



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 150 OF 2013**

**AUTO SELECTION KENYA LTD.....1<sup>ST</sup> APPELLANT**

**CAROLINE WAWERU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARITY WANJA KAGIRI.....RESPONDENT**

**(An Appeal arising out of the judgment of H. Nyakweba PM delivered on 24<sup>th</sup> June 2013 in Kilungu Principal Magistrate's Court Civil Case No. 71 of 2012)**

**JUDGMENT**

The Appellants were the original Defendants in Civil Case No. 71 of 2012 at Kilungu Principal Magistrate's Court, and have appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 24/6/2013. The learned magistrate found the Appellants to be 100% liable for an accident that occurred on 23/1/2012. The trial magistrate awarded the Respondent total damages of Kshs 815,000/=, being Kshs. 800,000/= as general damages for pain and suffering and Kshs. 15,000/= for special damages.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 22<sup>nd</sup> July 2013, wherein their grounds of appeal are as follows:

1. That the learned magistrate erred in law and in fact in finding that the Respondent was entitled to general damages of Kshs. 815,000/= that was excessive and manifestly too high in view of the injuries suffered by Respondent.
2. That the learned magistrate's award of general damages was inordinately high as to be an erroneous estimate of general damages and was a miscarriage of justice.
3. That the learned magistrate erred in law and in fact in failing to rely on or accord due weight to or completely disregarded Dr. Opiyo's medical report dated 25<sup>th</sup> March 2013 which found that the Respondent had sustained left mandible fracture which had healed with no permanent incapacitation.
4. That the learned magistrate erred in fact and in law in failing to consider the Appellants' submissions on quantum.
5. That the learned magistrate erred in fact and in law in failing to consider conventional awards for general damages in cases of similar injuries.

The Appellants are praying for orders that the appeal be allowed with costs; that the judgement of the Honourable Principal Magistrate Hon. Nyakweba as far as the award on general damages is concerned dated 24<sup>th</sup> June 2013 be set aside and the Respondent's suit be dismissed with cost to the Appellants; and

that the court awards the Respondent quantum of general damages commensurate with the injuries sustained.

## **The Facts and Evidence**

I will proceed with a summary of the facts and evidence that was given in the trial Court. The brief facts of the case are that the Respondent who was the original Plaintiff instituted a suit in the lower court by filing a plaint dated 8.11.2012. She stated therein that, on or about 23/1/2012, she was travelling in Motor Vehicle Registration No. KAQ 507K owned by the Appellants along Nairobi/Mombasa road near Emali area, and that the Appellants' driver drove the vehicle so negligently that he lost control of the said vehicle and veered off the road and plunged into a river. An accident thereupon occurred and the Respondent sustained severe bodily injuries, suffered great loss and damage.

The particulars of the injuries were as follows:

- a. Cut wound on the face 10cm on left cheek
- b. Fracture on lower mandible
- c. Blunt injury to the mouth with shattering teeth
- d. Fracture on ribs left side
- e. Fracture on pelvic bone
- f. Multiple cuts on the left forearm
- g. Injury to the left arm with reduced movement
- h. Injury on the lower limbs with reduced movement.

The Respondent sought special damages of Ksh 15,000/= for medical related expenses, general damages for pain, suffering and loss of amenities, and costs of the suit.

The Appellants filed a Defence in the trial Court dated 19<sup>th</sup> January 2013, wherein they denied ownership of motor vehicle registration number KAQ 507K and that the Respondent was a lawful passenger therein. They also denied the occurrence of any accident and the particulars of negligence alleged by the Respondent, and in the alternative, averred that any such occurrence was caused solely and/or substantially contributed to by the negligence of the Plaintiff or by inevitable accident. The Appellants further denied the injuries and damages particularized in the Respondent's Plaint.

The Respondent testified in the trial Court as PW1. Her testimony was on the occurrence of the accident and the injuries she suffered. She testified that she was first admitted at the Makindu District Hospital for one day, and then transferred to St Mary's Hospital where she was admitted for seven days. Dr Mutungi, the doctor who examined the Respondent, also gave evidence as PW2 in the trial Court. He testified that he examined the Respondent on 29/10/2012, and found that she had sustained severe soft tissue injuries and skeletal injuries and needed to visit the dentist regularly. He produced the P3 form, treatment notes and discharge note as exhibits in the lower court. His medical report showed that the Respondent had suffered a blunt head trauma, a cut wound on the left cheek, a fracture on the lower mandible, fracture in the left ribs, fractured pelvis, multiple cuts on the left forearm, reduced movement of the left arm and blunt injury to both lower limbs

The Appellants called Dr. Sophia Opiyo as the only Defence witness (DW1) in the trial Court. The doctor testified that she examined the Respondent on 16/4/2013, and opined that she sustained pelvis and rib fractures which injuries were not permanent and had healed.

