



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

**CIVIL APPEAL NO. 20 OF 2015**

**EASY COACH LIMITED.....APPELLANT**

**VERSUS**

**EMILY NYANGASI.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon. B.M.Kimutai in Nyando SPMC NO.400 of 2013  
delivered on 13th May 2015)**

**JUDGMENT**

**Emily Nyangasi (*hereinafter referred to as respondent*) sued Easy Coach Limited (*hereinafter referred to as appellant*) in the lower court claiming damages for injuries allegedly suffered on 6th May, 2013 while the appellant was lawfully travelling in the respondent's motor vehicle KBQ825U.**

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs. The parties subsequently agreed on liability at 80:20% in favor of plaintiff/respondent against the defendant/appellant.

In a judgment delivered on **26th May 2015**, the learned trial Magistrate awarded the appellant general damages in the sum of Kshs. 700,000/- less 20% contributory negligence.

**The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 9th March 2015 which set out 3 grounds that:-

- 1) The Learned Magistrate erred in law and misdirected himself as to the extent and nature of respondent's injuries and thereby erred in law in his assessment of damages which was manifestly excessive**
- 2) The Learned Magistrate erred in assessing damages and failed to apply the trite principles in awarding damages, and specifically on general and special damages and comparable awards for analogous injuries**
- 3) The Learned Magistrate erred in awarding costs of the suit to the plaintiff and failed to apply the principle applicable in awarding of costs in a the suit**

**SUBMISSIONS BY THE PARTIES**

**Appellant's submissions**

When the appeal came up for hearing on 9.2.17, Ms. Okumu, advocate for the appellant and Mr. Wekhomba, advocate for the respondent agreed to have the appeal herein disposed of by way of written submissions which they dutifully filed in time to support their clients' respective rival positions and this court is now called upon to determine the appeal based on those submissions applying both statutory and case law.

The appellant submitted that respondent suffered soft tissue injuries and degloving injuries to the right hand and right leg, and that the court applied the wrong principles in arriving at the award of Kshs. 700,000/-. The appellant similarly submitted that the trial court failed to adhere to the doctrine of precedent to make comparable awards for analogous injuries and awarded special damages on the basis of a bundle of receipts that did not bear stamp duty which was contrary to section 19 of the Stamp Duty Act Cap 480 Laws of Kenya. Finally; the appellant submitted that the respondent was not entitled to costs and interest for lack of demand and notice of intention to sue.

### **Respondent's submissions**

The appellant submitted that she suffered very severe injuries and not mere soft tissue injuries as insinuated by the respondent. The respondent implored the court not to interfere with the award by the trial court.

### **The evidence**

The respondent stated that she was involved in an accident while travelling as a fare paying passenger in the appellant's bus and was injured on the right leg, right hand and left leg and that she was treated as an inpatient and that skin from the right thigh was grafted to the left lower leg. The respondent's injuries are detailed in a medical report by Dr. Okombo and a discharge summary from Jaramogi Oginga Odinga Teaching and Referral Hospital.

### **Analysis and Determination**

This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings.

I have perused the entire record of appeal and considered the submissions by counsels for both parties. I note that the entire appeal revolves quantum, special damages, costs and interest which I shall consider as hereunder.

#### **i. Quantum**

I have considered **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others[1986] eKLR** cited by the appellant where the court of Appeal held:-

***“.....inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.....”***

I am not oblivious to the fact that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. ***Lord Morris of Borth-y-Gest*** had occasion to comment on the above concept in the case of **H. West and Son Ltd v. Shepherd (1964) AC.326** and stated thus:

***“...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be***

***assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”***

The principles upon which this court should proceed are those stated in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER**, [1998]eKLR.

***“.... 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***

The same principle was reinstated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where the Court of Appeal in held:-

***An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....***

The appellant has questioned the basis for the award of Kshs. 700,000/= as general damages for pain and suffering. Appellant faults the learned trial magistrate on the basis that he appeared to give medical opinion concerning the time it might take for the respondent to recover, which it says was contrary to Dr. Okombo’s report and further, for reliance on cosmetic effects of the keloid scars, to reach the inordinately high award. Dr. Okombo examined the respondent on 27.9.13 which was 4 months after the accident and noted that she had not fully recovered. The discharge summary from Jaramogi Oginga Odinga Teaching and Referral Hospital shows that the respondent was treated as an inpatient from 7.5.13 to 8.7.13.

