



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 23 OF 2015
(FORMERLY KISII HCCA NO. 33 OF 2014)

BETWEEN

FRANCIS OCHIENG 1ST APPELLANT

GABRIEL ONGELE OGOLLA 2ND APPELLANT

AND

ALICE KAJIMBA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.M. Nyagah, Ag. PM at the Principal's Magistrates Court in Migori in Civil Case No. 89 of 2013 dated 18th February 2014)

JUDGMENT

1. The respondent filed suit in the subordinate court claiming damages for injuries sustained while she was travelling as a passenger in the 1st appellant's motor vehicle driven by the 2nd appellant on 16th January 2012 along Rongo – Awendo road. The issue of liability was settled by consent with the appellants bearing 80% and the respondent 20%.
2. The respondent was awarded Kshs. 500,000/- general damages and Kshs. 55, 408/- special damages subject to the agreed contribution. Being dissatisfied the appellant with the award, the appellants filed a memorandum of appeal dated 15th March 2014 setting out grounds of appeal as follows;
 1. *The Learned Trial Magistrate erred in law and in principle by failing to appreciate the injuries alleged to have been sustained by the respondent were in the nature of simple soft tissue injuries, of lesser magnitude and did not commensurate with the amount of general damages awarded.*
 2. *That the award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance.*
 3. *That the learned magistrate erred in law and in principle by ignoring the evidence in regards to the injuries of the respondent as noted during the trial, more specifically, that the respondent did not suffer any loss of teeth, contrary to and/or as opposed to what is pleaded and contained in the medical report of the doctor thereby arriving at a higher and excessive award.*
3. This appeal is therefore limited to the issue of the quantum of damages awarded by the subordinate court.

4. The respondent pleaded that she had a cerebral contusion with loss of consciousness for 2 hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, peri-orbital haematoma, loss of 5 anterior lower and 2 upper teeth, peri-orbital ecchymosis, nuchial stiffness, cut wound on the right hand and the right knee. She further testified that she was injured on the head and mouth and that she lost 5 lower teeth and 2 upper teeth. She stated that she had a stiff neck and cut wounds on the right hand and knee. After the accident she lost consciousness and was treated at Awendo Health Centre, Ombo Mission Hospital, Migori and later referred to Kisumu Aga Khan Hospital and was admitted Milimani Maternity Hospital Kisumu. She produced a medical and treatment notes from the hospitals she was admitted, the P3 Form duly filled and a medical report prepared by Dr Idagiza. She maintained that she had not fully recovered as gets dizzy and was still undergoing treatment.
5. Ms Kusa, counsel for the appellants, submitted that injuries sustained by the respondent were in the nature of soft tissue injuries and that therefore the award of Kshs. 500,000/- as general damages was excessive. She urged the court to examine the evidence carefully and note that the respondent did not sustain any loss of teeth as alleged. Mr Abisai, learned counsel for the respondent, submitted that the injuries pleaded by the respondent are consistent with her testimony and the medical evidence that was admitted by consent. He contended that the appellant did not contest the injuries sustained by the appellant and that the award was reasonable in the circumstances.
6. There is no dispute about the principles applicable in an appeal relating to quantum of damages. The assessment of damages is an exercise of judicial discretion by the trial magistrate and an appellate court should be slow to reverse the trial court unless he has acted on wrong principles or awarded so excessive or little damages that no reasonable court would; or he had taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong result. These principles have been cited and approved in several cases among them; **Butler v Butler [1984] KLR 225**, **Butt v Khan [1981] KLR 349**, **Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another [1982 – 88] 1 KAR 72** and **Mariga v Musila [1984] KLR 257**.
7. As I understand, the substance of the appellants' contention is that the learned magistrate failed to consider the nature and extent of the injuries sustained by the appellant and hence came to the wrong assessment of damages. The appellants' case before the trial court and in this court is that the respondent did not lose her teeth as a result of the accident.
8. I have examined the documents relating to the respondent's treatment. The first document, the attendance card dated 16th January 2013 from Awendo Sub-District hospital where the respondent was first treated does not mention that she lost any teeth. The Discharge Summary from St. Joseph's Mission Hospital, Migori shows that the respondent was scanned for head injury and that she has headache, back pain and bleeding from the left ear. When she was taken to Aga Khan Hospital, Kisumu, the external transfer form dated 17th January 2013 shows that she had a mild head injury with bilateral temporo-parietal scalp haematoma. The Discharge Form from Milimani Maternity Hospital shows that the respondent sustained head injuries, sub-conjunctival haemorrhage and periorbital ecchymosis on both eyes. It shows that she was admitted on 17th January 2013 and discharged on 23rd January 2013. The issue of teeth first appeared in the P3 medical report prepared on 26th March 2013 which shows that the respondent sustained the loss of 7 teeth. Dr Idagiza who examined the respondent on 20th May 2013 also recorded the loss of teeth.
9. Although the documents were admitted with the consent of the appellants, that fact did not absolve the learned magistrate from considering the reports side by side by drawing any necessary inferences and conclusions. Mr Abisai submitted that the appellant should have called for a further examination of the appellant in order to ascertain whether the teeth were as result of the accident. In view, the second medical report would only have confirmed that the respondent lost some teeth.

It is clear that the primary documents which recorded the injuries immediately after the accident do not allude to any injury of the teeth which would have been self-evident.

10. Given the length of time the respondent spent at Milimani Maternity Hospital, it would have been unlikely that any injury on the teeth would not have been noticed or recorded much less the loss of 7 teeth. It is therefore likely that the respondent did not lose her teeth as a result of the accident. The learned magistrate therefore failed to consider whether in fact the loss of teeth by the respondent was as a result of accident. In the circumstances, the court is entitled to review the damages awarded.
11. In the court below, the respondent submitted that an award of Kshs. 650,000/- was reasonable in the circumstances. He cited the case of *Kenya Tea Development Agency v James Ateka Nyanguiya KSI HCCA No. 113 of 2005(UR)* where the plaintiff sustained a cut wound on the scalp, fracture of the neck, dislocation of the right humerus, bruises on the left hand and injury to the left ankle and disability assessed at 30%. He was awarded Kshs. 650,000.00 in 2010. The appellants on the other hand submitted the respondent sustained minor soft tissue injuries which should attract an award of Kshs. 200,000. They relied on the cases of *Bhupinder Singh Bhangra v Joel Tuwei Koech HCCA No. 12 "B" OF 2002* where the plaintiff was awarded Kshs. 170,000/- for soft tissue injuries and *Eddah Wangui Murimi v Nairobi Sports House Ltd NYR HCCA No. 11 of 2003* where the sum of Kshs. 100,000/- was awarded for the plaintiff who sustained multiple soft tissue injuries and also lost 3 upper incisor teeth.
12. The injuries sustained by the respondent were multiple soft tissue injuries without any fractures. I have also found that the respondent did not lose 7 teeth as stated in her testimony. The respondent sustained head injuries which aggravated the injuries. Considering the cases cited and inflationary trends, I find that an award of **Kshs. 350,000/-** would be reasonable in the circumstances.
13. The appeal is therefore allowed and the subordinate court judgment in respect of general damages is substituted with an award of **Kshs. 350,000/-** subject to agreed contribution making a sum of **Kshs. 280,000/-**.
14. The appellants shall have the costs of the appeal.

DATED and DELIVERED at MIGORI this 2nd day of June 2015.

D.S. MAJANJA

JUDGE

Ms Kusa instructed by O. M. Otieno & Company Advocates for the appellants.

Mr Abisai instructed by Abisai & Company Advocates for the respondents.