



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 8 OF 2016**

**AMOS WENYERE.....APPELLANT**

**VERSUS**

**ASHFORD MURITHI MUREGI.....RESPONDENT**

**CONSOLIDATED WITH**

**HIGH COURT CIVIL APPEAL NO. 6 OF 2016**

**BONFACE W. NDERITU.....APPELLANT**

**VERSUS**

**PRISCILAH MUTHONI MURIGE.....RESPONDENT**

**AND**

**HIGH COURT CIVIL APPEAL NO. 7 OF 2016**

**BONFACE W. NDERITU.....APPELLANT**

**VERSUS**

**MARIO NJERU BERECHÉ.....RESPONDENT**

***(Being an Appeal from the Judgment of the Honourable A.G. Kibiru, Senior Principal Magistrate Civil Case No. 161 of 2014 delivered on the 24<sup>th</sup> day of March, 2016.)***

**J U D G M E N T**

1. **AMOS WENYERE** the appellant herein is appealing against the judgment of Hon. A.G. Kibiru Senior Principal Magistrate which was delivered vide Chuka SPM's Court Civil Case No. 161 of 2014 on 24/3/2016. In that suit, the appellant had been sued by Ashford Murithi Mutegi the respondent herein for negligence that caused a road traffic accident where the respondent herein (a pedestrian) was knocked down and injured by motor vehicle Registration No. KAV 071 owned and controlled by the appellant. Both the appellant and the respondent filed a consent on liability and left the trial court to assess the quantum of damages which it did awarding the respondent a total of Kshs.165,600/- after factoring in 10% contributory negligence as agreed between the parties.

2. The appellant herein felt aggrieved by the judgment of the trial court and preferred this appeal raising four grounds namely:-

*i. That the learned magistrate erred in law and fact in finding that the respondent was entitled to general damages that were too high and without considering the provisions of Cap 405 (The Insurance Motor Vehicle Third Party Risks) (amendment) Act which gives guidance on how compensation ought to be computed.*

*ii. That the learned magistrate erred in law and fact in failing to apply the above Act where compensation for soft tissue injuries is set at 2 % of the maximum compensation of Kshs.3,000,000/- which translates to Kshs.60,000/- and instead awarded general damages of Kshs.180,000/-*

*iii. That the learned magistrate erred in law and fact by misdirecting himself on an act of parliament.*

*iv. That the learned magistrate did not consider conventional awards for general damages for similar cases.*

3. This appeal was canvassed through written submissions and though the parties were further required to attend court and highlight their respective positions, only the appellants attended through counsel who highlighted his position on the appeal. The main ground in this appeal in the appellant's counsel was that the trial court erred in the award of quantum which in his view was too high to the extent that it amounted to an injustice. It has been submitted that the injuries suffered by the respondent in the accident were soft tissue injuries which had healed with no permanent incapacity. The appellant has contended that trial magistrate did not adhere to the guiding principles set out in the case of **SOFIA YUSUF KANYARE -VS- ALI ABDI SABRE & ANOR [2008] eKLR** where **Hon. R.N. Nambuye J** (as she then was) held inter alia that an award should neither be too low nor too high and that an award in compensation is not meant to enrich the victim but to try as much as possible to restore him/her to the position in which they were in prior to the accident.

4. The appellant has further submitted that this court being a first appellate court should consider the evidence tendered at the trial and re-evaluate the same in order to arrive at an independent finding whether or not to uphold the Judgment. The decision in the case of **Kemfro Africa Ltd T/A Meru express Services (1976) & Anor- vs- Lubia & Anor [1985] eKLR** has been cited where the court of appeal observed that in deciding whether it is justified to disturb the quantum of damages awarded, the appellate court must be satisfied that the Judge in assessing 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 low or so inordinately high that it must be wholly erroneous estimate of the damage.

5. The respondent has opposed this appeal and though his counsel never turned up to highlight his opposition to this appeal for unknown reasons, I have nevertheless considered his written submissions filed on 23rd November, 2016. The respondent has contended that an appellate court should not readily disturb a finding of fact by a trial court who had the advantage of seeing and hearing the witnesses. He has cited the decision in the case of **KITAVI -VS- COASTAL BOTTLERS LTD [1985] KLR 470** where **Justice Threller J.A** held that an appellate court will only disturb an award of damages when the trial court has taken into account a factor he ought not to have taken account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. In his view the award made by the trial magistrate in this case was not so inordinately high or low and faulted the appellant for criticizing the trial court's award as unconventional arguing that the award was within acceptable limits.

