



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

**CIVIL APPEAL NO.31 OF 2012**

**TABRO TRANSPORTERS LTD           ..... APPELLANT**

**VRS**

**ABSALOM DOVA LUMBASI           ..... RESPONDENT**

**JUDGMENT**

1. The appeal is as a result of the judgment of P.M's Court, Webuye SRM CC No.162 of 2009 delivered on the 16<sup>th</sup> day of May, 2009. Parties settled the issue on liability by consent and left for the court was the issue of quantum. The Appellant was aggrieved by the award which it submits was inordinately high.
2. The Respondent having been involved in an accident received the following injuries:
  - a. Blunt trauma to the chest,
  - b. Blunt trauma to the back,
  - c. Blunt trauma to the spinal column,
  - d. Swollen left leg and
  - e. Fracture of the left tibia and fibula.

The trial court awarded the sum of kshs.500,000/= in general damages and Kshs.2,000 in specials.

3. The appeal was opposed and the Respondent cited legal principles that this court should consider in dealing with this appeal as follows to re-evaluate the evidence on record, assess and come to an independent opinion; assessment of damages is a judicial discretion based on comparables and an appellate court must not disturb an award of damages unless the same is inordinately low or high as to be an erroneous estimate of damage. It was the Appellant's submission therefore the sum awarded was reasonable.
4. Parties relied on several authorities. I have considered their rival submissions and authorities cited. Parties are in agreement as to the injuries sustained by the Respondent namely:
  - Blunt trauma to the chest
  - Blunt trauma to the back
  - Blunt trauma to the spinal column
  - Injury to the left leg
  - Fracture of the left tibia and fibula

The 1<sup>st</sup> report by Dr. S. I Aluda dated 9<sup>th</sup> January, 2009 indicated that the injuries were severe but

continued to heal. The second report by Dr. Gaya is dated 1<sup>st</sup> January, 2012, 3 years after the 1<sup>st</sup> indicated that the Respondent walked without a limp, his left leg fracture healed but with a deformity at junction between middle and lower third leg. He described the deformity as permanent. He was also of the view that he may develop early osteoarthritis of the left knee and ankle joint. He gave degree of permanent disability at three (3) percent.

5. 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 and 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** at page 730 where Kneller J. A 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.”*

I will be guided accordingly in arriving at an opinion.

7. Several comparables were cited some with more serious injuries and others with less serious injuries comparables are as follows:

**Charles Mikama and Another and Betty Hassan suing through next of friend Safina Singila Civil Appeal No.106 of 2003** Judgment delivered on 28/4/2008. The Respondent sustained the following injuries:

- a. Bruise on the forehead;
- b. A wound on the right thumb and left mast joint;
- c. A wound on the second right finger;
- d. Fracture of the right tibia and fibula;
- e. A wound on the lateral aspect of the right ankle joint and general damages were assessed at Kshs.800,000/=.

8. **Soren Peterson & Another vs Charles Muhavi Singa Eldoret Civil Appeal No.149 of 2003** delivered on 3<sup>rd</sup> September, 2008. The court was of the view that injuries sustained were compound fracture of the tibia and fibula. The rest of the injuries were soft tissue injuries but were extensive. On appeal court reduced the award from Kshs.500,000/= to Kshs.400,000/=. **Eliza Muluma vs Tawfig Bus Services Civil Case No.81 of 2000.**

The Plaintiff therein sustained fracture of tibia and fibula and shortening of the right leg. An award was Ksh.250,000/=. **Zachariah Mwangi Njeru vs Joseph Wachira Kanoga Civil Appeal No.9 of 2012** judgment delivered. The Respondent sustained a fracture to the tibia and fibula and was awarded Kshs.400,000/=.

10. It is not doubtful that the serious injury sustained by the Respondent was the fracture of the tibia fibula which resulted to a permanent deformity assessed at 3 %. The other injuries were soft tissue. Having in mind that this court can only interfere if the sum is inordinate low and high, I find using the comparables above cited that the award was excessive and in the circumstances.

11. Therefore the appeal succeeds. The judgment of the trial court is set aside and judgment is entered for the sum of Kshs.400,000/= as general damages and special damages retained at Kshs.2,000/= plus interest at court rate.

**Dated and delivered at Bungoma this 3<sup>rd</sup> day of March 2015.**

**A. ARONI**

**JUDGE**