



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

**CIVIL APPEAL NO 114 OF 2013**

**ABDI HAJI GULLEID ..... APPELLANT**

**VERSUS**

**AUTO SELECTION (K) LTD.....1<sup>ST</sup> RESPONDENT**

**MOHAMUD MOHAMED.....2<sup>ND</sup> RESPONDENT**

**(An Appeal arising out of the judgment of A.A. Odawo RM delivered on 29<sup>th</sup> May 2013 in Machakos Chief Magistrate’s Court Civil Case No. 72 of 2012)**

**JUDGMENT**

The Appellant was the original Plaintiff in Civil Case No. 72 of 2012 at Machakos Chief Magistrate’s Court, and has appealed against the judgment of the learned trial Magistrate which was delivered in the said suit on 29/5/2013. The trial magistrate awarded the Respondent total damages of Kshs 406,175/50, being Kshs. 300,000/= as general damages and Kshs. 177,852/50 for special damages, less Kshs 71,677/= as the Appellant’s 15% contribution. The parties had recorded a consent on liability before the hearing in the trial court, at a ratio of 85:15 in favour of the Appellant as against the 2<sup>nd</sup> Respondent. They also consented to the case against the 1<sup>st</sup> Respondent being withdrawn with no order as to costs.

The Appellant has now moved this Court through a Memorandum of Appeal dated 10<sup>th</sup> June 2013 and filed in Court on 11<sup>th</sup> June 2013, wherein he has raised the following grounds of appeal:

1. That the learned trial magistrate erred in fact and in law by failing to give concise statement of the case, points of determination, decision thereon and reasons for her judgment.
2. That the learned trial magistrate erred in law and in fact in failing to consider both the Appellant’s and 2<sup>nd</sup> Respondent’s submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination.
3. That the learned trail magistrate erred in fact and in law by awarding the sum of Kshs. 300,000/= on general damages which is inordinately little and unrealistic in the circumstances against the injuries sustained by the Appellant.
4. That the learned trial magistrate erred in law and in facts by applying wrong and inapplicable principles of law in civil case and which did not form any basis to warrant her determination on general damages.

The Appellant is praying for orders that the appeal be allowed and the judgment be set aside and the awarded sum be reviewed and/or revised accordingly. Further, that the costs of the Appeal and costs of the lower court be granted to the Appellant, and any other order this Court may deem fit to grant.

## **The Facts and Evidence**

The brief facts of this appeal are that the Appellant instituted a suit in the lower court by filling a plaint dated 8/2/2012, which was later amended on 26/6/2012. He stated therein that at all material times the 1<sup>st</sup> Respondent was the registered owner of Motor Vehicle Registration No. KBC 910F and that the 2<sup>nd</sup> Respondent was the driver/servant and/or agent of the 1<sup>st</sup> Respondent who was in control of the said motor vehicle. The Appellant further stated that, on or about 9/2/2009, along the Nairobi-Namanga Road, the 2<sup>nd</sup> Respondent drove, managed and/or controlled the said motor vehicle so negligently that he caused the same to overturn, and as a consequence of which the Appellant who was a lawful passenger in the motor vehicle sustained serious bodily injuries, and suffered pain, loss and damage.

The particulars of the injuries given in the Plaint were serious and grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture of the back at L1. The Appellant sought special damages of Ksh 184,906/= for medical related expenses, general damages for pain and suffering, costs of the suit and interest at court rates.

The 2<sup>nd</sup> Respondent filed a Defence dated 2/8/2012 in the trial Court wherein he denied ownership of, and driving motor vehicle registration number KBC 910 F and that the Appellant was a lawful passenger therein. He also denied the occurrence of any accident and particulars of negligence alleged by the Appellant, and in the alternative, averred that the Appellant wholly and/or substantially contributed to the accident. The 2<sup>nd</sup> Respondent further denied the allegations of loss, injuries and damages particularized in the Amended Plaint.

The parties entered a consent in the trial court that quantum was to be determined by way of written submissions and that the medical reports by Dr. John Bodo dated 4/12/12 and Theopilus Wangata dated 17/5/2012 be admitted by consent. The report by Dr. Wangata showed that the Appellant suffered a wedge compression fracture of the back at L1, and that he developed features of osteoarthritis of the back which is a chronic joint condition that presents with pain, swelling and stiffness and requires the current use of painkillers and regular physiotherapy on the back. The doctor found the extent of permanent and functional incapacity from the injuries to be estimated at 25%.

