



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL CASE NO. 31 OF 2011**

**ISMAEL KAGUONGO..... APPELLANT**

**VERSUS**

**NICHOLAS NJOROGE KANYI.....RESPONDENT**

*(Appeal arising from the judgment of Hon L. Mbugua Ag.*

*Principal Magistrate in Karatina Civil suit No. 14 of 2009)*

**JUDGMENT**

1. By a plaint dated 28th January 2009 the respondent sued the appellant for general and special damages arising out of a road traffic accident on 23rd December 2007 involving motor vehicle registration No. KAS 485K owned by the appellant and the respondent who was walking along Karatina-Mukurweini/Ichamara Road.
2. The respondent pleaded that the said accident and subsequent injuries were caused solely by the negligence of the appellant particulars of which were pleaded in paragraph 5 thereof and at paragraph 6 the particulars of injuries and special damages were stated as follows:

a. **Particulars of injuries**

*i. compound fracture of the right tibia and fibula*

*ii. Blunt Trauma to the right shoulder*

b. **Particulars of special damages**

*i. police abstract - Ksh. 200*

*ii. Copy of records - Ksh. 500*

*iii. Medical expenses - Ksh. 76,269*

*iv. Medical report - Ksh. 1,800*

***Total - Ksh. 78,769***

3. By a defence dated 9th March 2009 the appellant denied the occurrence of the said accident, ownership of the subject motor vehicle and in the alternative attributed the said accident to the negligence and or contribution by the respondent.

4. On 21st July 2010 consent judgment was entered on liability at 80%:20% in favour of the respondent and the matter fixed for assessment of damages at which the respondent testified that he sustained fracture of the right leg and injuries to the left shoulder from which he incurred medical expenses of Ksh. 76,269/- Two medical reports by Dr. Theophilus Wangata dated 16th December 2008 and Dr. Wambugu P.M. dated 14th April 2009 were produced by consent.
5. In assessing general damages at Ksh. 500,000/- the trial court pronounced herself as follows:

***I have considered that the healing of fracture resulted in slight shortening of the length and that there is post traumatic chronic osteomyelitis”.***

6. Being dissatisfied with the said award the appellant filed this appeal and raised the following grounds of appeal.

1. ***That the learned magistrate erred both in law and facts in assessing and awarding Ksh. 500,000/- on general damages as the same is excessively high.***
2. ***That the learned magistrate erred both in law and facts in failing to take into account the medical documents before her whilst making the award.***
3. ***That the learned magistrate erred both in law and fact in failing to take into account the submissions of both counsels whilst making the award.***
4. ***That the learned magistrate erred both in law and fact in making an award on quantum which was unsupported by authorities.***

1. Directions were given that the appeal be determined by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the award was excessive given the nature of injuries sustained by the respondent and that the trial magistrate failed to take into account the medical documents produced before her. It was submitted that on the authority of JABANE v OLENJA this court ought to interfere with the award on damages and an award of Ksh. 300,000/- was proposed.
2. On behalf of the respondent it was submitted that the respondent has relied on the case of SAVCO STORES LTD v DAVID MWANGI (2008)eKLR where Ksh. 800,000 was awarded and therefore the trial magistrate must have considered the injuries sustained by the respondent in awarding Ksh. 500,000/-. It was further submitted that the trial court took into account the medical documents and submission before arriving at an award herein.
3. In this appeal there is only one issue for determination. That is whether the award of Ksh. 500,000/= was excessive so as to be interfered with by the appellate court.
4. In the case of JABANE v OLENJA(1986)KLR the court of appeal set up the follow up points to be considered in approaching an award of damages made by trial court.

***a) Each case depends on its own facts.***

***b. The award should not be excessive.***

***c. Comparable injuries should attract comparable awards.***

***d. Inflation should be taken into account.***

***e. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or is so low as to be erroneous estimate. It should be left alone.***

5. The Respondent before the trial court submitted the case of SAVCO STORES LTD supra wherein the plaintiff sustained fracture of the left Tibia and fibula and fracture of the ulna the high court Lenaola J confirmed an award of Ksh. 800,000/-. The appellant submitted the case of ISAYA

MAGUMBA KIRAMBI vs JOHN KIPNGETICH KOECH & OTHERS HCCC NO. 5141 OF 1991 and GEOFFREY NDUNGU NGUGI v NJOROGI WAKARURI & OTHERS HCCC NO. 145 OF 1991 where Ksh. 250,000/- was awarded.

6. Having taken into account the rate of inflation and the years when the said authorities were decided I am of the considered opinion that an award of Ksh. 500,000/- is not excessive and would therefore decline to interfere with the trial court exercise of her discretion herein.
7. In the final analysis I find no merit on the appeal herein which I hereby dismiss with cost to the respondent.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of Mr. Gitibi for Mr. Mwaniki for respondent and in the absence of the appellant.

J. WAKIAGA

JUDGE