



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 633 OF 2009**

**GLOBAL ALLIED INDUSTRIES LIMITED.....APPELLANT**

**VERSUS**

**GERALD MWANGI MUIRURI.....RESPONDENT**

*(Appeal from the original judgment and decree of Hon. Mr. K. Muneeni in Kiambu SPMCC No. 251 of 2004 delivered on 5<sup>th</sup> November, 2004)*

**JUDGMENT**

1. The Respondent sued the Appellant seeking compensation following a road traffic accident which occurred on or about 11<sup>th</sup> March, 2004. It was the Respondent's case that he was on the material day a fare paying passenger aboard motor vehicle registration number KAN 655F along Kiambu-Nairobi road near Thindigua stage when the Appellant's motor vehicle registration number KAH 157C which was alleged to have been driven negligently, collided with KAN 655F as a result of which the appellant suffered swollen face with multiple bruises, swollen right arm and shoulder, cut wound on the right arm, fracture of the right 3<sup>rd</sup> and 4<sup>th</sup> ribs, fracture of the right humeral head and fracture of the right acromion bone. He pleaded special damages for Kshs. 1,500/= for medical report, KShs. 3,550/= for medical expenses and KShs. 100/= for police abstract.
2. On 5<sup>th</sup> February, 2009, the parties herein entered into a consent on liability at the ratio of 10:90 between the Respondent and the Appellant respectively. The matter then went for assessment of damages. It was the Respondent's testimony that as a result of the accident he sustained injury to his forehead, right hand and sustained a fracture of the hand. He stated that for the said injuries he was treated at Kiambu District Hospital and paid KShs. 3,500/= for the services. He produced receipts to that effect as P. Exhibit 1. He testified that he was examined by two Doctors and produced medical report by Dr. J.N. Muiru as P. Exhibit 2 and a receipt for the said report for KShs. 1,500/= as P. Exhibit 3. He produced a medical report by Dr. Yusuf Kodwawwala as P. Exhibit 4. He stated that he was unable to lift heavy things. The Respondent also produced a receipt for KShs. 100/= for the police abstract as P. Exhibit 5. On cross-examination he stated that he had also sustained injury on the ribs. The Respondent's case was then closed and the Appellant's case too was closed.
3. In his judgment the trial court indicated that he agreed with the Respondent's counsel, that the Respondent suffered severe injuries and went further to state that the Respondent suffered 15% disability according to Dr. Kodwawwala's assessment, that temporary disability lasted for three (3) months and that the Respondent complained of pain when lifting heavy loads. He stated that he found the authorities by the Respondent's to be relevant and that those by the Appellant's counsel were over ten (10) years old. Trial court then proceeded to award the Respondent KShs. 700,000/= to be subjected to liability amounting to KShs. 630,000/=. Special damages were awarded at KShs. 5,000/= and subjected to liability amounting to KShs. 4,500/=.

4. The Appellant felt aggrieved by the trial court's decision and filed this appeal on grounds that:-
  - i. *The learned magistrate erred in both law and fact for failing to take into consideration the whole evidence put before the court in reaching at his judgment.*
  - ii. *The learned magistrate erred in both law and fact in failing to take into consideration the evidence of the Respondent as to the extent of his injuries vis à vis the alleged extent as pleaded.*
  - iii. *The learned magistrate erred in law in basing his assessment on injuries not supported by evidence placed before him.*
  - iv. *The learned magistrate erred in both law and fact in that he awarded general damages which were so manifestly high as a totally erroneous estimate of compensation due to the damages to the Respondent.*
  - v. *The learned magistrate erred in both fact and law in applying the wrong principles in assessing the damage he awarded to the Respondent and as a result he arrived at a figure which was so inordinately high that it must be a wholly erroneous estimate of the damage to the Respondent.*
  - vi. *The learned magistrate erred in both law and fact in failing to be guided by decisions cited wherein awards were made to claimants who had sustained injuries similar to those sustained by the Respondent.*
  - vii. *The learned magistrate erred in refusing to be guided by the decisions cited by the Appellants solely on the ground that they were delivered many years back.*
  - viii. *The learned magistrate erred in finding that the nature of the mild injuries attracted an award of general damages in the sum of KShs. 700,000/=.*
  - ix. *The learned magistrate erred in failing to assess general damages as was required of him.*
5. This appeal was canvassed by way of written submissions. The Appellant cited the case of **Paul Kipsang Koech & Another v. Titus Osule Osore (2013) e KLR** where the Court restated instances where the Appellate court can disturb the trial court's award on quantum as follows :-

