



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL APPEAL NO. 12B OF 2017**

**(FORMERLY MACHAKOS HCCA NO. 59 OF 2010)**

HASSAN FARID.....1<sup>ST</sup> APPELLANT

HUSSEIN SHARRIF ABDALLA.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

SATAIYA ENE MEPUKORI.....1<sup>ST</sup> RESPONDENT

LUCY ISAIYA.....2<sup>ND</sup> RESPONDENT

KAKURO OLE LEMASIKA (father & next friend of

SOMAINA KAKURO.....3<sup>RD</sup> RESPONDENT

SERAH LEMOMO TIMOTHY.....4<sup>TH</sup> RESPONDENT

AGNES SIMON aka LIMBAI ENE TETU.....5<sup>TH</sup> RESPONDENT

GRACE WAMBUI.....6<sup>TH</sup> RESPONDENT

NALIKO SAMING'O.....7<sup>TH</sup> RESPONDENT

*[Being Appeals from the Judgments of Senior Principle Magistrate Hon.F. M. Nyakundi*

*delivered on 31<sup>st</sup> March 2010 in Makueni Civil Cases Nos. 15, 16, 17,*

*18, 19, 20 & 21 of 2007 (all consolidated in file No 15 of 2007)]*

**JUDGEMENT**

**INTRODUCTION**

1. The Appellants were the Defendants in the lower court and the Respondents were the Plaintiffs.
2. The suits against the Appellants were for payment of general and Special Damages resulting from injuries occasioned by a road traffic accident on 14/11/2006 along the Mombasa-Nairobi highway.
3. Consent on liability was entered in the ratio of 80:20 in favour of the Respondents. This appeal is purely on quantum.
4. After assessment of damages, the learned trial magistrate made the following awards (*before contribution*);

a) CC 15 of 2007: Kshs. 200,000/=

- b) CC 16 of 2007: Kshs. 200,000/=
- c) CC 17 of 2007: Kshs. 200,000/=
- d) CC 18 of 2007: Kshs. 200,000/=
- e) CC 19 of 2007: Kshs. 200,000/=
- f) CC 20 of 2007: Kshs. 450,000/=
- g) CC 21 of 2007: Kshs. 250,000/=

### **THE APPEAL**

5. Aggrieved by the said awards, the Appellants filed this appeal and raised a common ground in all the suits *to wit*;

- a) That the Learned Trial Magistrate erred by awarding general damages, for minor injuries, that were manifestly high as to amount to a totally wrong estimate.
- b) In CC 20/2007, there was an additional ground that; the Learned Trial Magistrate erred in law and fact by the way she weighed the evidence before her and failed to note the inconsistencies in the witness testimony.
- c) In CC 21/2007, there was an additional ground that; the Learned Trial Magistrate erred in law and fact by failing to note inconsistencies and lack of documents that would ordinarily prove the alleged injuries.

6. The appeal was canvassed by way of written submissions. The parties complied and filed their respective submissions.

### **DUTY OF COURT**

7. It is now settled that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

8. Basically, the Appellants are asking this Court to interfere with the award of damages made by the Trial Court. The circumstances that would lead to such interference have been reiterated in numerous authorities across the jurisdictions resulting in uniformity of the general principles.

9. In **Dumez (Nig) Ltd -Vs- Ogboli{1972} 3 S.C. Page 196** the Court of Appeal of Nigeria stated as follows;

*"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

10. I will address the grounds of appeal under their distinct heads.

### **WHETHER THE AWARDS WERE MANIFESTLY HIGH**

11. The Appellants submit that the injuries sustained by the Respondents in CC 15-19 of 2008 were basically minor soft tissue injuries that had completely healed according to the testimony of PW2, Dr. Kaburu.

12. They relied on Makueni PMCC No. 99 of 2008 in which the same Trial Magistrate had awarded Kshs.70,000/= for soft tissue injuries.

13. They also relied on Mombasa HCCA No. 78 of 2008; **David Okaka Okero -Vs- Kilidini Tea Warehouses Ltd (2008) eKLR** where Kshs 40,000/= was awarded for soft tissue injuries.

14. On their part, the Respondents submit that reliance by the Appellants on a lower Court authority is to joke with the intelligence of our Courts as such an authority is of no value for being neither binding nor persuasive.

15. Consequently, they contend that the Appellants did not use any authority and the trial Court had to make it's findings based on the submissions by the Respondents.

16. Further, they submit that the trial Court made no error and the awards were not only reasonable but also fair and within limits of awards made by the High Court for like injuries.

17. In **CC 15, 16 & 19 of 2008**, the evidence on record shows that the Respondents sustained blunt injuries and cut wounds on various parts

of their bodies which are basically soft tissue injuries.

18. The doctor, PW2 saw the Respondents about a month or two after the accident and in CC 15 and 19, his evidence was that the Respondents had recovered. In CC 16, the Respondent had recovered but was advised to undergo physiotherapy.

