



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 13 OF 2015**

**ELDORET EXPRESS LIMITED.....1<sup>ST</sup> APPELLANT**

**CMC MOTORS GROUP LIMITED.....2<sup>ND</sup> APPELLANT**

**ABRAHAM MWAURA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**ANN KHISA.....1<sup>ST</sup> RESPONDENT**

**HASSAN HUSSEIN.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment and Decree in Original Bungoma CMCC 429/2010 delivered on 19.2.2015 by P.N. Areri Senior Resident Magistrate)*

**JUDGEMENT**

The 1<sup>st</sup> Respondent Ann Khisa filed a suit against the appellants in Bungoma CMCC 429/2010 seeking general damages for pain and suffering from injuries sustained in a road ....accident involving motor vehicle KAT 065D Toyota matatu owned by 1<sup>st</sup> defendant and motor vehicle registration number KAY 301A Nissan bus owned by the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent along Bungoma-Chwele road on 8.8.2009. The respondent was a fare paying passenger in motor vehicle KAT 065D which collided with the appellants vehicle KAY 301A due to negligent driving of the same by the driver and/or agent of the appellant. The particulars of negligence on the part of the 1<sup>st</sup> respondent and 2<sup>nd</sup> and 3<sup>rd</sup> respondents were pleaded and nature of injuries sustained tabulated in paragraph 6 of the plaint.

The 1<sup>st</sup> respondent in its defence denied any negligence or liability in respect of the accident and averred that the accident was caused solely or substantially contributed to by the driver of motor vehicle KAY 301A belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. Particulars of the negligence on the part of the driver of motor vehicle KAY 301A were stated.

The 2<sup>nd</sup> and 3<sup>rd</sup> appellant in their statement of defence averred that the plaintiff caused or substantially contributed to the accident due to the plaintiff negligence in failing to take adequate precaution for her own safety, failing to heed instructions or observe traffic rules and regulations while travelling. Appellants also averred that the accident was caused by or substantially contributed by the negligence of the 1<sup>st</sup> respondent's driver and/or agent whose particulars they enumerated in paragraph 4 of their statement of defence.

The evidence before the trial court was that. Pw1 Anne Khisa testified that on 8.8.2009 at about 6.30 pm while along Mayanja-Bungoma road she was on board motor vehicle registration number KAT 065D a Nissan matatu heading to Bungoma. The vehicle had 5 passengers that she knew. They were Margaret, Emily, Diana, Magdalene who were from her family but she did not know the rest. The vehicle was being driven on the left side of the road towards Bungoma. At Bukananachi area an Eldoret express bus emerged from the opposite direction and veered to its right and knocked the matatu. The bus was registration number KAY 301A. Upon impact pw1 sustained injuries and was taken to Bungoma District Hospital and admitted the very day till 11.8.2009. Pw1 sustained injuries at the back, stomach and knees.

She reported the matter at Bungoma police station and was issued a p3 form that was filled by Dr. Mulianga Ekesa. She paid Kshs. 1,500 for the medical report. That at the bus she had paid Kshs. 120 as fare from Chwele to Bungoma. That it was the Eldoret express driver who was to blame for he moved from its side to the rights side and caused the accident. That pw1 was wearing a safety belt at the time of the accident. That due to the back problem she had been going to Kimilili hospital for treatment.

Pw2 No. 85081 PC Everylne Cheronno of Bungoma Traffic Base testified with regard to the accident that occurred between motor vehicle KAT 065D Matatu Hiace and KAY 301A Nissan Bus. She told court that the passengers that were in the matatu were Benson Wanjala the driver, and other passengers. They were issued with P3 forms and that the recommendation of the investigating officer was that the driver of motor vehicle KAY 301A be charged with careless driving. The sketch plan indicates that M/V KAY 301A was supposed to be on the left

side facing Mayanja. The point of impact was on the front of the vehicle because of a head on collision. The collision was on the right side of the road as one faces Mayanja. It is the bus KAY 301A that moved from its lane to the side of the matatu. Motor vehicle KAT 065D did not have pre-accident defect. The matatu driver was to blame.

