



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 117 OF 2017**

*(Arising from the Judgment of Hon Stella Abuya (SPM), in Meru CMCC No. 148 of 2016, delivered on 29<sup>th</sup> November 2017)*

**(CORAM: F. GIKONYO J.)**

**JULIA MUCECE.....APPELLANT**

**-Versus-**

**REHAN TRADING COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**PETER MWAMBA MURIRA.....2<sup>ND</sup> RESPONDENT**

**LAURENCE MAINGI.....3<sup>RD</sup> APPELLANT**

**JUDGMENT**

[1] This Appeal arises from the Judgment of Hon Stella Abuya (SPM), in Meru CMCC No. 148 of 2016, delivered on 29<sup>th</sup> November 2017, in which the Learned Trial Magistrate awarded the Appellant Kshs 600,000 in general damages for pain and suffering for injuries sustained in a result of a road traffic accident that occurred on 1<sup>st</sup> August 2015.

[2] In the Memorandum of Appeal filed in court on 22<sup>nd</sup> December 2017, the appeal is premised on the following grounds;

***a) That the Learned Trial Magistrate erred in law and in fact in awarding general damages so manifestly low so as to amount to a misapplication of the principles of assessment of damages.***

***b) The Learned Trial Magistrate erred in law and in fact in that she failed to consider or proper consider the seriousness of the injuries suffered by the plaintiff and/or the degree of permanent disability suffered, in arriving at the general damages awarded.***

***c) The Learned Trial Magistrate erred in law and fact in that she failed to consider and/or properly consider the evidence, submissions and/or authorities tendered by the plaintiff and as such arrived at a manifestly wrong decision in regard to general damages.***

***d) The Learned Trial Magistrate erred in law and in fact in awarding general damages based on the decision in NAIROBI HCCA NO. 124 OF 2003 MICATO SAFARIS V KAMAU GICHANGI MUKORA & ANOTHER whereas the injuries suffered by the plaintiff are different.***

***e) The Learned Trial Magistrate erred in law and in fact in that she awarded manifestly and inordinately low general damages of Kshs 600,000 despite the fact that the plaintiff suffered over 25% permanent disability among other serious injuries, which award is against the applicable law.***

***f) The Learned Trial Magistrate erred in law and in fact in reaching to a conclusion on general damages that was contrary to the evidence placed before her and therefore awarding a manifestly low amount/sum.***

[3] This Appellant was the plaintiff in the primary suit. He has appealed on quantum only as liability had been apportioned at 10% against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and 90% against the 2<sup>nd</sup> Respondent.

**Submission by Appellant**

[4] The Appellant submitted that in view of the injuries suffered by the Appellant, the award of Kshs 600,000 in general damages was so

inordinately low as to be an erroneous estimate of damages. He argued that the injuries sustained by the Appellant were particularized in paragraph 7 of the plaint. Doctor Koome who had prepared a medical report stated in his report that the Appellant was currently inter alia disoriented with noticeable cognitive impairment and slurring speech and walked with a noticeable limp and could not stand for long periods of time nor walk long distances. Consequently, the Appellant urged the court to set aside the judgment of the trial court and award a sum of Kshs 3,000,000 in general damages.

#### Submission by Respondents

[5] According to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents the award in general damages was not so inordinately low as the trial Magistrate took into account all relevant factors in awarding the Appellant Kshs 600,000. The said award was reasonable and fair compensation for the injuries sustained by the Appellant. In any case, the authorities cited by the Appellant were on more severe injuries than those suffered by the Appellant.

[6] The 2<sup>nd</sup> Respondent urged that the trial court considered the nature of the injuries, effluxion of time from the time the cases were decided and the inflation rates in making the award of Kshs 600,000. The award was just, reasonable and sufficient to recompense the Appellant for her injuries suffered. There was no evidence whatsoever to show that the trial court and the Learned Magistrate erred in law and fact in reaching the said quantum and as such the honourable court should exercise caution before any such interference as suggested by the Appellant.

#### ANALYSIS AND DETERMINATION

##### My Duty

[7] This being a first appeal, the court should, with judicious alertness analyze and re-assess the evidence afresh and reach its own conclusions except it should always bearing in mind that it neither saw nor heard the witnesses testify. See *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*.

