



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT KISII**

**CIVIL APPEAL NO 107 OF 2019**

**MASENO UNIVERSITY COLLEGE.....APPELLANT**

**VS**

**ELIZABETH KERUBO MOKAYA.....RESPONDENT**

*(Being an appeal the judgment of the Honourable Chief Magistrate, Hon. E.A Obina delivered on the 6<sup>th</sup> day of August, 2019*

*in the Chief Magistrate Court Civil Suit No. 147 of 2018 at Kisii)*

**JUDGMENT**

1. The respondent sued the appellant in the magistrates' court for general damages; special damages; costs of the suit and interest thereof. The issue of liability was settled by consent and was apportioned in the ratio 80:20 against the appellant.
2. The respondent claim before the lower court was that on 25<sup>th</sup> January 2018 on the Mortuary-Cathedral road, appellant's motor vehicle Reg No. KBJ 662U collided with a motorcycle Reg No KMDU 009U where she was a pillion passenger. According to the respondent, the appellant's driver drove the vehicle in a negligent manner, causing it to lose control and collide with the motor cycle. According to the plaintiff, the respondent suffered the following injuries: chest contusion, bruises on the left elbow, bruises on the right forearm, degloving injury on the left floor, dislocation on the left ankle and bruises on the right leg.
3. The appellant denied that the respondent was not a passenger on the motor cycle and further denied driving the vehicle in the manner alleged by the respondent.
4. The trial magistrate after conducting a full hearing awarded the respondent Kshs. 600,000/- and Kshs. 9,720/- as general and special damages respectively subject to liability.
5. The subject of this appeal as contained in the memorandum of appeal dated 25<sup>th</sup> September 2019 concerns the issues of both liability and quantum. However, having established that the parties consented to liability and the only issue for determination is quantum. The appellant also abandoned the issue of liability in their submissions and made submissions on quantum only.
6. The appellant in their submissions argued that an award of Kshs 100,000 would suffice as general damages. They cited the case of **West Sugar Co. Ltd v Stephen Nasiali Nyifu (2019) eKLR** where the court awarded plaintiff's with similar injuries Kshs 90,000/- and the case of **Ndungu Dennis v Ann Ndirangu Wainaina & Another (2018) eKLR** where the High Court substituted an award of Kshs 300,000/- with that of Kshs 100,000/-.
7. The respondent in her submissions faulted the appellant's reliance on the case of **Ndungu Dennis v Ann Ndirangu Wainaina & Another (2018) eKLR**, and argued that the plaintiff in that case sustained minor soft tissue injuries. It was further argued that that the appellant had not established why this court should disturb the finding of the trial court.
8. On the issue of whether this court can interfere with the lower court's award, the principles upon which this court should interfere with damages awarded by a lower court were stated in the case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs A. M. M. Lubia & Another [1998] eKLR**:

*“... 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”*
9. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that–

*“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”*

10. According to the report of Dr. Morebu Peter Momanyi the plaintiff suffered a chest contusion; bruises on the right forearm and right leg including the right and left elbow; degloving injury on the left floor and dislocation of the left ankle. In his report, Dr. Morebu Peter Momanyi was of the opinion that the dislocation may lead to post traumatic arthritis and that the respondent may require to undergo surgery for the degloving injury so that skin grafting may be done.

11. In the **Ndungu Dennis v Ann Ndirangu Wainaina & Another (2018) eKLR** submitted by the appellant the plaintiff therein suffered bruises on the back and tenderness of the right leg and was awarded Kshs 100,000/-. The respondent before the trial court cited the case of **NAIROBI HCC NO 156 OF 2012, Tononoka Rolling Mills Ltd v James To Boso Were**, where the plaintiff sustained degloving injury to the left thigh, compound commuted fracture mid third left femur X-ray, soft tissue injuries, pains and blood loss and functional disability assessed at 15% and was awarded Kshs 850,000/-. The case cited by the appellant is of simple soft tissue injuries while the one by the respondent was of a plaintiff who suffered more severe injuries.

12. The respondent in this case suffered soft tissue injuries and a dislocation of the left ankle and thus the award of Kshs 600,000/- by the trial magistrate was excessive and warrants this court's interference.

13. Accordingly, and for reasons stated, I would allow the appeal, and set aside the award of Kshs. 600,000/= by substituting it with Kshs. 200,000/=. The respondent bears 20% liability. The appellant shall have the cost of this appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF JUNE, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Miss Kerubo      For the Appellant**

**Respondent      Absent**

**Ms Rael              Court Assistant**