During cross examination Pw2 testified that motor vehicle KAT 065T had stopped at Mayanja for passengers to alight. That the matatu was stationary and it was the bus that went to where the matatu was. The driver of the bus was overtaking a pick up. That the matatu driver could not have done anything to stop the accident.

Pw3 the doctor testified that the plaintiff sustained soft tissue injuries. Pw4 Emily Wanyama testified that she knew pw1 and recalls that on 8.8.2009 she was with her in a vehicle from Marakalu to Tuuti. It was a Nissan matatu KAT 065D. They had an accident near Mayanja at Bukananachi junction. They were on the left side of the road. It was caused by a bus coming from Bungoma going towards Chwele. The bus was registered KAT 301A. Both the vehicles were speeding and there was a collision. That pw4 later learnt that the owner of the matatu was Hassan Hussein and the bus belonged to Eldoret express and was being driven by one Abraham Mwaura. That pw4 was injured. Margaret Nakhumicha, Magdalene Nasimiyu and Diana Khisa were in the matatu.

The defendants did not offer any evidence in rebuttal they did not controvert the plaintiffs evidence. The trial court awarded general damages of Kshs.200,000 and special damages of Kshs.2,500/=. The entire award was thus Kshs.202,500/=.

After considering the evidence the trial magistrate by judgment delivered on 19.2.2015 stated:

*”From the evidence on record and the exhibits produced I find the plaintiff has proved that on the 8<sup>th</sup> of August 2009 at 6.30 pm an accident occurred at Bukananachi area along Mayanja-Bungoma road involving motor vehicle Reg. KAT 065D and Motor vehicle Reg. KAY 301A. According to the plaintiff (Pw1) the police (Pw2) and the eye witness (Pw4) the driver of the bus (the 4<sup>th</sup> defendant) was to blame for the accident. That evidence was not challenged, denied, rebutted and/or controverted by the 4<sup>th</sup> defendant. Pw1, Pw2 and Pw4 said the driver of the matatu was not to blame. Again the evidence was not challenged, denied or rebutted. For the foregoing reasons, I find the driver of motor vehicle Reg. KAY 301A (4<sup>th</sup> defendant) solely liable to blame for the accident and I hold him liable at 100%. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are vicariously liable for the negligent acts of the 4<sup>th</sup> defendant.*

*I find no reason to blame the driver of the motor vehicle Reg. KAT 065D or the owner and I proceed to dismiss the plaintiff’s claim as against the 1<sup>st</sup> defendant with costs. This being a test suit this finding on liability will apply to Bungoma CMCC 401 of 2010, 430 of 2010, 431 of 2010 and 513 of 2010 as per the court order of 19<sup>th</sup> July 2011.*

*He then proceeded to award the respondents Kshs.200,000/= as general damages and special damages at Kshs.2,500/=. The appellants then filed this appeal faulting the judgment and decision on the following grounds: the learned magistrate erred in law and fact in awarding the plaintiff quantum of damages that were manifestly excessive in the circumstances of the case and injuries sustained and proved, the award was not supported by any evidence or applicable legal principles, the magistrate disregarded the defendants’ written submissions, the magistrate disregarded the provisions of Section 10 of the insurance (Motor Vehicle Third Party Risks) Act Cap 405 and particularly the schedule thereto and part(c) (39) (a) in making the award in general damages, the magistrate disregarded the provisions of section 10 of the insurance (Motor Vehicle Third PARTY Risks) Act Cap 405 and particularly section 3(b) (1 B) of the Insurance (Motor Vehicle Third Part Risks) (Amendment)b Act 2013 in making the award in special damages.*

By consent of the parties, this appeal was canvassed by way of written submissions. M/s Kairu Mc court for the appellant submitted that the award of Kshs.200,000/= by the trail court was manifestly excessive given that the injuries sustained by the 1<sup>st</sup> respondent were soft tissue injuries according to the 1<sup>st</sup> respondent’s testimony during trial. That the 1<sup>st</sup> respondent sustained the following injuries:

