



**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT KISUMU  
Civil Appeal 256 of 2005**

**ED .....1<sup>ST</sup> APPELLANT**

**RAS AMIR .....2<sup>ND</sup> APPELLANT**

**JOSEPH MAINGI NDETO.....3<sup>RD</sup> APPELLANT**

**AND**

**JANET ATIENO .....RESPONDENT**

***(An appeal from the judgment/decree delivered at High Court, Kisii (Arap Birech, commissioner of Assize) on 21<sup>st</sup> August, 2002***

***in***

***H.C.C. NO. 68 OF 2001)***

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the High Court delivered by P. K. K. Arap Birech, a Commissioner of Assize on 21<sup>st</sup> August 2002 awarding Shs. 500,000 to the respondent as general damages against the appellant for injuries sustained by the respondent in a road traffic accident.

There are two grounds of appeal namely, that the award was “*totally incommensurate with the actual extent of the respondents injuries*” and that the Commissioner of Assize failed to consider submissions on quantum awardable to the respondent.

The respondent was a fare paying passenger in the first appellant’s bus which collided with another vehicle thereby causing injuries to the respondent. The appellants were represented by the M/s Aminga, Opiyo, Masese & Company advocates who still represent them in this appeal. At the commencement of the trial the appellants admitted full liability resulting in a judgment by consent in favour of the respondent against the appellant to the extent of 100% liability.

Thereafter the respondent gave evidence relating to the injuries she sustained. Apparently she was not cross-examined on her evidence. The appellant did not call any witnesses at the trial. After the close of the trial the respective counsel filed written submissions.

The respondent relied on the medical report prepared by Dr. J. O. Kembe while the appellants relied on the medical report prepared by Dr. JayantKumar Karania. The respondent was about 32 years old when she was examined by Dr. Kembe about six months after the accident. It follows that she was about 31 years of age at the time of the accident.

According to Dr. Kembe the respondent sustained:-

- (a) Deep cut wound frontal head exposing the skull bone. She was unconscious for about 8 hours with brain concussion.
- (b) A bang to the right – upper and lower jaw loosening the right-lower incisors teeth.
- (c) Injury to the right shoulder with bruises over it.
- (d) Deep cut wound in right upper limbs just below right elbow.
- (e) Injury to the right big toe with bruises over it.
- (f) Blunt injury to the anterior part of the chest.

She was admitted for one day at Rift Valley Provincial Hospital, Nakuru. Thereafter she was transferred to Matata Nursing & Maternity Home at Oyugis where she was admitted for about 2 weeks (from 9<sup>th</sup> September 1999 – 21<sup>st</sup> September 1999). Although the injuries healed she was left with ugly keloid scars on the frontal area of the head including upper part of the head; on the right shoulder and on the right upper arm.

Dr. Kembe concluded in his report:-

*“However this lady at her young age is finding it very difficult to mix with people freely in public places due to ugly scars on her head and face. She cannot leave her head uncovered like any other lady of her age. This has affected her socially and may in future affect her free business transactions. For these scars to be corrected, highly specialized plastic surgery will be needed”.*

Dr. Jayant Kumar Karania indicates in his report that the respondent had healed scars on the right arm and head and that the scar near the right eye and on the right arm show keloid formation.

The respondent’s counsel had recommended an award of Kshs.600,000/= while the appellant’s Counsel had recommended kshs.100,000/=.

The assessment of damages is more like an exercise of judicial discretion and the appellate court will be slow to reverse the trial court on the question of the amount of damages unless it is satisfied that the Judge acted on a wrong principle of law, or misapprehended the facts or was for these or other reasons made a wholly erroneous estimate of damages suffered (see ***Mariga v. Musila [1984] KLR 251***).

Mr. Mbago Omondi learned counsel for the appellant submitted that the damages awarded were manifestly excessive as to be wholly erroneous; that the respondent merely suffered soft tissue injuries and that the most serious injury suffered was a cut wound on the right upper arm.

On the other hand, Mr. Bunde learned counsel for the respondent submitted that the principles for interfering with an award have not been satisfied and that the injuries suffered were severe.

We have already set out the nature of the injuries sustained by the respondent. The learned Commissioner

of Assize said:-

*“I have considered the awards and the injuries suffered by the plaintiff therein. I have also considered the kind of injuries suffered by the plaintiff herein and the future effects on her body considering that she is in her early thirties.”*

Thus, the learned Commissioner of Assize considered the awards in the authorities cited before him and the injuries that the respondent sustained and also the future effect of injuries on her.

We do not, with respect, agree with the submission of the appellant’s counsel that the injuries sustained were soft tissue injuries. On the contrary, the injuries were classified as grievous harm a fact with which Dr. JayantKumar Karania agreed. Further, the ugly keloid scars on the head and face of the respondent which necessitates the covering of the head is a severe disability to the respondent who was then a young woman. Dr. Kembe was of the opinion that highly specialized plastic surgery was needed to correct the scars. However, the Commissioner of Assize did not give a separate award for the cost of future plastic surgery. The award of Kshs.500,000/= apparently includes the costs of future plastic surgery.

On our analysis, we are not satisfied that the award was inordinately high as to represent an erroneous estimate of the injuries sustained by the respondent in the circumstances. In the result we dismiss the appeal with costs to the respondent.

Orders accordingly.

**Dated and delivered at Kisumu this 22<sup>nd</sup> day of March, 2012.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**