6. The respondent has also contended that the Insurance (Motor Vehicle Third Party Risks) Act Cap.405 and the Insurance (Motor Vehicle Third Party Risks (Amendment) Act 2013 which were amendments to the parent Act are relevant only in declaratory suits and do not oust the trial court's discretion in assessment of damages. The respondent has cited the decision of **Hon. J.L. Onguto J** in the case of **Law**

**Society of Kenya -vs- A.G. & 3 Others [2016] eKLR** where the hon. court declared various sections including **Sections (a) and 3(b) and 6** the Insurance (Motor Vehicle Third Party Risks) amendment Act, 2013 and subsections 1A & 1B of **Section 10** of Cap 405 unconstitutional, null and void.

7. The respondent has faulted the appellant's contention that the assessment of damages should have been pegged at 2 % of the maximum statutory amount of Kshs.3 million submitting that the appellant have no legal or medical basis for such contention. The respondent has submitted that the appellant's appeal to that extent lacks merit and asked this court to apply the findings in this appeal mutatis mutandis to appeals No.6 and 7 of 2016 which are related to this appeal.

8. I have considered this appeal and the submissions by both counsels and in my view this appeal has brought up two issues for determination.

**i. Whether or not in assessing the quantum of damages the trial court misapprehended the law (read Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya and Insurance (Motor vehicle Third Party Risks (amendment) Act, 2013).**

**ii. Whether the quantum of damages awarded was too high.**

9. On the first issue, it is clear from the appellant's submissions that the gist of their appeal is the fact that the learned trial magistrate in his view failed to apply the provisions of Cap.405. The Insurance Motor Vehicle Third Party Risks and the Insurance (Motor Vehicle Third Party Risks) (Amendment Act) No. 50 of 2013. This court at hearing of the highlights of the submissions asked Mr. Kariuki learned counsel holding brief for Asiyo for the appellant to pinpoint the exact sections of the law that were allegedly omitted by the trial magistrate but he cited notwithstanding the fact that that is what appears to be the main ground of appeal. It was obvious that the appellant's counsel was trying to avoid conceding the obvious which was the fact that this appeal as well as appeals Nos. 6 and 7, of 2016 are majorly hinged on **Sections 3(a) and 3(b)** of Insurance (Motor Vehicle Third Party Risks) (amendment) Act and **Section 10** Insurance (Motor Vehicle Third Party Risks) Act all of which were declared unconstitutional null and void in the cited case of **Law Society of Kenya -Vs - A. G. & 3 Others [2016] eKLR**. To the best of my knowledge, the A.G. of Kenya did not appeal against that decision and therefore, the decision by **Hon. Justice J. L. Onguto** stands. The trial court in this appeal certainly cannot be faulted for not applying some provisions of the law that have been declared a nullity. I am further in agreement with the respondent that the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya and the amendments contained the Insurance (Motor Vehicle Third Party Risks) (Amendments) Act 2013 did not in anyway oust the court's discretion in the award of damages in road traffic cases or commonly referred to as running down cases. The law has not placed a limit to a what a trial court considers to be an adequate remedy of course applying judicial discretion in arriving at a figure that is both fair and just in the circumstances.

10. On the 2<sup>nd</sup> issue concerning the quantum awarded by the learned trial magistrate, I am guided by both decisions in the case of **SOFIA YUSUF KANYARE -VS- ALI ABDI SABRE & ANOR (SUPRA)** and **ROBERT MSIOKI KITAVI -VS- COASTAL BOTTLERS LTD (SUPRA)** as cited by both the appellant's and respondent's counsels respectively. It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position he/she was before prior to the accident. In this appeal the appellant has not persuaded me that the amount awarded by the learned trial magistrate was so inordinately high that that it was either an erroneous estimate or that it kind of enriched the victim (respondent) of the accident. Considering that liability was not an issue at the trial court because the parties herein compromised and recorded a consent, this court finds that the quantum of damages awarded in the lower court was reasonable and was arrived at by the learned trial magistrate after taking into account all relevant factors.

In the premises, this court finds no merit in this appeal. The same is disallowed with costs to the respondent. For the interest of judicial time and after going through the other related appeals Nos 6 and 7 of 2016, the findings in this appeal shall apply also in the same way save for the fact that there shall be no order as to costs in appeals Nos. 6 and 7 of 2016.

***Dated and Delivered at Chuka this 16<sup>th</sup> day of March 2017.***

**R. K. LIMO**

**JUDGE**

**16/3/2017**

Judgment signed, dated and delivered in the open court in the absence of parties herein.

**R .K. LIMO**

**JUDGE**

**16/3/2017**