



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL APPEAL NO. 123 OF 2013**

**BETWEEN**

**ANGELINE AKINYI ODHIAMBO ..... APPELLANT**

**AND**

**TERESIA MBAIKA KANYO ..... 1<sup>ST</sup> RESPONDENT**

**TRISHA COLLECTION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM dated***

***11<sup>th</sup> December at the Chief Magistrates Court at Kisumu in Civil Case No. 343 of 2011)***

**JUDGMENT**

1. The appellant was travelling in the 2<sup>nd</sup> respondent's vehicle on 6<sup>th</sup> March 2011 when it was involved in an accident along Kericho-Awasi Road. She sustained injuries as a result and decided to lodge a suit claiming damages. Although the respondents denied liability, the issue of settled by consent in the ratio of 90:10 in favour of the appellant. According to the plaint, the appellant sustained a ruptured liver and injuries to the left ear, right hand with cuts, chest, right shoulder, back and waist. The learned magistrate awarded Kshs. 200,000/- as general damages.

2. The gravamen of the appellant's case is that the award of Kshs. 200,000/- was inordinately low given the nature of injuries and the long terms effect of such injury. According to counsel for the appellant, Mr Okoth, the learned magistrate failed to consider that the appellant's liver was ruptured and she had to be operated on in order to be treated. Counsel submitted that Kshs. 1.5 million was an appropriate award.

3. The respondent supported the judgment of the subordinate court and urged the court to uphold it. Mr Rotich, learned counsel for the respondent, submitted that the injury to the liver was merely a laceration which did not aggravate the injury hence the award was reasonable in the circumstances.

4. The appellant testified that she sustained a liver rupture and other injuries on the left ear, right hand and shoulders, back and chest. She was first admitted to Ahero Health Centre and then transferred to New Nyanza General Hospital where she was admitted for 8 days while undergoing an operation for repair of the liver. Dr Were Okombo (PW 1) examined the appellant on 3<sup>rd</sup> May 2011. When he saw the appellant, she complained of pain in the chest, abdomen, back and right hand. He found that her general condition was good. He concluded that she would need further treatment and that the injury to her abdomen led to rupture of the liver which was repaired through open surgery and that the condition would need follow up to ensure full recovery.

5. As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).

6. I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind that damages should not be inordinately high or too low. Damages are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts. Further, an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shilling at the time of the judgment.

7. Before the trial court, the appellant proposed Kshs. 1.2 million on the basis of *Joseph Kamee Gatonga v Mbo-I-Kamiti Farmers Ltd* NRB HCCC No. 1469 of 2000 (UR) where the plaintiff was awarded Kshs. 550,000/- as a result of soft tissue injuries, a fracture pelvis that led to dilation of the urethra and as a result he fractures he was unable to walk without crutches. The respondent proposed Kshs. 150,000.00 and called in aid, *John Mutisya Ngile v Nthambi Paul Mutisya (a child)* MKS HCCA No. 94 of 2004 [2006]eKLR where the plaintiff sustained a traumatic extraction of the upper left incisor, blunt abdominal trauma to the liver and gall bladder, laceration wound on perinea region and bruises on the lower limbs. The court reduced an award of Kshs. 340,000/- awarded by the trial court and awarded Kshs. 200,000/- in 2006.

8. PW 1, who was in a position to give a detailed opinion on the nature and extent of the injury, classified the injury sustained by the appellant as soft tissue injury. Although he noted that she was under treatment, his report referred to treatment in the form of analgesics (painkillers) and physiotherapy. He did not give a long term prognosis nor suggest that the appellant would suffer any significant form of disability due to the accident. Bearing in mind the doctor's opinion and the authorities cited, I cannot say that the award was inordinately low to warrant interference by the appellate court.

9. The case cited by the appellant bore little relation to the injuries sustained by the appellant while the decision cited by the respondent was relatively applicable to the appellant's situation. It is the duty of the advocates to guide the court by citing relevant cases and neither of them should complain if the court does the best it can in the circumstances. In this case though, I am satisfied the award of Kshs. 200,000/- was reasonable in light of the cases and injuries.

10. The appeal is dismissed with costs to the respondent.

**DATED and DELIVERED at KISUMU this day 6<sup>th</sup> of September 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Okoth instructed by Geoffrey O. Okoth and Company Advocates for the appellant.

Mr Rotich instructed by Kairu McCourt Advocates for the respondent.