



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**Civil Appeal 373 of 2005**

**FRANCIS SIMIYU WAISWA :::::::::::::::::::: RESPONDENT**

**VERSUS**

**SAMWEL KAIRO MAGADI:::::::::::::::::: 1<sup>ST</sup> RESPONDENT**

**JUDGMENT**

The appellant FRANCIS SIMIYU WAISWA filed NAIROBI CMCD.6467 OF 1998 against the Respondents SAMWEL KAIRO MAGADI AND LINET KAIRO seeking both special and General Damages on account of personal injuries sustained by the appellant arising from a road traffic accident along Nairobi High Way involving motor vehicle registration No. KAG 624J in which the appellant was traveling as a fare paying passenger. The said accident was alleged to have been due to negligent manner of driving attributed to the first Respondent who was driving the accident motor vehicle as an agent and/or servant of the 2<sup>nd</sup> appellant. The particulars of negligence relied upon were given. The particulars of injuries were also set out as:-

1. Injury to the left eye
2. injuries to the left infra orbital margin
3. Injuries to the left wrist.

A perusal of the lower court record reveals that interlocutory judgment was entered on 2.10.00 due to none appearance of the defence and filing of the defence. The matter proceeded by way of formal proof. The lower court when assessing damages during the formal proof was guided by the evidence of Dr. Marebi at paragraph 2 of the judgment where the Doctors is stated to have informed the court that the appellant had sustained multiple facial injuries, multiple glass foreign bodies on the face including the left eye and cut wounds on the left forearm. That the plaintiff now had diminished eye sight and had been advised to wear glasses. It was noted that the left eye waters excessively especially when he stares at bright light. Dr. Wokebi had advised the plaintiff to see an eye specialist.

The learned trial magistrate stated clearly that she had been guided by the report of Dr. Wokabi and the authorities cited to her by the plaintiffs Counsel and on that account she allowed Kshs 1,000,00 as special damages and Kshs 150,000.00 as general damages.

The defence later on applied to have that ex parte judgment set aside which application was allowed. Appearance and defence were filed. The matter was then set down for inter parties hearing. The appellant gave evidence and indicated that as a result of the accident he had cuts on the eye, and left hand. He went to a dispensary for treatment whereby they did first aid and then he was referred to

Kenyatta National Hospital for treatment. He was given an attendant card which he produced. He also produced medical report by Doctor Wokabi and receipts for specials.

In cross-examination the appellant stated that he was admitted at Kenyatta National Hospital from Friday night up to Tuesday morning. He reiterated that he was injured on the face and hand and that he had told the Doctor that he had suffered multiple facial injuries. That there were scars on the left eye but the trial magistrate noted that they had not been seen (not visible). He denied the injuries were minor but confirmed that he had no fracture or dislocation.

The defence offered no evidence in her judgment, the learned trial magistrate notes that he had considered injuries suffered, the submission and inflation tenderness and doing the best she could awarded Kshs 60,000.00 as general damages and Kshs 2,000.00 as special damages.

The applicant became aggrieved by that judgment and he has appealed to this court citing 4 grounds of appeal normally that the learned Senior Resident Magistrate erred in law and in fact by:-

- (1) finding that the appellant's injuries were soft tissue injuries.
- (2) Misdirecting herself and awarding the appellant the sum of Kshs 60,000.00 only as general damages.
- (3) Disregarding the fact that the appellant had been awarded kshs 150,000.00 by the same court.
- (4) Failing to give due consideration to the fact that the said sum of Kshs 150,000.00 was awarded to the appellant on the same grounds as on the trial.

In consequences there of appellant asked the Court to allow appeal, set aside the lower court judgment and order the Respondent to pay appellants costs.

The Respondent put in a cross-appeal to the effect that the learned trial magistrate erred in law and fact by:-

- (1) Closing the respondent's case without hearing their defence.
- (2) Finding that the appellant in a passenger in motor vehicle registration number KAY 624 J without evidence.
- (3) Funding that the injuries sustained by the appellant were soft tissue when evidence showed that he had sustained minor soft tissue injuries.
- (4) In awarding the appellant Kshs 60,000,00 as general damages which was excessive in the circumstances.
- (5) Disregarding the authorities submitted by the respondents whose comparative awards were between Kshs 15,000.00 and Kshs 25,000.00.

In consequence thereof prayed for the cross appeal to be allowed lower court judgment set aside and the appellant to pay costs to the Respondent both on appeal and the lower court.

On the hearing date Counsel for the Respondent did not turn up and the court being satisfied that they had due notice allowed the appellants Counsel to proceed ex parte. The sum total of the appellants Counsels submissions is that since the defence never gave evidence the issue of liability does not arise. As for injuries sustained it is her stand that the same were serious. The appellant failed to seek the services of an eye specialist because of financial constraints. That the same injuries had been awarded Kshs 150,000.00 during formal proof and it is surprising that the same court, and on the basis of the same evidence awarded Kshs 60,000.00 without giving any reasons for departure from the earlier award.

