



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO 106 OF 2017**

**1. JOSEPH KIMANI GATHAGA**

**2. BLUE SKY OUTSOURCING LTD.....APPELLANTS**

**VERSUS**

**MARTIN NJOROGE WACEKE..... RESPONDENT**

**(Being an appeal from the Judgment of Hon.B. Khaemba (SRM) delivered on 30<sup>th</sup> June, 2017**

**in Kiambu Chief Magistrates Court Civil Case Number 331 of 2016.)**

**J U D G M E N T**

1. By a plaint filed on 26/08/2016, the Plaintiff in the lower court and now the Respondent herein, sued the Defendants now the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, claiming compensation for injuries allegedly sustained on 3<sup>rd</sup> July, 2016. The Plaintiff averred that he was lawfully travelling in motor vehicle registration number **KBH 929U** as a fare paying passenger when the 1<sup>st</sup> Appellant so negligently and/or carelessly drove the motor vehicle registration number **KCC 308V** that he caused the same to hit motor vehicle registration number **KBH 929U** from behind, and as a result, the Respondent sustained severe bodily injuries and as a result he suffered loss and damages.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants filed their defence on 10<sup>th</sup> November, 2016, denying any liability for the accident. In particular, they averred that the said accident was caused by negligence on the part of the driver of motor vehicle registration number **KBH 929U**.

3. The case was heard by way of written submissions after the parties entered a consent on liability at 85:15% in favor of the Respondent . The trial Magistrate assessed quantum and entered judgment as follows:

a. General damages	Kshs.	400,000/=
Less 15% contribution	Kshs.	60,000/=
Net	Kshs.	340,000/=
b. Special damages	Kshs.	3,500/=
Total	Kshs.	343,500/=

4. The Appellants are dissatisfied with the lower Court’s judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed six grounds of appeal as follows:-

**a. That the Learned Magistrate proceeded on wrong principles in entering judgment for the Respondent for the sum of Kshs. 400,000/= in general damages.**

**b. That the Learned Trial Magistrate erred in failing to scrutinize/evaluate the evidence tendered in support of the injuries suffered by the Respondent and to correctly relate them to case law cited to him and thereby failed to arrive at a fair and reasonable compensation to the Respondent for his injuries.**

c. That the Learned Trial Magistrate erred in failing to give his reasons for finding that the sum of Kshs. 400,000/= in general damages to the Respondent was reasonable and/or adequate compensation.

d. That the Learned Magistrate erred in law and in fact in failing to find that the nature of injuries suffered by the Respondent did not warrant an award of Kshs. 400,000/=.

e. That the Learned Magistrate erred in law in failing to uphold the doctrine of precedent.

f. That the Learned Trial Magistrate erred in awarding such an inordinately high award of damages for such injuries that have resolved and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent.”

5. The court directed the appeal to be disposed of by way of written submissions.

6. The Appellants submitted that in assessment of general damages the conventional approach is that comparable injuries should be compensated by comparable awards as held in the case of *Easy Coach Limited v Emily Nyangarasi (2017) eKLR* where it was also stated that inordinately high awards lead to monstrously high insurance premiums and should be avoided. It was submitted that the trial court failed to scrutinize the evidence tendered and to correctly relate them with case law supplied. Counsel submitted that the injuries sustained by the plaintiff in *Peter Chege v Oserian Development Co. Ltd (2015) e KLR* relied upon by the Appellants were more similar to those suffered by the Respondent herein, and that the victim in the mentioned case was awarded Kshs. 70,000/= In the circumstances, the award of Kshs. 400,000/= in general damages was said to be inordinately high.

7. The Respondent filed his written submissions through his counsel and contended that the assessment of general damages is an exercise of judicial discretion by a court and should not be interfered with unless it is exercised on the wrong principle. Counsel cited the case of *Ratnam vs Cumarasamy & Another ALL ELR (1964) Volume 3 at pg 933* where it was held that the burden of proving that a judge has exercised his discretion improperly lies on the person challenging the same . He also cited the case of *Samken Limited & Another vs Mercedes Sanchez Civil Application Number Nairobi 21 of 1991*. It was submitted that the Appellants had failed to discharge that duty and as such , the Appeal should fail. Counsel relied on among others the cases of *Peter Mburu Echaria vs Priscilla Njeri Echaria Civil Application No. 204 of 1998 and Mbogo vs Shah (1968) EALR at pg 93* to demonstrate the situations where an appellate court is justified to interfere with a trial court’s exercise of its discretion. In conclusion it was submitted that the Appellants have failed to demonstrate that the trial court erred.