19. In making the award, the Trial Magistrate opined that the authority quoted by the Appellants was too low while that of the Respondents was too high. This essentially means that the awards were not comparable.

20. At this juncture, let me quickly say that Counsels are duty bound to properly guide the Court by submitting relevant authorities. It goes a long way in expediting matters and saving the precious judicial time.

21. I have read the **Okaka case (supra)**. The Appellant therein was able to work up to 4pm the following day after the injury. Clearly, the injuries therein were less severe than in the cases under consideration. I did not have the benefit of the authorities relied upon by the Respondents in the Trial Court. Be that as it may, I have taken into account other decided cases on soft tissue injuries and particularly the Court of Appeal decision in **Maore -Vs- Mwenda (2004) eKLR** where the learned judges held that an award of 300,000/= for soft tissue injuries was inordinately high and reduced it to 100,000/=.

22. It is therefore my considered view that the awards of Kshs. 200,000/= made in CC 15, 16 & 19 of 2008 were inordinately high and amounted to an erroneous estimate. An award of Kshs.100,000/= was sufficient in the circumstances. The awards should be subjected to contribution hence the net awards should be 80,000/=.

23. In **CC 17 & 18 of 2008**, the evidence on record shows that in addition to the soft tissue injuries, the Respondents sustained fractures. In CC 17, the Respondent sustained a closed fracture on the right leg and in CC 18; there was a fracture with dislocation of the right hand fingers.

24. The Appellants relied on the Okaka case (supra) to submit that an award of Kshs. 70,000/= would have been adequate compensation. On the other hand, the Respondents submitted that the award of Kshs. 200,000/= was on the lower side.

25. In my view, the Okaka case is evidently not comparable in the cases under consideration because fractures were sustained. I find relevance in **Bungoma HCCA No. 6 of 2012; Global Trucks Ltd -Vs- Titus Osule Osoro** where Gikonyo J expressed himself as follows;

***“The injuries suffered ordinarily attract an award between Ksh.50,000/= - Ksh.200,000/= depending on the extent and severity of the injuries. Since there is a fracture of the right upper incisor tooth, loosening of other two teeth, and post accident pains on the left elbow and the abdomen, I will hereby make an award of Kshs 200,000/= as general damages.”***

26. From the foregoing, it is my considered view that the awards in CC 17 & 18 were reasonable and should not be disturbed.

27. In **CC 20 of 2008**, the Respondent, Grace Wambui (PW1) testified on 16/09/2009. That she sustained fractures at 2 places near the shoulder and at the wrist near the thumb. That she was also cut on the forehead, both legs and the back side. That she was admitted for 11 days and had a metal inserted in the right hand which was still there at the time of testifying. That she was issued with a P3 form which she identified and her medical report was prepared by Dr. Kaburu.

28. She produced the medical report, police abstract, discharge summaries and x-ray reports. It was also her testimony that she had not fully healed and was unable to lift her hand, a fact which the trial Court noted when she was being sworn. That she would stay with the metal plate for 4 years before removal at an estimated cost of Kshs. 60,000/=. That she used to farm and do all household chores which were impossible after the accident.

29. On cross examination, she said that she was not given any medical documents other than the ones she had identified. She denied knowing Dr Kaburu and stated as follows;

***“I was not myself the day of admission. I was feeling dizziness and cannot say he is the one I saw.”***

30. The Appellants raised a ground about inconsistency of the witness testimony. I looked at the evidence on record very keenly and honestly, I could not see any inconsistency.

31. If it is about PW1 saying that she did not know Dr. Kaburu, my view is that there was no obligation for her to know him especially because their interaction was only for purposes of preparing the medical report which was produced without objection anyway. I say that because there is no evidence to suggest that there might have been further interactions between them.

32. There was no inconsistency for the learned trial magistrate to note and accordingly, that ground of appeal should fail. I will now concentrate on whether the award was commensurate to the injuries in light of decided cases.

33. The Appellants submit that according to Dr. Wairioko, the last one to see her, the Respondent would recover without complications or disability.

34. They rely on **Nairobi HCCA No.147 of 2013; Said Abdullahi & Anor -Vs- Alice Wanjira** where, in addition to soft tissue injuries, the Respondent sustained a fracture of the right humerus bone with a permanent incapacity of 10%. An award of Kshs. 600,000/= was reduced to 300,000/= on appeal.

