



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO.8 OF 2013**

**THOMAS OMBIMA.....APPELLANT**

**VERSUS**

**SAMSON ANINDO MWENJE.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of J.Ongondo(SRM) in Maseno PMCC NO.96 of 2012 delivered on 18th December, 2012)*

**JUDGMENT**

1. **Samson AnindoMwenje (hereinafter referred to as respondent)** sued **Thomas Ombima(hereinafter referred to as appellant)** in the lower court claiming damages for injuries allegedly suffered on 14th November, 2011 when appellant's vehicle KBN 954K which was allegedly driven knocked him down as a result of which the respondent was injured.
2. The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **18th December, 2012**, the learned trial Magistrate found that the appellant was liable at 100% and awarded the respondent general damages in the sum of Kshs. 950,000/-.

**The Appeal**

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 1st February, 2013 which sets out 5 grounds of appeal which can be summarized into 3 main grounds to wit:-

- 1) **The Learned Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same**
- 2) **The Learned Magistrate misdirected himself in ignoring the principles in awarding quantum of damages and the relevant authorities on quantum cited in the written submission filed by the appellant**
- 3) **The Learned Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-a- vis the respondent's claim**

**SUBMISSIONS BY THE PARTIES**

5. When the appeal came up for mention on 17th October, 2017; the parties' advocates agreed to canvass it by way of written submission which the respondent dutifully filed.

**Respondent's submissions**

It was submitted for the respondent that the award of damages awarded to the respondent is reasonable and within the limits set out by decided cases. Respondent relied on the following authorities.

In the case of **Butt v Uwais Ahmed Khan [1982-88] KAR 5** in which the Court of Appeal in held 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 which was either inordinately high or low ....”***

In the case of Kigaraari – VsAya [1982 – 88] 1 KAR 768, the court held that:

**“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.”**

### **The evidence**

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See David KahurukaGitau& another v Nancy Ann WathithiGitau& another [2016] eKLR)

12. I have perused the entire record of appeal and considered the submissions by on behalf of the respondent. I note that the appeal revolves around the issue of quantum. The appellant holds the view that the award to the respondent is inordinately high. The respondent on the other hand holds the view that the decision of the trial court on quantum is warranted.

The respondent sustained:

- Communitated fracture of middle 1/3rd of left femur
- Back injury
- Dislocation left ankle
- Chest injuries
- Soft tissue injuries to the elbow joint
- Soft tissue injuries left knee joint

At the lower court, appellant offered Kshs. 150,000/- and cited Eldoret Steel Mills Limited v JothamWekesaWanami [2014] eKLR in which an award of Kshs.150,000/- was upheld on appeal. The authority does not however show the injuries that the respondent in that case had sustained. The respondent urged the lower court to award him Kshs. 1.2 million and relied on BoderickNzomoKiminza v Baggies Investment Ltd &AnorMks HCCC No. 19 of 2000 which was neither attached to the submissions before the trial court or before this court. Requests to the respondent’s advocate to avail the authority to this court did not succeed and a search at *kenyalaw* did not yield any results.

It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered but the advocates in this case failed to do so. In CalebOnyangoUyogo v P A (a minor suing through W R K as next friend) [2014] eKLR Kshs.300,000/- was upheld on appeal for a soft tissue injuries with a swelling of the face,a fracture of the middle part of right femur and soft tissue injuries of the pelvis.

In the result the appeal is allowed to the extent that the award of general damages is set aside and substituted with an award of Kshs. 400,000/-. Special damages remain undisturbed. The appellants shall have costs of the appeal.

**DATED AND DELIVERED THIS 1st DAY OF March 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix &Carolyne

Appellant –N/A

Respondent-N/A