*"[13] It is a well-established law that, assessment of quantum of damages in a claim for general damages, is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion; must be exercised judicially, with wise circumspect and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court:*

- a. *Took into account an irrelevant factor or*
  - b. *Left out of account a relevant factor or,*
  - c. *The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."*
6. It was the Appellant's submissions that it cited **Mombasa HCCC No. 168 of 1987., Patrick Mukoko Kitoi v. Mburira Nyaga & Another** where the Plaintiff who suffered a head concussion, fractured five (5) ribs and fractured shaft of the left humerus was awarded KShs. 30,000/= for concussion, KShs. 85,000/= for chest injuries including fracture of 5 ribs and KShs. 45,000/= for arm injury; **Nairobi HCCC No. 3297 of 1982., Beatrice W. Thomi v. Usham Singh & Another** where a Plaintiff who had suffered mid shaft fracture of the right humerus, laceration on the forehead, right knee and swollen eye and was admitted in hospital where the arm was immobilised in a plaster after an operation fixation of a metallic plate was awarded KShs. 120,000/= and **Nairobi HCCC No. 400 of 1991., Jilan Kai Nyamawi v. KP & T Corp & Another** where the Plaintiff who sustained a fracture of the right humerus and abrasions on both legs, plaster removed after two months, and the fracture had healed with a resultant loss of flexion of the arm at 30% and was awarded KShs. 130,000/=. The Appellant contended that both parties cited decisions that were over ten (10) years old. It was submitted that the reasons for finding the Appellant's submissions to be irrelevant was not indicated by the trial court hence it was a blanket statement. That the Plaintiffs in the authorities cited by the Respondent, suffered injuries that were

- more serious than the ones suffered by the Respondent and such decisions should not have formed the basis of the trial court's findings. It was lamented that the trial magistrate did not indicate whether in arriving at his decision of awarding the Respondent KShs. 700,000/= he considered increased cost of living and inflationary trends given the ages of the decisions cited. The Appellant submitted that even if factors such as increased cost of living and inflationary trends were factored in, it did not warrant an increase in award to KShs. 700,000/=.
7. The Respondent on the other hand submitted that in fact the award of general damages should be enhanced to KShs. 800,000/=. It was submitted that the Respondent relied on **Nakuru HCCC No. 456 of 1996 Irene Wanjiku Gitonga v. Kinyanjui Ngethe & 2 Others** and **Mombasa HCCC No. 298 of 1989 Kombo Amani v. Attorney General & Others**.
  8. This being the first appeal, it is the duty of this Court 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 hearing and seeing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**).
  9. The principles to be applied by this court in assessment of damages have been discussed in **Paul Kipsang Koech** (supra) and **Loice Wanjiku Kagunda v. Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)**. In Loice Wanjiku the Court held:-

***“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)***

10. The Appellant's argument is that the award of general damages was inordinately high considering the age of the cited cases and the date of the accident. The medical report by Dr. J.N. Njiru and Kodwawwala confirmed the Respondent's injuries as pleaded. On incapacitation the two doctors differed slightly. Dr. Njiru was of the opinion that the Respondent would be incapacitated for two months while Kodwawwala said one and a half months. Kodwawwala's however stated that the Respondent would suffer three months disability in which the trial court relied on while assessing damages. I have considered the authorities cited by the Respondent and the Appellant. Those by the Respondent related to the plaintiff' whose injuries were much more severe than the Respondent's. However, considering the age of the cited cases, the date of the occurrence of the accident and the rate of inflation on the Kenya Shillings, I am of the view that the award by the trial court was reasonable and hold that no wrong principles were relied on nor was the award inordinately high. For the reasons given this court is of the opinion that there is no justification to disturb the award arrived at by the lower court. The appeal is dismissed in its entirety. The lower court decision is confirmed. The respondent will have costs of the appeal over the proceedings in the lower court. Orders accordingly.

**Dated, Signed and Delivered in open court this 10<sup>th</sup> day of March, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

Kimani holding brief for the Appellant.

No appearance for the Respondent.