##### Legal threshold

[8] The appellate court will only interfere with the discretion of the trial court in awarding damages where, in assessing the damages the trial court took into account an irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of the damages. See decision by the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA**, inter alia that

*“the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 high that it must be wholly erroneous estimate of the damages.*

[9] See also **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1** that;

*“a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle” - see *EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278*.*

##### Applying the test

[10] This appeal is on quantum only. According to a medical report prepared by Dr. Koome, the Appellant sustained the following injuries:

1. *Brain contusion with loss of consciousness for 24 hours and disorientation for 3 weeks,*
2. *Muscular contusion of muscles of the right forearm with crepitus formation,*
3. *Deep cut wound on right leg approximate 10cm,*
4. *Bilateral pubic rami fractures and*
5. *Bruises on the lower back.*

[11] For the foregoing injuries, the Learned Trial Magistrate awarded the Appellant Kshs 600,000 in general damages for pain and suffering. She relied on the case of **MICATO SAFARIS V KAMAU GICHANGI MUKORA & ANOTHER (2009) eKLR NAIROBI CIVIL APPEAL NO. 124 OF 2003**. The plaintiff in that case had sustained a bilateral fracture of the superior pubic ramii, neck and back (a 2009 decision) where the plaintiff was awarded Kshs 200,000 as general damages. What there any error in principle in her assessment of damages?

##### Some comparable past decisions

[12] I will consider some relevant authorities to guide the court in the decision. For instance, in the case of **MARIAM ATHUMANI AND**

**SALAMA RASHID A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND MARIAM ATHUMANI vs. OBUYA EXPRESS & PHILIP KIPKEMOI CHECULE. NAKURU HCCC NO. 477 OF 1998**, the 1<sup>st</sup> plaintiff sustained the following injuries.

- *Head injury – had brain concussion and lost consciousness for several hours, bruises and lacerations on the lips.*
- *Extensive lacerations on the upper back with foreign body pieces of glass embedded in the skin.*
- *Bruises and lacerations on the upper limbs. Deep cut wound on the posterior aspect of the left arm above the elbow joint.*
- *Extensive bruises on the left leg and foot with foreign bodies (broken pieces of glass)*
- *Bruises on the right leg.*
- *Bruises on the left gluteal region and lacerations and foreign body on the right gluteal region. The court, awarded to the first plaintiff Kshs 600,000 as general damages for pain suffering and loss of amenities.*

[13] In the case of **RICHARD MUNGAI GICHUHI vs. PETER NGILU KAHIA AND K.K PROMOTE LIMITED NAIROBI HCC NO. 2654 OF 1997** the injuries suffered by the plaintiff were as follows

- Comminuted fracture of the left lower end of the tibia
- Fracture of the left patella with mild displacement.
- Fracture of the left tibia plateau
- Comminuted fracture of proximal third of the left femur
- Compound comminuted fracture of the lower end of the right patella
- Comminuted fracture of proximal third of the right tibia of the right leg.
- Closed head injury
- Multiple soft tissue injuries. General damages for pain suffering and loss of amenities assessed at Kshs. 180,000.00 on 6<sup>th</sup> February 2002.

[14] I have held the view that no injuries suffered by one plaintiff will be the same as those suffered by another plaintiff. They are bound to be different. Therefore, past judicial decisions only act as a guide but not as a fixed measure of sort. For example, in the case of **RICHARD MUNGAI GICHUHI (supra)**, the plaintiff was awarded Kshs 180, 000 in general damages in February 2002, for injuries which are far severe. Consistence in these awards is however important so that those who are bound to meet liability especially the insurance industry may reasonably anticipate the amount to pay upon certain category of injuries. Looking at the injuries sustained, the case of **MARIAM ATHUMANI (supra)** and also the case of **MICATO SAFARIS (supra)** which the trial magistrate relied upon are apt guide. The latter case was decided in 2009 and so inflation would be a factor to consider. The trial magistrate considered the nature of the injuries as well as the fact that the case she relied upon was old and so she increased the award to Kshs. 600,000 due to inflation. It has not been shown that the trial magistrate took into account irrelevant factors or omitted relevant ones, or committed any error in principle or made an erroneous estimate of damages. The award of Kshs. 600,000 is reasonable compensation for the injuries sustained by the Appellant. I find no reason to interfere with the decision of the Learned Trial Magistrate in awarding Kshs. 600,000 in general damages. I am satisfied that she exercised her discretion properly.

[15] Accordingly the Appellant’s appeal is without merit and is dismissed with an order that each party bears its own costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 8<sup>th</sup> day of October, 2018**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Mwilalia for appellant

M/s. Nyaga advocate for Mr. Gitonga for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Mr. Nduati for 3<sup>rd</sup> Respondent – absent

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**F. GIKONYO**

**JUDGE**