35. The Appellants urge this Court to reduce the award and contend that in 2010, Kshs. 200,000/= would have been adequate compensation.
36. The Respondent's Counsel submits that the Respondent was admitted for 10 days and the injuries sustained were classified as grievous harm. That in the trial Court, the Appellant submitted for Kshs. 180,000/= while the Respondent submitted for Kshs. 500,000/=. That the authority relied upon by the Appellants was on the lower side and meant to demean the injuries sustained.
37. The Respondent was examined by Dr. Kaburu on 07/02/2007 whose medical report shows that she sustained the following injuries;
- a) *Deep facial cut wound.*
  - b) *Blunt injury to the back*
  - c) *Fracture of the metacarpal bone of the right thumb.*
  - d) *Comminuted fracture of the right humerus.*
  - e) *Blunt injury to both thighs.*
38. Upon re-examination by the Appellants' Doctor on 28/03/2007, he opined as follows;
- “Grace suffered serious injury. She did however receive good treatment and should recover without complications or disability. The internal fixators will however require removal approximately 24 months after implant. The pain she experiences will recover in due course and disappear.”***
39. I have considered the authority submitted by the Appellants and also taken the liberty to look at several others. In **Kenya Power Lighting Company Ltd & Another –Vs- Zakayo Saitoti Naingola & Another (2008) eKLR**; the Plaintiff who sustained a fracture of the left femur mid shaft, blunt injuries to the lower jaw and left shoulder was awarded Kshs.300,000/= in general damages.
40. In **Zacharia Mwangi Njeru –Vs- Joseph Wachira Kanoga (2014) eKLR** a Plaintiff who suffered a fracture of tibia/tibula was awarded ksh.400,000/= in general damages.
41. In **Clement Gitau -Vs- GKK (2016) eKLR**, the Plaintiff sustained a fracture of the tibia/fibula and bruises on the neck. An award of Kshs. 600,000/= was upheld on appeal.
42. From the foregoing, it is my considered view that an award of 450,000/= is within an acceptable range and should not be disturbed.
43. In **CC 21 of 2008**, in addition to saying that the award was inordinately high, the Appellants contend that the Learned Trial Magistrate erred in law and fact by failing to note inconsistencies and lack of documents that would ordinarily prove the alleged injuries.
44. The Respondent, Naleku Saming'o (PW1) testified on 16/09/2009. That she was injured on the leg, face, forehead, back of the head, back and chest (fractured).
45. That she was admitted for 2 days. She produced a treatment card, payment receipt for x-ray, P3 form, medical report by Dr. Kaburu and a police abstract. That she was experiencing pain on the right shoulder and the rib that was fractured.
46. On cross examination, she said that she was injured in several areas and an x-ray was ordered. She had a receipt for x-ray but not the report. That she told her Advocate all the injuries she sustained. That she was injured on the ribs and was not aware that the medical report did not mention the fractured rib.
47. The only inconsistency was about the fracture which the Respondent talked about in her testimony yet it was not reflected in the documentary evidence but in my view, the important thing is that she was examined by a medical professional who used his expertise to ascertain the injuries sustained.
48. Actually, what should concern the Appellants is whether the trial magistrate based her findings on the medical evidence produced.
49. Further, I looked at the medical report and P3 form and the injuries therein are in tandem with the pleaded injuries. Therefore, the issue of lack of documents does not arise and this ground of appeal should fail.
50. With regard to the award, the Appellants submit that according to the medical report of Dr. Kaburu, the Respondent suffered soft tissue injuries which had recovered. In the lower Court, they relied on **Nairobi HCCC No. 3838 of 1990; Constanzo M. Thiong'o –Vs- AG** where the Court awarded Kshs. 50,000/= for soft tissue injuries.
51. The medical report shows that the Respondent sustained the following injuries;
- a) *Cut wound on the forehead.*

b) *Cut wound on the occipital region.*

c) *Facial cut wounds.*

d) *Blunt injury to the chest.*

e) *Blunt injury to the back.*

f) *Blunt injury to both hands.*

g) *Cut wound on the right leg.*

52. Doctor Kaburu testified that the Respondent suffered multiple soft tissue injuries which had recovered leaving some significant scars.

53. I have considered the injuries sustained, the submissions by the parties and comparable authorities. In my view, the authority relied upon by the Appellants was too old to be comparable. From the evidence, it is clear that the Respondent sustained soft tissue injuries although in my view, they were abit severe than the ones sustained by the Respondents in CC 15, 16 & 19.

54. Be that as it may and having been duly guided by the decision of the Court of Appeal in the **Maore case (*supra*)**, an award of Kshs. 250,000/= was on the higher side for soft tissue injuries.

55. Taking all the factors into consideration, an award of Kshs. 150,000/= was sufficient in the circumstances.

### **CONCLUSION**

56. The appeal succeeds partially. The court thus makes the following orders;

**1) The court allows appeal to the extent above.**

**2) For avoidance of doubt, the awards are thus as follows;**

a) **CC 15 of 2007: Kshs. 80,000/=**

b) **CC 16 of 2007: Kshs. 80,000/=**

c) **CC 17 of 2007: Kshs. 200,000/=**

d) **CC 18 of 2007: Kshs. 200,000/=**

e) **CC 19 of 2007: Kshs. 80,000/=**

f) **CC 20 of 2007: Kshs. 450,000/=**

g) **CC 21 of 2007: Kshs. 150,000/=**

**3) Interest from the date of judgement in the lower court.**

**4) Parties bear their own costs.**

**SIGNED, DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2018, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**