- i. Concussion in the head and neck*
- ii. Low back pains*
- iii. Swelling over the low back*
- iv. Swelling of both knee joints*

That during cross examination the 1<sup>st</sup> respondent testified to the effect that she had healed and the trial magistrate failed to take that into account. That the evidence of the doctor also pointed to the fact that the 1<sup>st</sup> respondent may have been injured again after the accident. That as to the issue of trauma there was no psychologist who was called to testify to this effect. The appellant faulted the reliance of the magistrate on the case cited by the plaintiff in **Kisumu HCCA NO. 67 OF 2008 [COLLINS OCHUNG ONDIEK vs WALTER OCHIENG OGUNDE]** whereby the injuries sustained were among others the fracture of the left clavicle midshaft whereas the respondent herein suffered minor soft tissue injuries.

That the appellant had submitted in the trial court for an award of Kshs.50,000/= relying on the case of **NAIROBI HCCC NO. 173 OF 2008 [SAMULEL MBURU N. NG’AARI & 4 OTHERS Vs. WANGIKI WANGARE & ANOTHER (2014 Eklr** the magistrate’s disregarded their proposal and awarded Kshs.200,000 giving credence on the authorities cited by the respondents.

Mr. Bwonchiri for the respondent submitted that the trial magistrate considered all relevant factors and did not leave out any relevant factor in making the award. He relied in the recent cases of **CIVIL APPEAL NO. 26 OF 2014 BONIFACE NDWIGA MBOGO VERSUS JAMLECK MWANIKI** where court held that damages for soft tissues injuries sustained be assessed at Kshs.200,000 and the case **CIVIL**

**APPEAL NO. 147 OF 2006 PATRICK MWITI M. IMANENE VERSUS KEVIN MURUNGI NKUNJA** where court awarded Kshs.170,000 for soft tissue injuries.

The main issue in this appeal is on the quantum of Kshs.200,000/= general damages awarded. The appellant submitted that the same was excessive in the circumstances and that urges this court to interfere with the same. Counsel for this Respondent submits that the general damages awarded are not excessive.

As this court stated in *Makeni Joel Vs. Edwin Nyongesa Bungoma C.A. 19/2017*. The assessment of this quantum of damages is at the discretion of the trial court, and exercise that must be done Judiciously within the legal principles of the assessment to achieve the objective of compensation in personal injury cases. The appellate court will interfere with the assessment if it is demonstrate on appeal that the trial court took into account an irrelevant factors; or left out of account a relevant factor or that the award is so inordinately low or so high as to show an erroneous estimate of the damages done.

The trial magistrate in the Judgment in considering the assessment rendered himself as follows.

*“On quantum the nature and extent of injuries sustained, the treatment given and the period of the treatment, the rate of inflation, current trends, and the submissions of the parties together with case law cited and I will award general damages for pain suffering and loss of amenities of*

*Kshs.200,000 relying on Bungoma High Court case No. 6 of 2012 Global Trucks Ltd. & Another Vs. Titus Osule Osore where Gikonyo J assessed general damages at Kshs.200,000 for nearly similar injuries.”*

It is therefore evident that the trial magistrate examined the nature of the injuries sustained and compensation awards made in similar cases in the past and taking into consideration inflation trends.

In this appeal it has not been demonstrate that the trial magistrate took into account extraneous facts or did not consider a relevant factors or that he applied wrong principles or that the award is so low or so high as to reflect an erroneous approach to assessment of damages. In this appeal none of the above factors have been demonstrated. I therefore respectively decline the invitation to interfere with the trial court assessment on quantum of damages. In the result, I find no merit in this appeal and which is hereby dismissed with costs.

**Dated and Signed at Bungoma this 5<sup>th</sup> day of October, 2018.**

**S.N. RIECHI**

**JUDGE.**