

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 40 OF 2017

DAVID ABDALLA TIEGO1ST APPELLANT

KISAKA JOHN GEDION t/a PRINCE BUS SERVICES.....2ND APPELLANT

NATIONAL INDUSTRIAL CREDIT LIMITED.....3RD APPELLANT

VERSUS

SUSAN SABULA.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. B. Ochieng, Chief Magistrate in Kakamega CMCCC No. 134 of 2015 of 15th March 2017)

JUDGMENT

1. The appellant lodged herein a memorandum of appeal dated 7th April 2017, in which it was averred that the trial court had treated the evidence and submissions on quantum superficially and thereby came to the wrong conclusions thereon, had failed to analyse the authorities submitted as against the injuries suffered by the respondent, had not considered the evidence tendered in totality, had proceeded on the wrong principles when assessing the awards of damages to be made and had made an award that was inordinately high in the circumstances. It is sought that the said decision of the lower court be set aside and substituted with an award that is appropriate.

2. This is a first appeal and I am conscious of the requirement pronounced in *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.

3. The respondent's injuries, as recorded in her plaint dated 8th April 2015, were blunt injury on the head, blunt injury on the chest, blunt injury on the chest, and a blunt injury on the left shoulder. At the hearing on 24th August 2016, the respondent did not recite the injuries that she had suffered, instead she referred to her treatment notes and the medico-legal report prepared by her doctor. The medical treatment notes from Provincial General Hospital –Kakamega, dated 1st May 2012, does not state the nature of the injuries that the respondent had suffered. The medico-legal report by Dr. Charles M. Andai of Lubinu Medical Clinic, dated 18th October 2012, records that she had sustained a blunt injury to the neck, a blunt injury to the chest, a blunt injury to the head and a blunt injury to the left shoulder. The doctor assessed her injuries to be moderate soft tissue injuries, and his prognosis was that there would be complete recovery with no resultant incapacitation.

4. The trial court made an award of Kshs. 250, 000.00 general damages for pain and suffering. The court did not cite any authorities to justify the award. I note though that the respondent had proposed an award of Kshs. 400, 000.00 but did not cite any authority. The appellants urged the trial court to award Kshs. 50, 000.00, and cited the decision in *Wambaira and 47 others vs. Kiogora and 2 others* (2001) eKLR, where the court had awarded Kshs. 50, 000.00 to Kshs. 100, 000.00 for soft tissue injuries. The said decision of the Court of Appeal was made on 17th December 2004. They also cited *Mokaya Mochama vs. Julius Momanyi Nyokwoyo* (2013) eKLR, where an award of Kshs. 70, 000.00 was made for soft tissue injuries, which included loss of consciousness and a deep cut wound. That was a decision of 2013.

5. The parties have urged the appeal by way of written submissions. Both sides filed written submissions and cited authorities to support their respective positions.

6. I have looked at the record before me. I am satisfied that the injuries sustained by the respondent were mainly to the soft tissues. In my view the injuries were not severe and the doctor gave the opinion that the respondent would recover fully without disability. I am not convinced that they were severe enough to warrant the award made. On liability. I do note that the respondent was a fare paying passenger and the accident was self-involving and therefore liability attached on the appellants fully.

7. In view of the foregoing, I find that the appellants have demonstrated that the trial court fell into error in making the award of damages that was inordinately high in the given circumstances. I shall accordingly interfere with the trial court's exercise of discretion and set aside the award of Kshs. 250, 000.00 general damages, and replace the same with an award of Kshs 100, 000.00 general damages. The appeal before me shall be disposed of in those terms. There shall no orders as to the costs of the appeal. Any party aggrieved by the orders made herein has a right of appeal to the Court of Appeal, within the next twenty-eight (28) days of date of delivery of this judgment.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE