



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 1 OF 2015**

**AHMED MZEE FAMAU**

**t/a NAJAA COACH LTD ..... 1<sup>ST</sup> APPELLANT**

**BATODO HANGAH ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**VERONICA NGII MUIA aka VERONICA MUIYA**

**aka VERONICA NGUI MUIYA ..... RESPONDENT**

(Being an Appeal from the Judgement of the Honourable Y. Shikanda, Senior Resident Magistrate  
delivered on 22<sup>nd</sup> October 2014)

**JUDGEMENT**

The respondent was involved in a road traffic accident on 17.12.2012 along the Malindi – Garsen road. She filed Civil Suit No. 292 of 2013 before the Malindi Chief Magistrate’s Court. Liability was agreed between the parties at 90% against the appellant and 10% against the respondent. The trial court awarded the respondent Kshs.500,000/= as general damages. The appeal herein is against the assessment of damages awarded by the trial court.

The grounds of appeal are similar. They are that the trial court erred in law by finding that the respondent was entitled to the amount of awarded damages. That the trial court did not consider the appellant’s submissions on quantum. That the trial court did not consider general damages awarded in similar cases and that the special damages were not proved.

Counsel for the appellant submitted on all the grounds together. It is submitted that the damages awarded cannot be compared to the injuries sustained. The medical evidence indicated that the respondent did not suffer any permanent incapacity. The doctor estimated permanent incapacity at 2%. The appellant had urged the court to award Kshs.150,000/= as general damages. The proposal was based on the case of **KHILNA ENTERPRISES LTD V CHARLES MAINA MIGWI [2006] eKLR**. Counsel further submit that in the case of **POWER LIGHTING COMPANY LTD & ANOTHER V ZAKAYO SAITOTI NAINGOLA & ANOTHER [2008] eKLR** the court awarded Kshs.300,000/= as general damages for injuries on the teeth and lower jaw, fracture of the lower jaw and dislocation of the teeth. Counsel urged the court to set aside the damages awarded by the trial court and award damages commensurate to the injuries.

On his part counsel for the respondent opposed the appeal. It is submitted that the authority relied upon by the appellant at the trial court did not provide similar injuries. In the case of **KHILNA ENTERPRISES LTD V CHARLES MAINA MIGWE** the victim suffered soft tissue injuries. The decision was also made in 2006. The trial court considered all the relevant factors before making the award. Counsel urged the court not to disturb the findings of the trial court.

The record of appeal does not give the proceedings of the trial court. Only the handwritten judgement was part of the record. It is indicated that Civil Suit No. 292 of 2013 was consolidated with Civil Suit No. 294 of 2013. I have been able to trace the record for Civil Case CMCC 294 OF 2013. The record of that file indicate that eight witnesses testified. The respondent herein testified as PW3. She informed the court as a result of the accident she sustained a fracture on the lower right jaw. Injury on the chest, right ear and left forearm. She still felt pain when chewing. Her favourite food is muthokoi which is hard to chew. She is now forced to take soft food like rice. A medical report prepared by Dr. Ajoni Adede dated 26.6.2013 was produced. The medical report itemized the injuries sustained by the respondent as follows:

Fracture of the lower jaw (right mandible).

Deep cut on the left forearm.

Blunt object injury to the right ear (per-auricular region).

Blunt object injury to the chest (sternum).

The main issue for determination is whether the amount of damages awarded by the trial court is excessive. The injuries have been stated as per the medical report. The doctor indicated in his report that the fracture of the lower jaw will weaken the teeth on the side of the fracture line. The other soft tissue injuries did not leave any permanent disability. There was also a short report by Dr. said Omar of Pandya Memorial hospital which described the injuries suffered by the respondent as Right mandibular angle undisplaced fracture. Before the trial court, the appellant offered a sum of Kshs.150,000/= as general damages on the basis of the Khilna Enterprises Ltd case. In that case the plaintiff fell from a lorry and sustained injuries to his left ulna distal that was fractured together with a fracture of the radial styloid. Kshs.100,000/= was awarded in 2006. On his part counsel for the respondent urged the trial court to award Kshs.600,000/= on the basis of the case of **PRISCILLA NEKESA V ANDREW MWAMBINGU & ANOTHER Nairobi HCC 4539 OF 1988**. In that case Kshs.360,000/= was awarded for a fracture of pre-maxilla, cut wound on the hands, skin and upper lip.

