



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 44 OF 2014**

***(Being an appeal arising from Judgment and Decree in Eldoret CMCC No. 98 of 2013***

***delivered by Hon. P. Mbulika– Resident Magistrate on 10/4/2014)***

**ANDREW KIBET KITUM.....1<sup>ST</sup> APPELLANT**

**JOHN KAKAI WAFULA.....2<sup>ND</sup> APPELLANT**

**VERSES**

**ALICE NJERI GATUNDU.....RESPONDENT**

**JUDGMENT**

1. The facts leading to this appeal are clear and straight forward. On the 20<sup>th</sup> November 2012, the respondent was lawfully standing outside her kiosk selling cereals in Musembe Centre along Eldoret- Webuye road when the 2<sup>nd</sup> defendant while driving Motor Vehicle Registration No. KBC 084S Mitsubishi Tanker veered off the road and hit the respondent causing her serious bodily injuries.

2. The respondent then filed suit at the lower court seeking general and special damages as a result of the said accident. The matter proceeded to full trial where the parties entered into a consent on liability at 80:20 as against the appellants and the lower court made a determination on the issue of quantum at a total of 726,610/=

3. The appellants being dissatisfied with the said judgment have filed this appeal raising the following grounds in the Memorandum of Appeal filed in court on 12/9/2017:-

***a. The trial Magistrate erred both in law and in fact by failing to take into account the weight of the evidence adduced before court.***

***b. The trial Magistrate erred in law and in fact by not considering the appellant's submissions.***

***c. The trial Magistrate erred in law and in fact by applying the wrong principles of law in assessing quantum.***

***d. The trial Magistrate erred in law and in fact by awarding damages which were inordinately too high in the circumstances.***

4. When the appeal came up for hearing on 26/10/2020, the court, with the consent of the parties directed that the appeal be disposed of by way of written submissions. The respondent filed her submissions on 8/2/2021 while the appellants filed theirs on 8/3 /2021. I have considered the said submissions as well as the attached set of authorities.

**Appellants' submissions**

5. It was submitted for the Appellants that the trial magistrate in her judgment stated that a woman is delicate being created to bring forth life of the next generation and having a fracture of the pelvis as severe as the one sustained by the plaintiff is an unfortunate incident which according to the appellants was a wrong assessment leading to the award of damages which were inordinately high. It was submitted further that, in assessing damages, the general approach should be that comparable injuries should be as far as possible be compensated by comparable awards. Counsel for the appellants cited several authorities in support of his case while placing reliance on the case of **JOSEPH**

**NJERU LUKE & 3 OTHERS V STELLAH MUKI KIOKO [2020] ECLR.** Counsel urged the Court to set aside the judgment and decree of the trial court on quantum and make a proper finding.

### **Respondent's submissions**

6. The respondent submitted that the Appellants had failed to establish how the award of Kshs 720,000 as general damages was inordinately high or excessive bearing in mind that the medical report by Dr. Aluda and the discharge summary from Moi Teaching and Referral Hospital confirmed that the injuries sustained by the respondent were severe multiple hard and soft tissue injuries which were potentially life threatening. The respondent further submitted that the trial court did not misdirect itself in awarding special damages of Kshs 6,610 which were pleaded and proved by way of production of the receipts. Reliance was placed on the case of Simon **KAMAU KABALI AND ANOTHER VS ZIPPORAH CHEGE HCCA NO. 141 OF 2013** in urging the Court to dismiss the appeal.

### **DETERMINATION**

This being a first appeal, the Court must analyze and re-evaluate the evidence on record and reach at its own conclusions bearing in mind that it neither saw nor heard the witnesses when they testified. See **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123 and KIRUGA V KIRUGA & ANOTHER [1988] KLR 348.**

7. This Appeal is only on quantum of damages, as liability had been agreed upon by the parties on the ratio of 80:20 in favour of the Respondent. It is trite law that assessment of damages is at the discretion of the trial court and that the appellate court will only interfere with the exercise of that discretion where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the Court of Appeal decision in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

*“...the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge 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 high that it must be wholly erroneous estimate of the damages”.*

8. The respondent while giving her testimony stated that she sustained injuries to the head, blunt trauma to the scalp, blunt trauma to the lower back, blunt trauma to the pelvis which was tender with a wound on the pubic region, a deep cut wound on the right thigh, blunt trauma to the right leg, sustained fractures of the left superior and left inferior pubic rami and sustained fractures of the right superior and right inferior pubic rami. Documentary evidence was also produced in support of the respondent's case and according to the Medical report by Dr Aluda who examined the respondent, the injuries sustained were very severe and that the scars will remain a permanent feature on her body. Dr Gaya, in his report which was produced as Dexb 1 confirmed that the respondent had indeed suffered the injuries which were severe and that as at the time of the examination, she had healed well.

9. Both medical reports by Dr. Aluda and Dr. Gaya were in agreement that the Respondent suffered fracture of the pelvis involving both left and right superior and inferior pubic rami and multiple bruises and cuts on both lower limbs.

10. The trial magistrate awarded Kshs.720,000 as general damages, I note that the respondent had sought for Kshs 1,000,000 relying on the case of **SIMON KAMAU KABALI & ANOTHER V ZIPPORAH CHEGE [2012] eCLR** where an award of Kshs 700,000 was awarded to the plaintiff who had sustained injuries to the fracture of the superior right pubic rami, fracture of the inferior right pubic rami, fracture and dislocation of the symphysis pubic, Cut wound of about 5cm to the right shin, cut wound of about 5cm to the left shin and a cut wound of 6cm to the elbow region of the right upper limb.

11. The appellants on the other hand had urged the court in their submissions to award Kshs. 300,000 to the respondent while placing reliance on the case of **MICHAEL OUMA NYAOKE v CIRES NYANCHAMA NYASOKO [2010] eCLR** where the injuries suffered by the plaintiff were multiple contusions to the chest trunk with soft tissue injuries, Dislocation of right thumb and metacarpo-phalangeal joint, Fracture of pelvis at right Pubic Ramus and Contusions with soft tissue injuries to the legs bilateral, where the High Court awarded Kshs. 279,000

12. In the case of **JOSEPH NJERU LUKE & 3 OTHERS V STELLAH MUKI KIOKO [2020] ECLR** which case was cited by the appellant, Justice Majanja awarded Kshs 750,000 where the respondent therein had suffered almost similar injuries to the respondent in the instant case.

13. Taking my cue from the above and keeping in mind the various cited authorities and the arguments put forth by counsels, I am in agreement with the respondent's Counsel that the award of quantum by the trial magistrate was appropriate and commensurate to the injuries suffered by the Respondent. In addition, given the passage of time since the lower Court award was made and taking into account the vagaries of inflation, I find that in the circumstances, the award of Ksh. 726,610/- issued by the learned trial magistrate at the lower Court is an appropriate measure of general and special damages.

14. Accordingly, I uphold the decision of trial Court as is and dismiss this appeal with costs to the Respondent. This Court so orders.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF APRIL, 2021.**

In the presence of:-

Mr. Ndege for the Appellant.

Mr. Chanzu for the Respondent.

Gladys - Court Assistant

Mr. Ndege: We pray for 30 days stay of execution so as to make arrangements to pay.

Mr. Chanzu: I have no problems with that.

Court: 30 days stay of execution is granted as prayed.

**S. M GITHINJI**

**JUDGE**