



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 82 OF 2008**

**T A M (Minor suing thro' Her father and next friend J O. M).....APPELLANT**

**VERSUS**

**RICHARD KIRIMI KINOTI.....1<sup>ST</sup> RESPONDENT**

**PETER KABIRU WANJOHI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

By a plaint filed in the Chief Magistrate court at Milimani Nairobi on the 8<sup>th</sup> day of June, 2005, the Appellant T A M, Minor suing through her father and next friend J O M lodged a claim against the Respondents, Richard Kirimi Kinoti and Peter Kabiru Wanjohi for general and special damages, interests and costs for personal injuries sustained in a motor vehicle accident.

The Appellant pleaded that on the 12<sup>th</sup> day of June, 2002 the Minor T A M was a lawful pedestrian within Umoja Estate, along Moi drive, in Nairobi when the 2<sup>nd</sup> Appellant so recklessly and carelessly drove, managed and/or controlled motor vehicle Registration Number KAM 393K and caused the same to violently collide with the Plaintiff thereby seriously injuring her. The particulars of negligence on the part of the 2<sup>nd</sup> Appellant were pleaded in paragraph 4 of the plaint.

On the 15<sup>th</sup> August 2005 the Respondents entered appearance and on the 17<sup>th</sup> August, 2005, they filed a joint defence to the claim. In paragraph 4 of the defence, the defendants denied the occurrence of the accident but in the alternative and without prejudice averred that if the accident complained of occurred, they denied the particulars of negligence and attributed negligence to the Plaintiff in paragraph 6 of the Plaintiff. The respondents went further and denied all the other particulars in the Plaintiff save for the jurisdiction of the court.

Though the Respondents attributed negligence to the Appellant, the counsel for the Appellant did not file a reply to the defence which has a bearing on liability but since the appeal does not touch on liability, this court will not delve into that issue.

The lower court matter proceeded for hearing on the 13<sup>th</sup> day of December, 2007. On the said date both counsels agreed to put in the medical reports by Dr. Maina Ruga dated 20<sup>th</sup> November, 2007 and by Dr. Otieno dated 10<sup>th</sup> August, 2007 without calling the makers.

The Plaintiff called two witnesses. She testified as PW1 and her father J O M who testified as PW2. The Defendants though represented by a counsel did not call any witnesses in support of their case but the counsel participated in the trial by cross examining the plaintiff's witnesses.

Parties thereafter filed submissions on the 17<sup>th</sup> day of January, 2008. After the trial, the learned magistrate awarded general damages in the sum of Kshs.160,000/- plus costs and interests but did not award special damages because they were not proved as per his judgment.

The Appellant, aggrieved by the said judgment filed the appeal herein on the 21<sup>st</sup> day of February, 2008 which appeal is essentially on quantum of damages. The Appellant preferred three grounds of Appeal as listed hereunder:-

1. The trial magistrate erred in law and in fact in failing to take into account the serious nature of the injuries the appellant sustained and thereby arrived at an assessment of damages which was manifestly inadequate and inappropriate in the circumstances of the case.
2. In awarding Kshs.160,000/- as general damages and declining to award Kshs.8,200 claimed special damages. The learned trial magistrate acted on wrong principles of law and reached an erroneous estimate of damages to which the Appellant was entitled.
3. The learned trial magistrate erred in law and in fact in failing to appreciate and take into consideration the pain and suffering the Appellant underwent following the injuries she sustained and the sums spent in treating the Appellant which were not claimed from the Respondents and this made an award which was inordinately low in the circumstances of the case.

These grounds of appeal were argued on behalf of the appellant by learned Counsel Mr. Ogegu and were opposed on behalf of the Respondents by learned counsel M/s. Ombonyo.

The summary of the evidence was that the Plaintiff who testified as PW1 was on 12<sup>th</sup> June, 2002 coming from [*particulars withheld*] Primary School in company of other siblings. The cars had stopped, her sister crossed the road and she was left behind. She later crossed but a school van came along and hit her. The accident occurred in Umoja.

She fell down after she was hit but she was lifted and put into the van and was taken to Emmaus Hospital near where the accident occurred. She sustained bruises and a fracture on her leg. Her parents were contacted who transferred her to Kenyatta Hospital where she was admitted. She was later treated at Nairobi Hospital. A plate was inserted on her leg but by the time she testified, she had healed. The metal plate has since been removed leaving a large scar at the site.

