trial court took into account the incidence of inflation since they were decided. It is not a secret that inflation has taken a heavy toll on the Kenyan shilling since.

In my view, had the trial court considered recent court decisions relating to soft tissue injuries and taken into account the inflationary trends since, I have no doubt at all that she would have awarded more than Kshs. 30,000/= to the appellant. I am therefore satisfied that, that award was so inordinately low that it must be wholly erroneous estimate. I think that an award of Kshs. 70,000/= would have suited the occasion. In reaching this verdict I am fortified by the awards made by the court of appeal to various appellants in the recent case of **Ziphora Wambui Waimbaira** (Supra). Some of the appellants had sustained soft tissue injuries comparable to those sustained by the appellant herein. They were each awarded Kshs. 50,000/=. That was on 17<sup>th</sup> December, 2004. The case before the trial court was heard and determined on 9<sup>th</sup> July, 2008. That was about 4 years after the decision in the aforesaid authority was made. An additional Kshs. 20,000/= over and above, Kshs. 50,000/= to take care of incidence of inflation is I think welcome.

In view of the foregoing, I allow the appeal and set aside the award of Kshs. 30,000/= made by the trial court and substitute thereof with an award of Kshs. 70,000/= with costs and interest. Thus the appeal is allowed to that extent. The appellant shall have the costs of this appeal as well.

**Judgment dated, signed and delivered** at Kisii this 16<sup>th</sup> September, 2010.

**ASIKE-MAKHANDIA**

**JUDGE**