The trial magistrate in his judgement considered the two authorities. The court took into account the age of the two cases as well as the vagaries of inflation. The **KHILNA ENTERPRISE** (supra) case does not provide comparable injuries. Counsel for the appellant relies on the case of **CHRISTINE AGNES OMANYO V MATILDA AKUMU KHADULI**. In that case the plaintiff suffered a fracture of the left radius and ulna, blunt soft tissue injury to the left cheek and broken tooth (upper jaw). Kshs.170,000/= was awarded as general damages. That authority does not provide comparable injuries. The major injury suffered by the respondent herein is the fracture of the lower jaw. This is different from fracture of a tooth or loss of teeth. The case of **POWER LIGHTING COMPANY LTD V ZAKAYO SAITOTI NAINGOLA** (supra) is quite relevant. The injuries sustained in that case were fracture of the lower jaw. The teeth were dislocated. Kshs.300,000/= was awarded by the trial court. The injury in that case was sustained on 8.9.1992. the case was decided in 2004. The appeal was dismissed in 2008.

There is the case of **MARY MUTHONI NDICHU V HESHIMA DISTRIBUTORS, Nairobi HCCC No. 4983 of 1989** decided on 22.3.1994. It is cited in the **KENYA POWER LIGHTING CO. LTD & AOTHER V ZAKAYO SAITOTI NAINGOLA** case. In that case (Mary Muthoni), the claimant sustained a fracture of the jaw right mandible, dislocation of the jaw left temporally mandible joint, broken and chipped left premolar tooth and loss of upper canine tooth. Injury to the left ear, laceration of the limb and soft tissue injuries to the legs. Kshs.350,000/= was awarded as general damages. This was in 1994.

The principles upon which a superior court can disturb an award of damages by a trial court are well established. The award of the trial court should be either inordinately too low or too high, or that the trial court took into account irrelevant factors or failed to consider relevant factors. The award should be seen as an erroneous estimate of the damages. Comparable injuries deserve comparable awards and the court's discretion to assess the damages should be exercised within the above parameters. There is no scientific computation of general damages but the above principles act as a guide to trial courts. Inflation has to be considered. Cost of medication and treatment keep on increasing and time is a fact to be considered in assessing damages. What was awarded five years ago, will act as a guide now but the court will have to consider the time factor.

The authorities cited herein above indicate that a fracture to the jaw together with other soft tissue injuries will attract an award of damages of not less than Kshs.300,000/=. Kshs.300,000/= was awarded in the power lighting company case. Kshs.350,000/= was awarded in the Muthon Case in 1994. The injuries in these two cases would be a bit more serious but they are comparable to the ones suffered by the respondent. Further, the Muthon Case was decided in 1994. This is over twenty years now. The time factor makes the injuries to be comparable to those suffered by the respondent. Counsel for the respondent cited the case of **PRISCILLA NEKESA V ANDREW MWAMBINGU & ANOTHER Nairobi HCCC No. 4539 of 1988**. Kshs.360,000/= was awarded for a fracture of the pre-maxilla, cut wound on the hands, skin and upper hip. This a 1988 case.

Given the assessment made by the trial court, I am satisfied that the amount of general damages awards is not inordinately too high. It is commensurate to the injuries suffered by the respondent. The sum of Kshs.2,000/= awarded as special damages was the cost of the medical report that was produced. It was pleaded. I do find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered in Malindi this 2<sup>nd</sup> day of February, 2017.**

**S.J. CHITEMBWE**

**JUDGE**