PW2 J O M gave evidence during the trial. He is the father to the Plaintiff through whom the plaintiff has sued as the next friend. He told the court that on the 12<sup>th</sup> June, 2002, he received a telephone call from his wife who informed him that their daughter (plaintiff) was involved in a road accident and had been taken to Emmaus Hospital.

He rushed to the scene and managed to see her daughter who had sustained a fracture on the left leg. He was able to identify the van that hit his daughter as registration number KAM 393K. He found it parked outside the hospital and the driver explained to him what had happened. He took his daughter to Kenyatta National Hospital where she was admitted for 4 weeks. A metal plate was inserted on her leg. He produced documents in support of the Plaintiff's case which were produced as exhibits 2(a) and (b). He told the court he spent Kshs.2,700/- which was covered by his employer's medical cover. Upon discharge the plaintiff was discharged on crutches for 2 months and PW2 told the court that he bought crutches at Kshs.3,500/- but he did not have the receipts as he had misplaced them. He reported the accident at Buruburu Police Station where he was issued with a police abstract form which he produced as exhibit 3. He produced a P3 form as exhibit 4. The plate was removed at Kshs.67,000/- which was paid through PW2's medical cover but about Kshs.4,000/- was deducted from his salary. The plaintiff was seen by Dr.

Otieno who prepared for her a medical report at Kshs.3,000/-. He did not produce the receipt which he told the court he had misplaced. In his evidence his daughter has recovered well but occasionally she complains of pain in the injury site.

The appeal is on damages and this court shall restrict itself to that issue only as liability is not in issue. Mr. Ogegu for the Appellant argued the three grounds of Appeal globally. He submitted that the court's assessment of damages at Kshs.160,000 was too low taking into account the injuries that the Plaintiff sustained. He based his submissions on the P3 form and the medical report by Doctor Otieno dated 3<sup>rd</sup> August, 2007. He urged the court to consider the submissions that were made by the counsel for the Appellant in the lower court and the proposed award of Ksh.300,000/- and the two authorities in support being HCCC No. 138 of 1987 **Stephen Ngunza Mbandi Vs Dismas K Kianthe Eliud & another** where for a fracture of left forearm, the court awarded general damages of Ksh.200,000/-

The other authority he referred to in the lower court is HCCC No. 154/1988 **Agnes Akoth & 3 others Vs Nyabichuku Farm & Another** where the Plaintiff who sustained fracture of the femur was awarded Ksh.220,000/- as general damages. He submitted that the lower court adopted fully the proposal made by the Respondents of Ksh.160,000/- and failed to take into account the submissions filed by the Appellant.

He referred the court to the Appellant's list of authorities filed on 30<sup>th</sup> September, 2015. He referred to the cases of: -

1. ***Anne Muriithi, Lilian Kathoki, Naomi Nzisa, Mary Nzomo, Anne Njeru & Jane Syombua Sammy Vs the Headmistress Mks Girls, The Chairman Board of Governors & Wamua Makau (2003) eKLR.***

2. ***Beatrice Kidade Vs Wilson Simiyu Siambi [2014] eKLR.***

3. ***Zipporah Wambui Vs Gachuru Kiogora [2004] eKLR.***

M/s. Ombonya the learned counsel for Respondents vigorously supported the judgment of the trial court. She submitted that the award of general damages made by the lower court in the sum of Ksh.160,000/- was adequate. She told the court that the Appellant failed to file his submissions in the lower court to guide the court on quantum of damages and the only guide line that the court considered was the submissions by the Defendant's counsel. She referred the court to the Coram for the 7<sup>th</sup> January, 2008 to the effect that the Plaintiff did not hand over submissions to the court on that day. She referred to the medical report of the Plaintiff by Dr. Otieno and argued that though the Plaintiff sustained a fracture of the femur, the Doctor says that she has recovered from the injuries. She further submitted that this was confirmed by the minor in her evidence when she told the court that she is able to run and play. The injuries healed well leaving a scar. She referred the court to the case of **Alex Okene Asava (a minor) Vs William Ongweno & another** HCCC No. 3559 of 1987 Nairobi, where the Plaintiff aged 8 years sustained a fracture of both right and left femur. He healed with permanent incapacity, the court awarded general damages of Ksh.50,000/-

