



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CIVIL APPEAL 18 OF 2015**

**TRIAD COACHES LTD.....1<sup>ST</sup> APPELLANT**

**RAMADHAN YUSUF IBRAHIM.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARY MUTHEU KAKEMU.....RESPONDENT**

**(Being an appeal against the judgement on quantum delivered by Honourable M. D. Kiprono SRM on the 27th June, 2013 in Hola SRMCC No. 7 of 2011)**

**JUDGEMENT**

1. The Respondent was a fare-paying passenger travelling in motor vehicle registration KBF 842H on the 5<sup>th</sup> October 2009 when the said motor vehicle veered off the road and overturned causing serious injuries to the Respondent. She sued the Appellants for negligence in the subordinate court and prayed for damages, cost of the suit plus interest. The Appellants filed their defence and denied liability.
2. In his judgement, the trial magistrate apportioned 100% liability against the Appellants and awarded the Respondent Ksh. 300,000/- as general damages and Ksh 2,200 as special damages.
3. The Appellants aggrieved by the judgement of the trial court filed their Memorandum of Appeal dated 16<sup>th</sup> July 2013 and filed on the 18<sup>th</sup> July 2013 on four grounds reproduced below that:-
  - (i) The Learned Magistrate erred in Law and in on the key issue of quantum, was biased by totally disregarding the Appellants submissions resulting in a miscarriage of justice.
  - (ii) The Learned Magistrate erred in Law and in fact awarding manifestly excessive amount of general damages of Ksh. 300,000/- and disregarding the Defendant's submissions and the injuries suffered by the Respondent.
  - (iii) The Learned Magistrate decision was unjust, against the weight of evidence and was based on wrong principles of law and occasioned a miscarriage of justice.
  - (iv) The Learned Magistrate erred in Law and fact by disregarding the Appellants submissions on quantum thus occasioning a miscarriage of justice.
4. The parties agreed to dispose of the appeal by way of written submissions. The Appellants filed their submissions dated 20<sup>th</sup> July 2020 on the 30<sup>th</sup> July 2020, while the Respondent filed her submissions dated 30<sup>th</sup> July 2020 on the 3<sup>rd</sup> August 2020.
5. The Appellants submitted that the medical report by Dr. Mwadena confirmed that the Respondent only suffered a fracture of the distal tibia fibula and soft tissue injuries on the wrist, which soft tissue injuries healed without any incapacity. That in the trial court, the Appellants suggested an award of Ksh 120,000/- as fair compensation and cited the case of **Charles Odhiambo vs Omar Transmotors Ltd & Anor HCCA No. 155 of 1998** where the Plaintiff had suffered similar injuries. They submitted that the trial magistrate however analyzed the Respondent's submission and awarded Ksh. 300,000/- which was manifestly excessive. The Appellants submitted that the principle in assessing damages, comparable injuries should be compensated by comparable awards keeping in mind the correct level of awards in similar

cases as was held in **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013] eKLR**.

6. In support of their appeal that the award was excessive, the Appellants relied on the case of **H. Young Construction Company Ltd vs Richard Kyule Ndolo [2014] eKLR** where the Plaintiff suffered injury to the leg with loss of skin over the calf muscle and blunt injury to the left ankle. That after treatment the Plaintiff still suffered pain on the ankle joint when walking, remained with scars on the left leg and thigh and, was at risk of suffering post-traumatic osteoarthritis of the left ankle and was awarded Ksh. 250,000/-.

7. The Appellants further cited the case of **Odinga Jactone Ouma vs Moureen Acheing Odera [2016] eKLR** where the Respondent sustained a head injury, cut wound on the right mandible, neck muscles contusion, chest pain on the left side and lacerations, cut wounds on the right shoulder, multiple lacerations over the left shoulder, cut wounds and lacerations over the right forearm and a painful swollen left finger where on appeal the court awarded Ksh. 180,000/-. The Appellants further cited **Geroge Kinyanjui T/A Climax Coaches & Ano vs Hassan Musa Agoi [2016] eKLR** where the Respondent suffered a fractured left clavicle, fractures of the 4<sup>th</sup> and 5<sup>th</sup> ribs mid shaft, dislocation of the left shoulder joint and multiple soft tissue injuries where the court awarded Ksh. 406, 890/-.

8. On her part, the Respondent submitted that she had suffered fractures of the distal tibia and fibula, dislocation of the right ankle and blunt injury to the right wrist and ankle as confirmed by the medical report of Dr. Mwadena. The Respondent submitted that the award of Ksh. 300,000/- was not inordinately high and relied on the case of **Clement Gitau vs GKK [2016] eKLR** where the Respondent suffered a fracture of the left tibia and minor bruises and was awarded a sum of Ksh. 600,00/-. She further cited the case of **Geoffrey Wamalwa Wamba & Ano vs Kyalo Wambua** where the Respondent suffered a compound fracture of the right tibia fibula, cut on the scalp, chest and lip and was awarded Ksh. 700,000/-.