The learned trial magistrate rendered himself as follows: ***“..... I wish to state that considering the injuries and time taken for full recovery a sum of Kshs. 700,000/- would be adequate for the plaintiff.*** “I have not discerned any medical opinion in the finding by the learned trial magistrate. In my considered view, the learned trial magistrate simply restated what was contained in the medical report and the discharge summary.

Dr. Okombo’s report PEXH. 2 shows that plaintiff suffered:-

- a. Facial injuries
- b. Injury to chest
- c. Injury to back
- d. Injury to right hand with cut wound
- e. Injury to right leg with cut wounds

The most serious injuries were on the right hand which healed with a 10 cm scar with keloid formation on the elbow, and on the right leg which was treated through grafting and healed with healed 18cm scar right thigh, 26 cm scar right leg, 28 cm scar right leg below the knee and 12 cm scar right foot with keloid formation.

The appellant in its submission to the lower court offered Kshs. 60,000/- and cited **Eastern Produce (K) Ltd (Savani Estate) V Gilbert Muhunzi Makotsi [2013]eKLR** in which an award of Kshs. 130,000/- was set aside on appeal and substituted with an award for Kshs. 70,000/- for a pricked wound on the left foot

(dorsal aspect) which was tender and severe pains incurred during and after the injury and **Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR eKLR** in which an award of Kshs.80,000/- was set aside on appeal and substituted with an award for Kshs. 30,000/- for soft tissue injuries to the right hip joint and the back. The respondent on the other hand sought Kshs. 700,000/- and cited **Gusii Deluxe Limited & 2 Others V Janet Atieno [2012] eKLR** in which an award of Kshs. 500,000/- was upheld for deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right – upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest and **Kiru Tea Factory & Another v Peterson Watheka Wanjohi [2008] eKLR** where Kshs. 800,000/- was awarded for a degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating.

General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR** thus:

***“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.***

I have re-evaluated the injuries sustained and the cases cited by the parties. The cases cited by the appellant bore little relation to the injuries sustained by the respondent. In each of the cases, the claimants sustained minor soft tissue injuries which are a far cry from the injuries sustained by the respondent in this case. **Gusii Deluxe Limited & 2 Others V Janet Atieno [2012] eKLR** was cited by the respondent is relevant and an indication of the prevailing level of awards. It was 3 years old as at the time of the judgment.

It was the duty of the advocates to guide the court by citing relevant cases to enable the court arrives at a fair decision. **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** now cited by the appellant was not cited before the trial court and an appellate court cannot be expected to fill in the gaps left by inadequate guidance given to the trial court. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of general damages and I dismiss the same as not disclosing an inordinately high award as to be disproportionate to the evidence on injuries suffered.

#### **i. Special damages**

The learned trial magistrate awarded special damages in the sum of Kshs. 21,335/- on the basis of a bundle of receipts that did not bear stamp duty which was contrary to the Stamp Duty Act Cap 480 Laws of Kenya.

Section 19 of the Stamp Duty Act provides:

***(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—***

***(a) in criminal proceedings; and***

***(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped***

As correctly submitted by the appellant, the bundle of receipts marked PEXH. 5 for Kshs. 21,335/- ought not to have been received in evidence and the sum thereof is hereby set aside.

**ii. Costs and Interest**

Section 26 of the Civil Procedure Act Cap 21 Laws of Kenya states:

***(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.***

Section 27 states:

***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

After considering the law on costs and interest, I am not persuaded that the learned trial magistrate improperly exercised his discretion in awarding costs and interest and I find no justification in interfering with the same.

In the result, this appeal partly succeeds. The award on general damages, interest and costs is upheld but the award on special damages is hereby set aside. The appellant will have 20% costs of this appeal.

**DATED AND DELIVERED ON THIS 6TH DAY OF APRIL 2017**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk	-	<b>Winnie</b>
Applicant	-	<b>No appearance</b>
Respondent	-	<b>No appearance</b>