She referred to the second case of **Swabah Mafudh Vs Mini Bakeries Ltd** where the Plaintiff a minor sustained a fracture of the right femur and bruises on the face and hands and general damages were awarded at Ksh.90,000/-. It was on the basis of those authorities and taking into account passage of time that the Respondents proposed a sum of Ksh.160,000/- in the lower court. She took issue with the authorities cited by the Appellant i.e. the case of **Stephen Ngunze Vs Dismas Kiatini & Another** HCCC 138/1997 and told the court that the injuries in this case are more severe than the ones sustained by the Plaintiff in the case herein.

The other case that she took issue with is **Agnes Akoth & 3 others Vs Nyabichuku Farm & Another** HCCC 1540/1988 which she said the injuries therein were more severe than for the Plaintiff in this case and the same applies to the ones relied on by the Appellant in the lower court. She urged the court to dismiss the Appeal and uphold the judgment of the lower court. As for the special damages, she submitted that the court was right in disallowing the same because no receipts were produced and no

explanation was given to court why they were not available.

Since this is a first appeal, I am required to consider the evidence adduced before the trial court, evaluate it and draw my own conclusion but always bearing in mind and making allowance for the fact that I did not have the opportunity which the trial court had to see and hear the witnesses testify. See **Selle & another Vs Associated Motor Boat Company Ltd & another (1968) E.A 12/3** and **Ramji Ratna and Company Ltd Vs Wood Products Kenya Ltd** Civil Appeal No. 117 of 2001.

I also bear in mind that this court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial magistrate is shown demonstrably to have acted on the wrong principle in reaching the findings that he did. The only issue this court is called upon to determine is whether the award of Ksh.160,000/- was adequate as submitted by the counsel for the Respondent or whether it is excessively inadequate as submitted by the counsel for the Appellant.

In this regard, the court is guided by the two medical reports by Dr. Otieno P. A. O and Dr. Maina Ruga. The two Doctors are in agreement on the injury sustained by the Plaintiff which is fracture of the left femur. In the opinions by the two Doctors, the Plaintiff has healed well save for a permanent scar on her left thigh. The authorities the Appellant has referred to in the list of authorities filed on 30<sup>th</sup> September, 2015 have more severe injuries than what the Plaintiff sustained in this case and therefore, are not very useful in this Appeal. However, this court notes that the Plaintiff suffered a lot pain after the accident she was admitted at Kenyatta National Hospital for 4 weeks where a metal bar was inserted on her leg and after the discharge from hospital, she was on crutches for 2 months. She was later admitted at Nairobi Hospital for two days when the plate was removed.

The lower court erred in failing to consider the submissions filed by the Appellant yet they were filed on time and were on record. Had the court considered the said submissions and the authorities attached to the same may be the learned magistrate could have made a different finding on quantum. I have looked at the authorities quoted by both parties in the lower court and I find the case of **Agnes Akoth & 3 others Vs Nyabichuku Farm & Another**, HCCC No. 154 of 1998 very persuasive in this case where for similar injury, an award of Kshs.220,000/- was made as general damages. This was in the year 1987. As the court rightly stated in the cases of **Shabani Vs City Council of Nairobi (1985) KLR 516** and **Kiragari Vs Aya (1985) KLR 273**, in assessment of general damages, it must be borne in mind that each case depends on its own facts, award should not be excessive, comparable injuries should attract comparable awards and inflation should be taken into account.

Taking into account all the above factors, I would award Ksh.250,000/- as general damages for pain and suffering to the Appellant. I make no award on special damages as they were not proved. Accordingly, I allow the appeal to that extent, set aside the judgment of the lower court and substitute therefore Judgment for the Appellant for Ksh.250,000/- general damages. Costs of the Appeal are awarded to the Appellant. Those are my orders.

Dated and delivered at Nairobi this 5<sup>th</sup> day of November, 2015.

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**LUCY NJUGUNA**

**JUDGE**

In the presence of

..... for the Appellant.

..... for the Respondent.