



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT KISII**

**Civil Appeal 179 of 2007**

**MOMBASA MAIZE MILLERS LIMITED ..... APPELLANT**

**VERSUS**

**KASMIR ONKENDI KEBIRA ..... RESPONDENT**

**JUDGMENT:**

The respondent herein was involved in a road traffic accident on 14<sup>th</sup> September, 2006. He was hit by a motor vehicle belonging to the appellant. The respondent sustained the following injuries:

- (a) a deep cut wound on the left temporal region with skull bones exposed,**
- (b) cerebral concussion,**
- (c) cut wound above the left knee,**
- (d) multiple cut wounds on the left knee,**
- (e) multiple cut wounds on the left thigh,**
- (f) fracture of the left supra condylar bones of the femur.**

The above injuries were as per the respondent's medical report prepared by Dr. P.M. Ajuoga.

The appellant requested the respondent to undergo a second medical examination by Dr. Z Gaya who confirmed more or less the same findings as Dr. Ajuoga.

The parties entered into a consent on liability at the ratio of 85:15 in favour of the respondent.

When the respondent testified before the trial court, he alleged that he had also sustained injuries to his right testis but the same had healed. That information was not given to Dr. Ajuoga but when he was re-examined by Dr. Gaya he referred to the same.

Dr. Gaya found the right testis normal though it had a giant wart on the scrotal skin. The wart used to bleed from time to time. However, it had no relationship with the accident. The respondent testified that he could not walk without the aid of a walking stick. According to Dr. Gaya, the left leg had been shortened by two centimeters as compared to the right one. He also had permanent scars on the face and around the left knee. The one on the face was described as "**very prominent**" and "**ugly**" by the said doctor. The doctor further concluded that the respondent will develop very early post traumatic

osteoarthritis on the left knee joint.

Apart from the respondent, no other witness testified. It appears that it is only the respondent's advocate who filed written submissions thereafter. He cited several authorities and urged the court to award general damages of Kshs. 1,000,000/= plus special damages of Kshs. 7,290/=.

The trial court assessed general damages for pain suffering and loss of amenities at Kshs. 900,000/= on full liability which after contribution on liability came to Kshs. 765,000/= plus special damages of Kshs. 7,190/=.

The appellant was aggrieved by the trial court's assessment of damages and filed an appeal. In the memorandum of appeal 3 grounds of appeal were stated as hereunder:

**“1. The learned trial magistrate erred in law when he awarded the plaintiff a sum of Kshs. 900,000/= less contribution which award was excessive considering the injuries sustained by the Respondent.**

**2. The learned trial magistrate took into account wrong principal (sic) in awarding the Respondent the sum he did.**

**3. The learned trial magistrate failed to take into account matters which he ought to have taken into account and/or took into account matters he ought not to have taken into account and arrived at entirely erroneous estimate of damages in arriving at his decision.”**

The court was therefore urged to substantially reduce the award by the trial court and give costs of the appeal to the appellant.

In her submissions, Miss Watima for the appellant stated that the learned trial magistrate took into account the respondent's injury to his right testis in assessing general damages. She further submitted that the learned trial magistrate took into account matters which he ought not to have taken. However, that was not demonstrated.

Counsel was of the view that the award of Kshs. 900,000/= was excessive. She cited several authorities and summed up by saying that general damages ought to have been assessed in the range of Kshs. 200,000/= to Kshs. 400,000/= on full liability.

One of the authorities cited was **SISTER MARGARET W. CHEGE & LORETO INSTITUTE – VS- RUTH NYAMBURA**, HCCA NO. 48 OF 2005 at Eldoret. This authority was also cited by the respondent's counsel.

In that case, the plaintiff's injuries were stated as:

- (i) Head injury and two scalp lacerations – 4 inches each.
- (ii) Injury right shoulder.
- (iii) Soft tissue injuries back.
- (iv) Fracture of the left interior pubic ramus.

Those injuries caused the following permanent disabilities:

- (i) Osteoarthritis right shoulder with recurrent stiffness of right shoulder.
- (ii) Recurrent pains in the pelvic.

(iii) Inability to do strenuous physical work.

The plaintiff was also examined by Dr. Gaya who confirmed the injuries except for the fracture of the left interior public ramus. The doctor said that x-ray findings did not reveal that kind of fracture. The trial court awarded general damages of Kshs. 650,000/=.

The defendant appealed, saying that the award was too high. On the other hand, the plaintiff cross appealed and urged the appellate court to increase the award saying that the sum of Kshs. 650,000/= was too low. Ibrahim, J. having analysed several authorities, found no reason to disturb the award given by the trial court on account of general damages.

Mr. Ochillo for the respondent submitted that the award of Kshs. 900,000/= was fair and reasonable. He added that the trial court did not take into account the injury to the respondent's testis. He said that the learned trial magistrate exercised his discretion properly and took into account the respondent's injuries as shown in the two medical reports.

I have considered the above submissions. I have also studied the two medical reports very carefully.

In **MARIGA –VS- MUSILA** [1984] KLR 251, it was held that assessment of damages is more like an exercise of discretion and an appellate court ought to be slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the court acted on a wrong principle of law or misapprehended the facts or made a wholly erroneous estimate of the damages suffered. None of the above factors was demonstrated. The trial court did not state that it considered the respondent's injury to his right testis. The court merely mentioned that issue while commenting on the medical reports by Dr. Ajuoga and Dr. Gaya.

The injuries sustained by the respondent were much more severe than those of the respondent in **SISTER MARGARET W. CHEGE & LORETO INSTITUTE –VS- RUTH NYAMBURA** (Supra). In my view, it cannot be said that an award of Kshs. 900,000/= for such serious injuries is so inordinately high as to be an entirely erroneous estimate. I see no reason for disturbing the same. Consequently, I dismiss this appeal with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KISII ON THIS 31<sup>ST</sup> DAY OF MARCH, 2009.**

**D. MUSINGA**

**JUDGE.**

**31/3/2009**

Before D. Musinga, J.

**Court:** Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Mbunde for Respondent

Mr. Oguttu HB for Mr. Onyinkwa for Appellant.

**D. MUSINGA**

**JUDGE.**