



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL APPEAL NO. 1 OF 2014**

**BETWEEN**

**ODINGA JACTONE OUMA ..... APPELLANT**

**AND**

**MOUREEN ACHIENG ODERA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. R. Oanda, PM dated 4<sup>th</sup> December 2013 at the Principal Magistrates Court at Ukwala in Civil Case No. 8 of 2011)*

**JUDGMENT**

[1] The respondent was injured in a road traffic accident which occurred on 5<sup>th</sup> May 2010 along the Busia-Kisumu Road involving motor vehicle registration number KNK 339B belonging to the appellant. She sustained injuries as a result of the accident and filed suit against the appellant. The respondent initially denied the claim but settled the issue of liability by consent apportioned at the ration of 15:85 in favour of the respondent. The matter proceeded for assessment of damages and court made the following award;

<i>General Damages</i>	– Kshs.	400,000.00
<i>Less 15% Contribution</i>	– Kshs.	60,000.00
	Kshs.	340,000.00
<i>Special Damages</i>	Kshs.	3,200.00
<i>Total</i>	Kshs.	343,200.00

[2] The thrust of the appellant's case contained in the memorandum of appeal dated 7<sup>th</sup> January 2014 is that the award was inordinately high and did not take into account the nature of the injuries disclosed in the medical reports presented in court. The appellant also contended that the trial magistrate ignored the appellant's submissions and made the award without reference to the precedents cited. Mr Karanja, counsel for the appellant, submitted that the in light of the injuries and decisions cited a sum of Kshs. 180,000/- was reasonable.

[3] Counsel for the respondent, Mr Amune, supported the decision of the trial magistrate and was convinced that the award was reasonable in the circumstances and reflective of the nature and extent of the injuries sustained by the respondent.

[4] Both parties filed extensive written submissions which outlined their respective arguments. They agreed that this being an appeal on the issue of quantum, this Court, as an appellate court, will only interfere with an award of damages in certain circumstances as set out by the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** thus;

*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 ....*

[5] According to the plaint, the respondent sustained the following injuries;

- Head injury (concussion)
- Cut wound on the right mandible
- Neck muscle contusion
- Chest pain on the left side and lacerations.
- Cut wound on the right shoulder blade region
- Multiple lacerations over the left shoulder and upper arm
- Cut wounds and lacerations over right forearm.
- Painful swollen 4<sup>th</sup> left finger.

[6] The respondent testified after the accident she was treated at Inuka Nursing Home and St. Mary's Mumias Hospital where she was admitted for 3 days. She produced treatment notes. According to the report for St Mary's Hospital dated 21<sup>st</sup> May 2010, the respondent lost consciousness and sustained multiple soft tissue injuries in the upper limb and neck. She had a fracture of the first and second ribs and shoulder dislocation on the left and also a fracture on the left metatarsal. She was discharged on 8<sup>th</sup> May 2010 in fair condition.

[7] Dr Muliang'a Wekesa, who examined the respondent and prepared a report dated 7<sup>th</sup> August 2010, confirmed the injuries sustained by her. At the time she complained of chest pains on the upper left side, pains in the upper back, a painful shoulder joint especially on exertions and ugly scars on the body. He classified the injuries sustained by her as soft tissue injuries. He observed that she had fracture of the 2<sup>nd</sup> left rib and fracture of 4<sup>th</sup> left proximal phalanx, a head injury concussion and psychological trauma. He was of the view that she had made tremendous recovery and had residual permanent effects like physical and psychological scars. He classified her injuries as grievous harm.

[8] The respondent was also examined by Dr D. O. Olima who prepared a medical report dated 6<sup>th</sup> September 2011. He reviewed the previous reports and confirmed the injuries sustained by the respondent. At the time respondent complained of painful movements of the left shoulder joint and chest pains. He noted that she had hypertrophic scars of the right wrist joint, right forearm and back. His opinion and prognosis was that the respondent suffered soft tissue injuries with a fractured rib which had fully healed fully and that the other injuries had healed with multiple hypertrophic scars.