9. It is the duty of this court as a first appellate court, to re-evaluate as well as examine afresh the evidence and to arrive at its own conclusion having regard to the fact that this court has not seen or heard the witnesses as was stated in the case of **Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123**.

10. I have carefully considered the record of appeal and the respective submissions and the authorities filed by the parties. There is no doubt that the Respondent was a lawful passenger in the Appellants motor vehicle registration KBF 842H when it was involved in an accident on 5<sup>th</sup> October 2009 when she was injured. According to the medical report by Dr. Mwayayi Mwadena admitted in evidence the Respondent suffered a fracture of the tibia fibula, blunt injury of the right wrist and blunt injury of the right ankle with dislocation. This evidence was not challenged by the Appellants at trial. It is clear that their appeal is only against quantum.

11. The principles by which an appellate court is justified to interfere with quantum of damages awarded by a trial court were set out in the case of **BB (A minor suing through his next friend and father GON) v Ragae Kamau Kanja [2019] eKLR** where the Court of Appeal pronounced itself thus:-

***“31. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -v-A.M. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730 Kneller, JA. said:***

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles.”***

***32. And in Gicheru -vs- Morton and Another (2005) 2 KLR 333 this Court stated:***

***“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”***

12. The Court of Appeal further laid the principle on assessment of general damages and stated that:-

***“33. Assessment of general damages is a question of fact; however, the principle upon which the assessment is made is a principle of law. The legal principle is comparable injury should as far as possible get comparable compensatory award.”***

13. In the present case, the Respondent had proposed damages of Ksh. 2,000,000/- and relied on the case of **Joseph Poko Ochiengo vs Kenya Bus (Msa) Ltd HCCC 705 of 1991** where the Plaintiff suffered fractures of the right femur, compound fracture of the left femur, a massive laceration on the left thigh and a cut over the proximal medial aspect of the right leg. The Plaintiff had permanent incapacity assessed at 55% of the right leg. The court awarded general damages of Ksh. 1,100,000/-.

14. The Appellant on their part had proposed a sum of Ksh. 120,000/- and had cited the case of **Charles Odhiambo vs Omar Tranmotors Ltd & Ano HCCA No. 155 of 1998** where the Plaintiff sustained a broken tibia and fibula and liability was agreed at 100%, the court awarded general damages of Ksh. 100,000/-.

15. In awarding the general damages, the Trial Magistrate in his judgment considered the authority cited by the Appellants which had similar injuries as those sustained by the Respondent and stated that:-

***“The Plaintiff in that case had a fracture of the left lower leg tibia and fibula bone. In the present case, the Plaintiff had a fracture on the hand. She testified that she was a secretary and the injury had considerably affected her work. This coupled with the other injuries makes her condition more severe. Doing the best I can in the circumstances, an award of Ksh. 300,000/- would be just and reasonable compensation.”***

16. I am in agreement with the trial Magistrate that the injuries in the present case were more severe than those in the authority cited by the Appellants as the Respondent also suffered blunt injury to the wrist and ankle and further dislocated her ankle.

17. While assessing general damages, the trial magistrate considered that the Respondent had suffered a fractured hand, which affected her work as a secretary. However, the trial magistrate misdirected himself when he wrongly stated that the Respondent had suffered a fractured hand instead of a fractured leg as borne out by the medical evidence. This error affected the weight placed on the injury suffered by the Respondent in relation to the work of the Respondent. While it is not in doubt that the Respondent was affected by the injuries sustained, there was no evidence of any permanent disability from the medical report, which was prepared merely three months after the accident. In light of this I find that the general damages awarded were inordinately high.

18. For the reasons stated above, I allow the appeal and set aside the judgement of the lower court on general damages and substitute it with an award of Ksh. 250,000/-. The sum shall accrue interest at court rates from the date of judgment. The Respondent shall get costs in the lower court while each party shall bear its own costs in this appeal.

19. Orders accordingly.

**Judgment delivered, dated and signed at Garsen this 10<sup>th</sup> day of September, 2020.**

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**R. LAGAT KORIR**

**JUDGE**

**Due to the COVID -19 pandemic, this Judgement has, with the consent of the parties, been emailed to:**

**i. The Appellants’ advocates at Kimondo Gachoka advocates**

**ii. The Respondent’s advocates at [annekiusya@yahoo.com](mailto:annekiusya@yahoo.com)**