As for the cross appeal she urged the court to dismiss the same because the defence neither gave evidence or filed submissions. On that basis urged the court to allow the appeal.

On the courts assessment of the evidence on the record it is clear that the defence never gave evidence. The Respondent cannot complain of being shut out from tendering evidence on appeal when no efforts were made by them to apply to the lower court to have the proceedings reopened for them to give their evidence.

As for lack of proof that the appellant now appellant was a passenger in the defendants vehicle, the appellant produced a police abstract exhibit 2 where he is listed as one of those who were injured in the accident. Until that police abstract is faulted, it is proof that the appellant was a passenger in the said accident vehicle.

On injuries the appellant maintained that he sustained injuries. He is shown to have suffered injuries in the abstract. He produced a hospital card which proves that he attended hospital. The medical report produced in evidence which confirmed that the said Doctor observed injuries on the appellant and also relied on medical documents during the assessment. In the absence of other evidence to the contrary the learned trial magistrate had no alternative but to rely on them. It is however to be noted that the scars is no proof of failure to sustain injuries. This court is satisfied that the appellant indeed suffered injuries but they appear to have improved with time. The medical report is dated 18.3.2002 while the judgment has an 18.9.2003 almost a year later. In the absence of another medical report, the medical report produced is proof that the appellant had sustained injuries in the eye. Failure of availing an eye specialist report hampers the determination of the permanent disability percentage. Failure to determine permanent disability percentage is no bar to a court of law to determine quantum. The learned trial magistrate was therefore justified in considering the said injuries in arriving at quantum.

As regards quantum the principles for interfering with the lower court discretion in arriving at quantum are settled. These are:-

- (1) The award must have been arrived at erroneously.
- (2) Must be inordinately too high or too low so as to be unreasonable.

In arriving at an award the court may be assisted by awards undecided cases which are to be treated as mere guides and each case depends on its own facts. Other factors that the court has to consider are issues of inflation bearing in mind. The date of awards. These must not be for purposes of enriching the evicted but compensate the violation for the injuries suffered. The appellate court has power to .....the facts and arrive at its own decisions. In doing so this court is guided by authorities cited to the lower court. In the case of **SAMWERL WERE VERSUS LINT MARKETING BOARD UGANDA LTD MSA HCCC.44/87** the plaintiff suffered a blunt injury to the right eye causing damages to the macular optic nerve and iris leading to mucular scar, optic atrophy and traumatic mydriasis. The injuries received to almost total loss of vision in the right eye, the only vision left being hand movement close to the eye. Eyeball was however intact, movement responded to right. There was no visible disfigurement. The Court awarded Kshs 120,000.00 on 29.2.88. The case of **RINGI KIBAO RINGI VERSUS SOUTH PART LTD HCCC MSA 349/88** where the plaintiff suffered an injury to the left eye parterating the cornea which led to the formation of a cataract and total loss of vision in that eye leading to loss of a job the court awarded Kshs 140,000.00 on 11.7.89. The case of **STEPHEN MUREITHI WAHOME VERSUS PETER NJOROGE GATHURI AND OTHERS NAIROBI HCCC.3579/85, BUTTLER SLOSS on 26.10.89** awarded Kshs 150,000.00 for a blunt injuries. The injured eye miscue recovered well. The plaintiff complained of recurrent headaches inability to see properly with the left eye. In the case of **NJAGE MWAMATA VERSUS KPA MSA HCCC 388/86** where the plaintiff suffered injury to one of his eye sight due to entry of a foreign body. The eye started itching and swelling. The eye ball was removed leading to total loss of the eye. Kshs 100,000.00 was awarded.

This court has considered the awards in the cited cases, there age which were over 10 years as at the

time the judgment subject of this appeal was made. It is to be noted that some of these injuries sustained by victim in these cases were almost similar to those suffered by the appellant. Issue was raised about the same court can arrive at different awards over the same facts. It is to be noted that although the court is one the officers were different and each was entitled to exercise its own discretion in the assessment.

This court has considered the said two assessments and find that there is no doubt that those of the first magistrate had in mind the awards in the cited cases while that in the second assessment is not renoun the basis as the learned magistrate does not mention taking into account any authorities. The appellant suggested 150,000.000 while Respondent suggested 15,000 – 25,000.00. In this court's opinion in view of the fact that the appellant did not complain of serious handicaps at the time of trial. Kshs 150,000.00 is on the high side. On the other hand the suggestion by the respondent of an award of 15,000 – 25,000.00 would be to law to make the assessment nonsensical.

The court has taken all the relevant factors into consideration and doing the best I can assess kshs 10,000.00 as general damages (one hundred and ten thousand shillings only). The appeal is allowed. The decision of the lower court is questioned and the award of damages set aside and substituted with an award of Kshs 110,000.00. The award of special damages confirmed. The cross appeal is dismissed. The appellant will have costs both on appeal and the lower court.

**DATED, READ AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2007.**

**R. NAMBUYE**

**JUDGE**