



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

**CIVIL APPEAL NO. 88 OF 2016**

**COAST BUS (MSA) LTD.....APPELLANT**

**VERSUS**

**JOSEPH ODHIAMBO MAKAMBORA.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon. Martha Agutu (RM) in Chief Magistrates' Court  
Kisumu CMCC NO.558 of 2006 delivered on 4th November 2016)**

**JUDGMENT**

**Joseph Odhiambo Makambora (*hereinafter referred to as respondent*) sued Coast Bus (Msa) Ltd (*hereinafter referred to as appellant*) in the lower court claiming damages for injuries allegedly suffered on 24th March 2006 while the appellant was lawfully travelling as a fare paying passenger in the respondent's bus registration number KAP 759T.**

On the other hand, the defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's suit with costs.

Liability had been apportioned at 90% against the appellant in ***HCCC 48 Of 2007 Charles Osano Kijanah V Coast Bus Ltd & Another***. In a judgment delivered on **4th November 2016**, the learned trial Magistrate found that the appellant had proved his case on a balance of probability and awarded the respondent general damages in the sum of Kshs. 600,000/-.

**The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed a Memorandum of Appeal dated 28th November 2016 which set out 3 grounds which can be summarized as follows:-

- 1. The Learned trial Magistrate erred in awarding the respondent general damages of Kshs. 600,000/- which award was unjustifiable and/or inordinately high as to amount to an erroneous estimate considering the nature and extent of the injuries suffered by the respondent**
- 2. The Learned trial Magistrate erred by considering other injuries or extraneous and/or irrelevant factors and she erred by failing to seriously consider the issues or submissions of the appellant**
- 3. That the trial magistrate's award of general damages was, compared to awards in similar cases, excessive, disproportionate, unmerited, unreasonable, biased and indefensible and has**

resulted in a miscarriage of justice

## **SUBMISSIONS BY THE PARTIES**

### **Appellant's submissions**

The appellant's Counsel, Mr. Simiyu, submitted that the trial court in awarding damages to consider the injuries suffered by the respondent and cited inflation and future medical treatment which was not pleaded or proved. To this end, he relied on **Migori HCCA No. 7 of 2015 Harun Muyoma Boge v Daniel Otieno Agulo** in which an award of Kshs. 300,000/- was made on appeal for fracture right leg below the knee that have healed with stiffness of the right knee and a sinus that might herald underlying osteomyelitis. He had less than 5% permanent disability, **NBI HCCC 2326 of 1988 James Kitambi Lihui v Joseph Kibui & 2 Others** where plaintiff was awarded Kshs. 180,000/- for partial dislocation of the 4th and 5th vertebrae with a permanent disability of 20% and **MBA HCCC 363 of 1990 Patrick Abayo v Kenya Ports Authority** in which plaintiff was awarded Kshs. 140,000/- for fracture of the lower end of fibula.

### **Respondent's submissions**

The appellant's Counsel Mr. Ochieng submitted that the award of Kshs. 600,000/- is reasonable and that the learned trial magistrate had in awarding the same had been guided by the injuries pleaded in the amended plaint and supported by medical reports and the cases cited by both parties. He placed reliance on **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88) 1 KAR 727.**

### **The evidence**

I have perused the entire record of appeal and considered the submissions by both counsels. I note that the appeal revolves around quantum which I shall consider as hereunder.

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

***“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally ( see Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).”***

In a plaint amended on 20th March 2014; the respondent pleaded that he suffered:

- a. A simple U-Shaped hairline fracture of 1right mid-shaft tibia bone
- b. Sprain neck
- c. Multiple bruises to the neck, right leg and angle of right eye

The plaintiff was on 28.3.06 treated at Homabay District Hospital for simple hairline fracture on neck of right leg with callous formation, pain and stiffness at back of neck, bruises on left shoulder and lower leg and bruises at the angle of right eye. Dr. Okello in his report dated 5.5.06 confirmed that the responded suffered the injuries in the amended plaint i.e:-

- a. A simple U-Shaped hairline fracture of 1right mid-shaft tibia bone
- b. Sprain of neck
- c. Multiple bruises to the neck, right leg and angle of right eye

He noted that the respondent was expected to recover in 8 weeks' time. Subsequently; the respondent was treated for a recurrent headache, visual disturbance and musculoskeletal pain on right lower limb which revealed osteoarthritis of the knee.

### **Analysis and Determination**

I have perused the entire record of appeal and considered the submissions by counsels for both parties. The appellant holds the view that the respondent ought to have been awarded not more than Kshs. 200,000/-. The respondent on the other hand holds the view that the award is reasonable.

In assessing damages as is the norm, the court will consider comparables to arrive at an opinion bearing in mind the principles set out in making considerations in appeals of this nature. In **Stanley Maore & Geoffrey Mwenda at Nyeri Civil Appeal No.147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88] 1 KAR 727** which has been cited by the respondent and said:

*“The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied that either that 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.”*

In her judgment, the learned trial magistrate also considered the cited cases and while noting that the respondent had suffered less serious injuries than those in the cited cases considered the lapse of time and awarded the respondent Kshs. 600,000/-. There was however no evidence that the recurrent headache, visual disturbance and musculoskeletal pain on right lower limb which revealed osteoarthritis of the knee that appear on subsequent treatment records arose as a result of the accident that is the subject matter of this case. It was therefore misdirection on the part of the learned trial magistrate to consider such other extraneous injuries in making the award.

It was the duty of the advocates to guide the court by citing relevant cases to enable the court to arrive at a fair decision. All the cases cited before the trial magistrate; on behalf of the appellant and the respondent relate to more serious injuries than those suffered by the respondent. The case of **Harun Muyoma Boge v Daniel Otieno Agulo Migori HCCA No. 7 of 2015** 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 am of the view that the sum of Kshs. 600,000/- was inordinately high to warrant interference with the award. I therefore reduce the sum for general damages to Kshs. 300,000/-.

In the result the appeal is allowed to the extent that the award of general damages is set aside and substituted with an award of Kshs. 300,000/-. Special damages are retained at Kshs. 11,535/-. This award shall be subject to the decreed apportionment. The appellant shall have costs of the appeal.

**DATED AND DELIVERED THIS 15th DAY OF JUNE 2017**

**T. W. CHERERE**

**JUDGE**

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

Court Clerk - Felix

Appellant - Ms. Simiyu

Respondent - Mr. Oriero