



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 39 OF 2017**

**BETWEEN**

**OGEMBO TEA FACTORY.....APPELLANT**

**AND**

**JOEL ALBERT MOMANYI.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. N. Wairimu, PM dated 3<sup>rd</sup> May 2017 at the Principal Magistrates Court at Ogembo in Civil Case No. 71 of 2014)*

**JUDGMENT**

1. The respondent was injured in a road traffic accident that occurred along the Eberege – Kenyeny road on 8<sup>th</sup> January 2014, while he was a passenger in the appellant’s motor vehicle registration number KBH 357Q. The issue of liability was resolved by a consent order apportioning liability at 70:30 in favour of the respondent. The respondent was awarded Kshs. 300,000/- as general damages thus precipitating this appeal.

2. The injuries sustained by the respondent are not in dispute. According to Dr Ezekiel Ogando Zoga, who examined the respondent on 28<sup>th</sup> February 2014, he suffered blunt trauma to the chest and contusion on both shoulders and the knee. He was treated at Kenyeny District Hospital where he was given antibiotics and analgesics and complained of chest pain on and off. At the time of examination, the respondent was in general stable condition and had some chest tenderness. Dr. Zoga was of the view that the respondent had sustained soft tissue injuries and had healed well.

3. The respondent proposed a sum of Kshs. 400,000/ as general damages before the trial court and cited the case of *Kenya Power and Lighting Company Limited v Mary Akinyi KSI HCCA No. 72 of 2007 (UR)* where the plaintiff suffered soft tissue injuries including a deep cut on the calf of the muscles of the left leg, laceration on the right knee, right shoulder and contusion on the chest. She was awarded Kshs. 350,000/- in 2013.

4. The appellant was of the view that Kshs. 80,000/- would be adequate compensation. It cited the case of *Timsales Limited v Penina Achieng Omondi NKU HCCA No. 192 of 2008* where the plaintiff suffered a deep cut wound on the left index finger and severe soft tissue injury on the left index finger. She was awarded Kshs. 60,000/- in 2011. It also cited *Eastern Produce(K) Ltd v Gilbert Muhunzi Makotsi ELD HCCA No. 76 of 2012 [2013] eKLR* where the plaintiff sustained a prick wound on the left dorsal aspect of the left foot and severe pains and was awarded Kshs. 70,000/- in 2013.

5. In order to determine this appeal, I am alive to the well-worn principle that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan [1981] KLR 349*).

6. The injuries sustained by the respondent were soft tissue injuries from which he had healed completely when he was examined by the doctor about two months after the accident. In light of the decisions cited, I find Kshs. 300,000/- on the higher side. The respondent cited only one decision which may not have been reflective of the general trend of awards. The decision cited by the appellant are apposite and taking into account the element of inflation, I would find an award of Kshs. 120,000/- reasonable in the circumstances.

7. I allow the appeal and set aside the award of general damages and substitute it with an award of **Kshs. 120,000/-** which shall be subject to the agreed contribution and shall attract interest from the date of judgment before the subordinate court.

8. I award the appellant costs of the appeal which I assess at **Kshs. 15,000/=** all inclusive.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Mose instructed by Mose, Mose and Milimo and Company Advocates for the appellant.

Ms Gogi instructed by Khan and Associated Advocates for the respondent.