8. The court has considered the evidence in the lower court and submissions on this appeal. In *Selle v Associated Motor Boat Co. [1968] EA 123* the Court of Appeal for East Africa laid down the principles guiding the exercise of the jurisdiction of the first appellate court. The court stated:

**“An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hamid Saif v. Ali Mohamed Sholan*[1955] 22 EACA 270).”**

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 1958] 1 KAR 278*.

10. The sole question on this appeal relates to the assessment of general damages . Two medical reports were admitted by consent in the lower court and thereafter the parties filed their respective submissions. The report by **Dr. Mwaura** dated 23<sup>rd</sup> August 2016 revealed the following injuries:

- a. bruises to forehead, face, cheeks, nose and lips
- b. head concussion
- c. blunt neck injuries
- d. blunt injuries to chest
- e. blunt injuries to shoulders
- f. deep cut wound on right calf
- g. swollen bruised legs

The doctor gave a fair prognosis. This report was made about 1 ½ months since the accident.

11. Two months later, the Respondent was examined by **Dr. P.M. Wambugu**. The doctor listed the following injuries on his report:

- a. facial cut wounds involving upper and lower lips, right cheek and forehead.
- b. Laceration wound on right calf region
- c. Blunt chest trauma

The prognosis by **Dr. Wambugu** is similarly positive, noting that the Respondent had adequately recovered from his injuries.

12. In his judgment, the trial magistrate correctly rejected the authority in **Ben Menges v Edith Makungu Lande [2013] e KLR** cited by the Respondents to urge an award of KShs.950,000/= in general damages. The injuries in the case were fairly severe. While accepting the Appellants authorities, including **Peter Chege v Oserian Development Co. Ltd (2015) e KLR** the Court found that the Respondent herein sustained several soft tissue injuries and hence was of the view that the sum of KShs.70,000/= proposed by the Appellant was too low. He then proceeded to award the sum of KShs.400,000/=.

13. The Court of Appeal stated in **Bashir Ahmed Butt v Uwais Ahmed Khan (1982 – 1988) 1 KAR 1** that:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure that was so inordinately high or low as to be erroneous.”**

14. The Appellants fault the trial magistrate for distinguishing the injuries in the instant case from those in **Peter’s** case. In the latter case the Plaintiff had suffered soft tissue injuries including swelling on the right side scalp, soft tissue injuries to the chest, right shoulders and right thigh. With the exception of the deep cut on the right calf and alleged concussion, the injuries of the present Respondent compare well to those sustained by the Plaintiff in **Peter’s** case. While the trial court correctly found an award of KShs.70,000/= to be too low, it appears that the trial court did not consider other comparable decisions cited in **Peter’s** case reflecting the trend in awarding damages in respect of similar injuries, in particular the case of **Sibiah Ondieki v Samuel Ochillo (2010) e KLR** which compared better with the instant case.

a. Had the trial court carefully read and considered the entire judgment in **Peter’s** case, he would have arrived at a more reasonable estimate. Comparable injuries must attract comparable awards. Whereas the trial court was entitled to consider inflation, there was in my considered view no proper basis for awarding a sum of KShs.400,000/= in the circumstances of this case. In my considered view, even considering **Sibiah Ondieki’s case** and inflation over the years, an award of KShs.400,000/= appears unjustified. The judge in **Peter’s** case having considered all authorities before her had concluded that an award of KShs.70,000/= in **Peter’s** case was reasonable. The trial court while apparently basing its quantifications on **Peter’s** case did not apply the full counsel in the said judgment, and by awarding the sum of KShs400,000/= the court misapprehended the severity of injuries in this case in comparison to **Peter’s** case.

b. This court therefore feels justified to disturb the award thereby arrived at, and which on the face of it was inordinately high. Considering awards in **Peter’s** case, and inflation an award of KShs.200,000/= at most was adequate as general damages.

c. In the circumstances the appeal is allowed and the award of K Shs.400,000/= in general damages hereby set aside and substituted with an award of KShs.200,000/= which is subject to the agreed liability ratio. The costs of this appeal will be shared equally by the parties as the appeal has partially succeeded. Orders accordingly.

**DELIVERED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF MAY 2019**

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**C. MEOLI**

**JUDGE**

**In The Presence of:-**

**Mr. Olaka holding brief for Mr. Maanzo for the Appellants**

**Mr. Mwangi for the Respondent**

**Court Assistant - Nancy**