The Respondent in her submissions in the trial court relied on the decision in **Lucy Nyambura vs Stephen Njuguna Gathui, NRB HCCC No. 2418 of 1990**, and submitted that the Plaintiff in that suit sustained less severe injuries and were awarded Kshs 1,000,000/= as general damages. She further submitted that an award of Kshs 900,000/= would in the circumstances be reasonable. The Appellants on the other hand relied on the decision in **Stanley Mukumu vs Kariuki, NRB HCCC No. 393 of 1989** where an award of Kshs 230,000/= as general damages was given for severe soft tissue injuries and fractures. The Appellants were of the view that an award of Kshs 300,000/= was sufficient.

## **The Issues and Determination**

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are not contesting the issue of liability, and only that of the quantum of damages. This Court will therefore not determine on liability.

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 Appellants and Respondent filed written submissions on the present appeal. The Appellants in submissions dated 10/8/2015 argued that it was not in dispute that the Respondent had suffered fractures to the lower mandible, left rib and pelvis, which had healed well without any incapacitation. Further, that this was brought out in the testimonies PW2 and DW1, the doctors who were witnesses in the trial. That in view of the circumstances the award of Kshs. 815,000/= be substituted with an award of Kshs. 300,000/=.

The Appellants cited the case of **Michael Muimi Kimanzi vs Jamsons Industries Ltd & Another (2015) eKLR** in which the injuries sustained were commuted multiple fractures of the right mandible and a sprain injury to the right shoulder, for which the appellate judge awarded Kshs. 600,000/= as general damages. The Appellants argued that the injuries suffered by the Respondent in the instant case were less severe and an award of Kshs. 300,000/= would suffice.

In response the Respondent filed submissions dated 9.9.2015 in which she argued that the court should not interfere with the award as the Appellants were found to be 100% liable. Secondly, the award of special damages had been sufficiently proved by the Respondent at trial. Finally, that on quantum of damages, the principles laid out in **Jabane vs Olenja, Civil Appeal No. 2 of 1986** on when a court can interfere with the award of the trial court should be considered, and that the Appellants have not proved any of the said principles to warrant an interference with the award at trial.

I have considered the evidence given in the lower Court and the arguments made by the parties. It is not contested by the parties that the Respondent suffered injuries of fractures to the lower mandible, left rib and pelvis that healed without any incapacitation. The medical report by Dr. Mutungi produced as an exhibit in the trial Court also showed soft tissue injuries to the Respondent's face and left arm. I therefore find that the Respondent suffered multiple fractures to her lower mandible, left ribs and pelvis, as well as soft tissue injuries.

I note in this respect that these injuries were more severe than those suffered in **Michael Muimi Kimanzi vs Jamsons Industries Ltd & Another (2015) eKLR** which was relied upon by the Appellants. In that case the Appellant suffered multiple fracture of the right mandible and a sprain injury to his right shoulder, and the learned Judge found an award of Kshs 600,000/= to be adequate compensation for pain and suffering. No incapacitation was indicated in the case. The Respondent in the present appeal however in addition suffered fractures to her ribs and severe soft tissue injuries.

Similarly, the injuries the Respondent herein suffered were also less severe than those in **Stanley**

**Mukumu vs Kariuki, NRB HCCC No. 393 of 1989**, which was relied on by the Appellants in the trial court. The Plaintiff in that case suffered two fractures of the superior and inferior pubic ramil and was awarded Kshs 250,000/= in 1991, more than 20 years before the commencement of the trial in the lower court. There was also no indication that the Plaintiff suffered any incapacitation as a result of his injuries. This Court notes that the injuries suffered in that case was only but one of the injuries suffered by the Respondent in the present appeal, who in addition suffered fracture of her left mandible, fracture of her ribs and soft tissue injuries.

The injuries the Respondent suffered are however less severe that the injuries suffered in **Lucy Nyambura vs Stephen Njuguna Gathui, NRB HCCC No. 2418 of 1990** where an award of Kshs 1,000,000/= was also granted in 1991 for general damages. This is the case that the Respondent relied upon for her claim for Kshs 900,000/= in the trial Court. The injuries suffered by the Plaintiff in that case were a ruptured urinary bladder, fractured pelvis and laceration of the right vaginal wall. The said Plaintiff was in addition hospitalised for 4 weeks and her right leg healed with a 4-cm shortening. She was also not able to wear certain footwear and was likely to develop complications in childbirth as a result of the injuries she suffered.

In the premises I find that the learned trial magistrate's did not err, as he did find that the authorities cited by the parties bore injuries which were different from those sustained by the Respondent herein. Further, his award of Kshs 800,000/= as general damages for pain and suffering was not too high or too low given the awards granted in the cases cited in the foregoing, which were for injuries that were either less or more severe than those suffered in the present appeal.

In addition some of the said awards were given more than 20 years ago. The closest award in time was that of Kshs 600,000/= in **Michael Muimi Kimanzi vs Jamsons Industries Ltd & Another (2015) eKLR** , which the Court has found was for injuries that were less severe. Therefore an award of Kshs 800,000/= by the trail magistrate was reasonable. I also do not find any irrelevant factor that the learned magistrate took into account or relevant factor that was not considered in assessing the damages.

I accordingly dismiss this appeal for the above reasons and uphold the decision of the learned magistrate.

I award the costs of the appeal to the Respondent.

It is so ordered.

**DATED AT MACHAKOS THIS 5<sup>TH</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**