[9] Based on the injuries sustained, counsel for the respondent suggested that the sum of Kshs. 1,500,000/- was appropriate. He relied on **Emmanuel Mutai v China Road and Bridge Corporation MSA HCC No. 200 of 2007 (UR)** where the plaintiff sustained a fracture of the left clavicle, right humerus and right femur and was awarded Kshs. 800,000/- in 2008. The appellant's counsel submitted that the Kshs. 180,000.00 was an appropriate award. He cited several cases; **Elizabeth Wanjira Ngure & Another v Nyaka Agencies Ltd & Another NRB HCCA No. 903 of 2004 [2008]eKLR** where the claimant sustained a fracture of the left and right ribs and a dislocation of the shoulder and was awarded Kshs. 100,000/- as general damages in 2008; **John G. Mbutia v Stephen Muiruri Njenga NRB HCCA No. 689 of 2002 [2008]eKLR**, the plaintiff sustained fractures of the 4<sup>th</sup> and 5<sup>th</sup> ribs, cuts on the forehead, cut wounds on both legs and fractures and pubic rami. On appeal the plaintiff was awarded Kshs. 100,000/- after the pubic fractures were disregarded; **Telkom K Limited v Stephen Ndolo Owango KSM HCCA No. 92 of 2007 [2012]eKLR**, the plaintiff was awarded Kshs. 280,000/- as general

damages after sustaining a longitudinal fracture of the distal phalanx of the left thumb, amputation of the left thumb, massive blood loss and a contusion of the left hand and **Patrick Mwenda Bucha v Raphael Mainka ole Seya & Another NRB HCCC No. 1091 of 2002 [2007]eKLR** where the plaintiff was awarded Kshs. 100,000/- as general damages in 2007.

[10] The learned magistrate outlined the evidence and concluded as follows;

*I have considered all the issues raised by both parties in their submissions. I have also considered the judicial decisions cited. The plaintiff herein sustained injuries as outlined above, the injuries attract an award of damages between Kshs. 200,000/- and Kshs. 400,000/- having considered all the above. I award the plaintiff herein Kshs. 400,000/- general damages for pain and suffering .....*

[11] In this case, the nature and extent of injuries was not dispute, the issue is the level of compensation the appellant was entitled to. 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 CA Civil Appeal No. 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.*

This point has been emphasised by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd v Shepherd [1964] AC. 326,345**, where he observed that:

*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 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.*

[12] The principles were further summarised by the Court of Appeal in **Jabane v Olenja [1986] KLR 661** as follows;

*The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.*

*(1) Each case depends on its own facts;*

*(2) awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);*

*(3) comparable injuries should attract comparable awards.*

*(4) inflation should be taken into account; and*

*(5) unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.*

[13] I have re-evaluated the injuries sustained and the cases cited by the parties in light of the above principles. The respondent cited only one case which bore little relation to the injuries suffered. At this juncture I would point out that it is the duty of advocates to cite several and relevant cases in order assist the court reach a reasonable assessment. In any case the learned magistrate clearly disregarded the case.

The decisions cited by the respondent were relevant as they reflected injuries that were similar to those sustained by the respondent. It is clear from the cases cited by the appellant, the only issue left was how to factor in the cost of inflation since most of the cases were delivered between 2008 and 2012 and the case was heard and judgment delivered in 2013. In taking into account the element of inflation, the Court of Appeal in *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR remarked, “*We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.*”

[14] Having concluded that the cases cited by the appellant were apposite to the case at hand, I find that even taking into account a reasonable amount of inflation within a period of two to three years the cases cited were delivered, the sum of Kshs. 400,000/- awarded was excessive. I find that **Kshs. 180,000/-** suggested by the appellant as general damages reasonable in the circumstances.

[15] I therefore allow the appeal. The award of general damages in the subordinate court is set aside and substituted with an award of **Kshs. 180,000/-**. The sum shall accrue interest from the date of judgment in the subordinate court.

[16] The appellant shall have the costs of this appeal.

**DATED and DELIVERED at KISUMU this 3<sup>rd</sup> day of October 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr M. Karanja, Advocate for the appellant.

Mr Amune instructed by Omundi Bw'onchiri and Company Advocates for the respondents.