

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEALS NOS.41, 42, 43, 44 & 45 OF 2012 (CONSOLIDATED)

**BEING APPEALS FROM ORIGINAL JUDGEMENTS FROM MASENO PRINCIPAL
MAGISTRATE'S COURT IN CIVIL SUITS NOS. 62, 64, 61, 67, AND 65 OF 2010
RESPECTIVELY**

1. DICKSON NDUNGU KIREMBE1ST APPELLANT
2. JOHN KINUTHIA MBURU.....2ND APPELLANT

VERSUS

- 1.THERESA ATIENO.....1ST RESPONDENT
2. CONSOLATA AWINO MAKENYA.....2ND RESPONDENT
3. ESTHER AKINYI OCHIENG.....3RD RESPONDENT
4. EUNICE ALUOCH ODHIAMBO4TH RESPONDENT
5. GRACE ADHIAMBO AHAWO.....5TH RESPONDENT

J U D G M E N T

On 24/10/09 the respondents were traveling as lawful paying passengers in motor vehicle registration number KBC 638X Toyota matatu which belonged to the 1st appellant and being driven by the 2nd appellant. This was along Ukwala-Ugunja murram road. At Siranga the vehicle was involved in an accident as a result of which the respondents were injured. They each sued the appellants for general and special damages claiming that the accident was due to the negligent driving of the vehicle. The appellants denied each claim, but a consent was subsequently filed in which they were 85% liable and the respondents 15% liable. The trial court assessed general damages. The appellants were aggrieved by the assessment which they considered to be manifestly excessive and not being in line with the prevailing awards for similar injuries.

The decision as to what is payable for injuries suffered in a road accident entails the exercise of discretion on the part of the trial court. Such an award should be a reasonable reflection of the injuries suffered. The court should ensure that, as far as is reasonably possible, comparable injuries should be compensated by comparable awards (**RAHIMA TAYAB AND ANOTHER .V. ANNA MARY KINARU [1982-1988] 1 KAR 90**).

An appellate court will not disturb the quantum of damages assessed by the trial court unless the appellant is able to demonstrate that the court, in reaching the figure, took into account an irrelevant factor or failed to consider a relevant factor or that, short of this, gave an award that was so inordinately low or so inordinately high that it was a wholly erroneous estimate of the injury suffered (**KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO KANINI .V. A.M. LUBIA AND OLIVE LUBIA [1982-1985]1 KAR 727**).

The 1st respondent suffered swelling to the neck, tenderness all over the abdomen and back and cut wound on the left foot. She was stitched, given tetanus toxoid and analgesics. The P3 indicates she suffered harm. She was treated as an outpatient. She was aged 43 and a business lady. When she was seen by doctor Okombo she complained that she still had pains in the injured areas. She indicated that she could not lift heavy objects and was walking with a gait. The trial court awarded Kshs.300,000/= on 100% basis. This worked to Kshs.255,000/= in general damages. Certainly, the amount was excessive given the injuries. The 1st respondent suffered soft tissue injuries which produced no complications.

In the case of **STANLEY MAORE .V. GEOFFREY MWENDA, Civil Appeal No.147 of 2002 at Nyeri**, the respondent suffered injury to the right shoulder, chest, back and left leg with haematoma and had been awarded kshs.300,000/= by the High Court. The Court of Appeal found that those were soft tissue injuries and reduced the amount to Kshs.100,000/= in 2004. This is a relevant authority, but I consider the issue of inflation. Kshs.150,000/= would be a reasonable award on 100% basis. With contribution, the award shall be Kshs.127,500/= together with costs and interest.

The 2nd respondent was 32 and was admitted for two days at Nyanza Provincial Hospital. She suffered injuries to the chest, back, neck, lower limbs and shoulders and facial lacerations. Medical report indicated pain to the injured parts. She required physiotherapy and analgesics. The trial court awarded Kshs.350,000/=. I consider the authority above. However, the injuries were slightly more serious than those suffered by the 1st respondent. Kshs.350,000/= was inordinately high in the circumstances. I reduce it to Kshs.200,000/=. Considering contribution, she will get Kshs.170,000/= plus costs and interest.

The 3rd respondent was aged 25 and was admitted at Kitale District Hospital for 8 days. She suffered head, chest, and left ankle joint injuries, bruises on the forearm and compound fracture of the left tibia/fibula. The injuries were cleaned and dressed and plaster of paris put on the fractured site. The ankle joint wound had not healed at the time of examination, but was going to heal with continued medication. The trial court awarded Kshs.600,000/= on 100% basis. This worked to Kshs.510,000/= when contribution was considered. She certainly suffered relatively serious injuries. I consider that in **CECILIA W. MWANGI & ANOTHER .V. RUTH W. MWANGI, Civil Appeal No.251 of 1996 at Nyeri**, the respondent suffered head injury (cerebral concussion), cut wound over the vertex of scalp, cut wounds over the right lower leg and injury to the pelvis resulting in fractures of the right superior and inferior pubic rami. The injuries had healed well with minimal displacement and no serious complication, except for the prospect of osteoarthritis. The High Court awarded Kshs.450,000/= in general damages but that was reduced to Kshs.300,000/= in 1997. These injuries were more serious than those in present case, but the award was many years ago. I award Kshs.400,000/= on 100% basis as Kshs.600,000/= was in my view so erroneous as to lead to the belief that it was too high to merit interference. Considering contribution, the award shall be Kshs.340,000/= together with costs and interest.

The 4th respondent was 35 and a fish trader. She suffered tenderness in the chest, tender swelling on the right hand in respect of which x-ray showed fracture of distal metacarpal, swelling of the left knee and bruises in the face. She was admitted for 3 days at Kitale District Hospital. Treatment included application of plaster of paris, tetanus toxoid and pain killers. She was awarded Kshs.400,000/= in general damages, which worked to Kshs.340,000/= after contribution. Given the authorities cited above, the award was erroneously high. It is hereby reduced to Kshs.250,000/=. Considering contribution, the award shall be Kshs.212,500/= plus costs and interest.

The 5th respondent suffered multiple cuts on both legs anterior aspect, tenderness on the chest and bruises on the hands. She was treated as an outpatient on antibiotics and painkillers. Those injuries were nearly similar to those suffered by the 1st respondent, and therefore the award of Kshs.450,000/= in general damages was inordinately high and therefore erroneous. The injuries suffered were only soft tissue. She is awarded Kshs.150,000/=. Considering contribution, the award shall be Kshs.127,500/= which shall be with costs and interest.

To that extend, therefore, the appeal is allowed with costs.

Dated, signed and delivered this 10th March, 2014.

A. O. MUCHELULE

JUDGE