The report by Dr. Bodo also indicated that the Appellant had suffered a wedge compression fracture of the back at L1, and that he complained of occasional pain in the lumbar spine after a long walk. The doctor found no tenderness in the lumbar spine and no neurological deficit in the lower limbs. He put the Appellant's permanent disability to be 10%.

The Appellant in the submissions made in the trial court relied on the decision in **Joseph Mganga Kasha vs Kenya Power and Lighting Company, MSA HCCC No. 188 of 2005**, and submitted that the Plaintiff in that suit sustained L1 injuries similar to those of the Appellant with slightly more severe complications, and was awarded Kshs 3,000,000/= as general damages. The Appellant on that basis sought an award of Kshs 2,000,000/= as general damages less the 15% contribution.

The 2<sup>nd</sup> Respondent on the other hand relied on the decision in **Mary Nyadzua Ngale vs Sheikh Omar Bin Dahman, MSA HCCC No. 122 of 1999**, where an award of Kshs 300,000/= as general damages was given for dislocation to the cervical spine C3 and C4 which led to numbness of the upper and lower limbs. The 2<sup>nd</sup> Respondent submitted that an award of Kshs 350,000/= would be adequate taking into account inflation, time lapse and the slightly more severe injuries suffered by the Appellant.

## **The Issues and Determination**

I am not called upon to determine liability as it was agreed upon by consent of the parties, and accordingly recorded in court on 3/11/2011. The Appellants were to shoulder 15% while the 2<sup>nd</sup> Respondent was apportioned 85% liability. This Court will therefore only determine on the issues raised on quantum.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the Court as to quantum of damages should stand.

In an appeal on the quantum of damages, the appellate court will only interfere where trial court 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 not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

The Appellant and 2<sup>nd</sup> Respondent filed written submissions on the present appeal. The Appellant submitted on two issues in submissions dated 21<sup>st</sup> November 2014. The first issue was that of failure by the trial magistrate to give points of determination and the reasons for her judgment, and to consider both the Appellants and the 2<sup>nd</sup> Respondents submissions. The Appellant submitted in this regard that the statement in the judgment was very brief and shallow and failed to include the details as per the amended plaint.

Further, that the judgment had no points of determination, decision and the rationale, and that this is the reason why the learned trial magistrate misdirected her mind and proceeded to award general damages which were inordinately too little considering the injuries sustained by the Appellant. The Appellant contended that even though the learned trial magistrate mentioned the submissions filed by both the Appellant and the Respondent, she did not consider them in her judgment and thereby ignored very relevant guiding facts to reach a fair and a reasoned determination.

The second issue raised by the Appellant in his submissions was that of the inordinately low award of Kshs. 300,000/= as general damages, and the use of inapplicable principles of law in civil proceedings while making the award general damages. The Appellant submitted in this regard that the learned trial magistrate erred in law and in fact in awarding him an inordinate sum of **Ksh. 300,000/=** as general damages as compared to the seriousness of the injuries sustained by the Appellant which are enumerated in the amended plaint. Further, that the injuries were also confirmed by both Doctor Theophilus Wangata and by Dr. Joab Bodo in their medical reports, who confirmed that the appellant had spinal injury with wedge compression fracture of the back at L1.

Furthermore, that the report by Dr. Theophilus Wangata confirmed that the Appellant herein had not fully recovered and had suffered permanent disability estimated at 25%, while Dr. Joab Bodo put the permanent incapacity at ten percent (10%) . The Appellant submitted that his initial proposal for the award of Kshs. 2,000,000/= as general damages was and is reasonable compensation in this case for pain, suffering and loss of amenities, and that the award by the trial court of Kshs. 300,000/= as general damages was unreasonable and baseless.

The Appellant also argued that he had proved special damages of Kshs. 175,757/= which were awarded and not contested. However, that special damages refer to the actual expense incurred and that the apportionment of liability should only apply in terms of general damages but not to both as the learned trial magistrate did. He prayed for the full amount of Kshs. 175,757/= as pleaded and proved without any reduction.

The 2<sup>nd</sup> Respondent filed submissions dated 22<sup>nd</sup> January 2015 in which he argued that the issues for

determination had already been dealt with in the lower court as parties had consented on apportionment of liability and documents to be relied in assessing of quantum. Further, that the only issue to be determined was how much the Appellant to be awarded, which is clear from contents of the judgment, and that the trial court duly indicated therein that it took cognizance of the contents of both parties' documents and in particular the permanent incapacitation.

