



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 903 of 2004

ELIZABETH WANJIRA NGURE.....1ST APPELLANT

SIMON WAWERU NGURE.....1ST APPELLANT

VERSUS

NYAKA AGENCIES LIMITED.....1ST RESPONDENT

JOHN MWANGI MAINA.....2ND RESPONDENT

J U D G M E N T

This appeal arises out of a road accident which occurred on 12th April 2003 in which the appellant was injured whilst he was traveling as a passenger in motor vehicle registration number KAN 649 belonging to the first respondent and which was at the material time driven by the second respondent. Liability for the accident is not in dispute. It was agreed between the parties that the liability of the respondent was 95%.

The injuries suffered by the appellant can be summarized as follows:

- (1) Fracture left and right 2nd ribs.
- (2) Dislocation of the left shoulder

Medical report was produced before the learned trial magistrate by consent of the parties.

The learned trial magistrate awarded Shs. 100,000/= for pain suffering and loss of amenities relying on the medical report of Dr. Moses Kinuthia. The doctor in this report described the injuries as

- (1) Fractured left and right 2nd ribs and
- (2) Dislocation of the left shoulder

The appellant attended Muranga District Hospital as an out patient and the mode of treatment included

- (1) Figure of 8 bandaging for left shoulder dislocation

(2) X-rays that showed the above fractures.

The appeal is basically on quantum. Miss Wangombe appearing for the appellant submitted that an award of Sh. 100,000/= was inordinately low and erroneous. While Mr Mutie appearing for the respondent submitted the sum awarded was adequate compensation and the same was paid in full and accepted by the appellant.

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 magistrate are that it must be satisfied that either the magistrate, 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.

Both Counsel suggested figures of damages which they felt could be adequate compensation. Counsel for the appellant had suggested a figure of Sh. 300,000, and quoted authorities. Whereas counsel for the respondent suggested a figure of Sh 150,000/= and quoted authorities. Usually the claimant's advocate tend to rely on more serious cases to try and obtain larger award whereas defendant's Counsel tend to rely on less serious injury awards. Such a practice is unhelpful to courts.

In his speech, Lord Morris of **Borth-y-Gest in the case of Westch, & Sons Ltd vs. Shepard** [1964] AC 326 at page 345 said:

“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”

This approach by Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo v. Camden and Islington Aavea Health Authority* [1979] 1 ALL ER 332 at pg 339 and this approach was also adopted by the Court of Appeal in *Tayab V. Kinanu* [1982-88] 1 KAR 90.

Lord Denning MR said:

“In considering damages in personal injury claims, it is often said” the defendants are wrongdoers, so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are as lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.”

This passages demonstrates that damages ought to be assessed so as to compensate reasonably, the injured party but not so as to smart the defendant.

Taking into account all the injuries suffered by the appellant and keeping in mind the principles of assessment of such damages and also fall in value of money, I see no valid reason in disturbing the quantum of damages awarded by the trial magistrate.

Accordingly the appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of May 2008.

J. L. A. OSIEMO

JUDGE