



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 28 of 2007

PERIS MWIKALI MUTUA APPELLANT

VERSUS

PETER MUNYAO KIMATA RESPONDENT

JUDGMENT

1. The Appeal herein is limited only to the question of quantum properly awardable to the Respondent for injuries sustained when she was knocked down by motor-vehicle KAJ 120 J on 21/7/2003 at Katelembo Stage along the Machakos-Nairobi Road.
2. In the subordinate court, no evidence was led by the Appellant to show any contributory negligence on the part of the Respondent. In fact the Appellant led no evidence at all and I agree with the subordinate court that negligence was properly proved at 100%. The contested award therefore is that of Kshs.450,000/= in general damages and the Appellant's case is that the same was exaggerated, overly excessive and inordinately high.
3. As I understand the jurisdiction of this court as an appellate court, the award in damages can only be interfered with, if it is shown that the same is **“so inordinately high or low as to represent an entirely erroneous estimate based on same wrong principle or on a misapprehension of the evidence”** – per Hancox, Nyarangi and Platt JJA in **Shabani vs Nairobi City Council (1985) KLR 516.**
4. In this case the injuries suffered by the Respondent were pleaded in the Plaint dated 14/11/2003 as being;
 - a. marked pain and tenderness of the left hip joint;
 - b. marked swelling and severe tenderness of the left forearm;
 - c. bruises on the left forearm;
 - d. fractures of the ulna and radius (colles fracture) of the left distal forearm.
5. In evidence, a medical report by one Dr David Kaburu was produced and the noted injuries were;
 - a. marked pain and tenderness of the left hip joint;
 - b. marked swelling and severe tenderness of the left forearm;

- c. bruises on the left forearm;
 - d. fracture of the ulna and radius (colle's fracture) of the left distal forearm.
6. The same doctor noted that the injuries were serious and have left a significant permanent disability.
7. In awarding Kshs.450,000/= as general damages, the learned magistrate took into account the decision in **Mushambi Onde Gona vs Associated Assemblies Ltd HCCC No. 91/91 (Msa)**. In that case, the Plaintiff suffered the following injuries;
- a. comminuted fracture of the radius and ulna of the left arm;
 - b. wound on the scalp with concussion;
 - c. abrasions on the right hand, knees and chest.
8. Mbaluto J on 22/10/1993 awarded Kshs.380,000/= as general damages.
9. The advocate for the Appellant suggests that in this case Kshs.250,000/= is the right award in damages and the only relevant case he has cited is that of **Peter Kithuku Kitunguu vs Josephat Otieno Inda HCCC No.2273/1989** where Mbogholi Msagha J awarded Kshs.150,000 on 5/10/1990 for a fracture of the radius and ulna.
10. I have considered the above decisions and noted the injuries suffered by the Respondent. I have taken into account inflation, the high cost of living and the dates the above decisions were given. To my mind and applying the principles set out in **Shabani** (Supra), I see no reason to tamper with the award of Kshs.450,000/= which is reasonable and fair in the circumstances of this case.
11. As I find no merit in the Appeal, the same is dismissed with costs to the Respondent.
12. Orders accordingly.

Dated and delivered at Machakos this 17th day of **December** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mung'atta for Respondent**

N/A for Appellant

ISAAC LENAOLA

JUDGE