The 2<sup>nd</sup> Respondent further submitted that the trial court indicated that it looked at both parties' submissions, and that submissions are merely persuasive and trial court is not bound to take them as a guide or as a law. It was also argued by the 2<sup>nd</sup> Respondent that the trial court also took the issues of inflation into consideration when arriving at the said quantum of damages, and that there is no ground to merit interference with the trial court's decision.

I have considered the evidence given in the lower Court and the arguments made by the parties. On the first issue raised on the contents of the judgment by the learned trial magistrate, I have perused the said judgment and note that the learned trial magistrate was clear that the issue before the trial Court was that of quantum, and that it was canvassed by the parties by way of written submissions which she clearly stated she had considered.

The learned magistrate then proceeded to analyse the evidence and submissions before the court, before reaching a decision that she would be guided by recent opinion of Dr. Bodo of 10% permanent incapacitation, and that the authorities cited by the Plaintiff were for injuries which were too severe. She found the authorities cited by the Respondent to be slightly similar to the case in point, which is what guided her award. The judgment was therefore clear on the issue before the court, the findings of the court on that issue and the final decision arising therefrom, and I find no merit in the Appellant's ground of appeal on this point.

On the second issue raised as to the quantum, it is not contested by the parties that the Appellant suffered a spinal injury with a wedge compression fracture of the back at LI. The differing opinion was on the permanent disability thereby suffered by the Appellant, which the Appellant submitted was 25% and the Respondent as 10%. I have perused the medical reports by Dr. Wangata and Dr. Bodo. Even though the report by Dr. Bodo is the more recent report, the said doctor did not dispute the reasons given by Dr. Wangata for the 25% permanent incapacitation, which is that the Appellant would require recurrent treatment with analgesics and regular physiotherapy on the back. In any event, Dr Bodo's report confirmed that the Appellant complained of occasional pain on the lumbar spine after a long walk. I therefore find for these reasons that the Appellant suffered a spinal injury with wedge compression fracture of the back at LI, with a permanent and functional incapacity of 25%.

On the quantum that is reasonable for these injuries, I agree with the finding by the trial magistrate that the award relied on by the Appellant that was granted in **Joseph Mganga Kasha vs Kenya Power and Lighting Company, MSA HCCC No. 188 of 2005** was for much more severe injuries, both in terms of the nature of injury suffered and the degree of incapacitation. In that case the Plaintiff had severe and debilitating multiple bone and spinal code injuries leading to complete paralysis of both of his lower limbs, and a 100% permanent disability. He was also found to be forever dependent and in need of full time home based nursing care.

However, I also find that the authority found to be comparable and relied upon by the trial magistrate namely **Mary Nyadzua Ngale vs Sheikh Omar Bin Dahman, MSA HCCC No. 122 of 1999** where an award of Kshs 300,000/= as general damages was given for dislocation to the cervical spine C3 and C4 which led to numbness of the upper and lower limbs, was for lesser injuries suffered. This is particularly in respect of permanent incapacitation, as there was no permanent incapacity indicated to have been suffered by the Plaintiff in that case, and on the contrary the opinion of the doctors therein was that her pain could be cured by way of an operation. I also noted that the 2<sup>nd</sup> Respondent did concede this point in his submissions in the trial court, and proposed a higher award of Kshs 350,000/=.

Lastly, on the issue raised by the Appellant on whether contribution also operates on special damages, I find that the contribution of 15% should apply to both general as well as special damages. I see no basis,

and no logical reason for not applying the contribution to the special damages, and no reasons nor authorities were provided by the Appellant to this Court to persuade it otherwise.

In the premises I find that the learned trial magistrate's award of Kshs 300,000/= as general damages for pain and suffering was not reasonable and was too low, given that the permanent incapacity of 25% suffered by the Appellant was not taken into account in assessing the damages.

I accordingly set aside the award for general damages by the trial magistrate and revise the said award as follows:-

a. General damages for pain suffering and loss of amenities  
.....Kshs. 750,000/=

b. Special damages as pleaded and proved and as awarded by trial court.....  
Kshs. 175,757/=

Total damages.....Kshs 925,757/=

Less 15% contribution .....Kshs. 138,863.55

**TOTAL AWARD** **Kshs. 786,893.45**

I accordingly allow this appeal only to the extent of setting aside the award of s total damages of Kshs 406,175/50 and substituting it with an award of total damages of Kshs 786,893/45 . The consent as to liability in the ratio of 85:15 is upheld.

I also award 85 % of the costs in the trial court and 85% of the costs of the appeal to the Appellant.

It is so ordered.

**DATED AT MACHAKOS THIS 8<sup>TH</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**