**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 676 of 2000**

**PETER KAHUNGU …….....…….…….…….. 1ST APPELLANT**

**KENTMERE FLORA LIMITED …….....……. 2ND APPELLANT**

**VERSUS**

**SARAH NORAH ONGARO …….....…… RESPONDENT**

**JUDGMENT**

On the 22nd March, 1999 the Respondent, then an employee of the 2nd Appellant, while being ferried in the motor vehicle registration KAG 509G driven by the 1st Appellant to her place of work, fell off the lorry and got injured.

According to her, the accident happened because of the negligence of the 1st Appellant who drove the lorry recklessly over pot holes, causing her to fall out.

The Appellants case, on the other hand, is that the Respondent tried to alight from the moving lorry and got injured. She was negligent or substantially contributed to her accident.

The case was heard and determined by the learned trial magistrate (Mrs Ongeri) who delivered her Judgment on 30th November, 2000. She found for the Respondent, and awarded her Kshs.150,000/= in general damages. Aggrieved by that decision, the Appellants have appealed to this Court on the following grounds:

***(a) That the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the evidence placed before her.***

***(b) The learned trial magistrate erred in law and in fact in finding the appellant wholly liable against the weight of evidence.***

***(c) That the learned trial magistrate erred in law and in fact in awarding a sum manifestly excessive in the circumstances.***

***(d) The learned trial magistrate erred in law and in fact in coming to the conclusion that she did without any or any good reason or sufficient cause.***

Both liability and quantum are in issue in this appeal.

On the issue of liability, Mr Mungai, Counsel for the Appellants argued that the lower court made no finding on liability; that the Court gave no reasons for disbelieving the Appellant's witness, DW 1 who was a passenger in the same lorry as the Respondent, and who testified that the Respondent had attempted to alight from the lorry while it was moving; that there was no evidence that the doors of the lorry opened up as the lorry was being driven; that the said doors had been locked by DW 1; and finally that negligence had not been established against the Appellants. Counsel submitted that the Respondent was to wholly blame for the accident, or that she substantially contributed to that accident.

With regard to quantum, Counsel argued that the Respondent suffered only soft tissue injuries, hence the award was excessive. He relied on his submissions in the lower court and argued that no more than Kshs.50,000/= should have been awarded for general damages.

Mr Kimani, representing the Respondent, submitted that the Respondent had established her case on a balance of probability, and based on the injuries suffered, the award was fair.

Having heard the witnesses, and having observed their demeanour, and having considered submissions made by Counsel, the learned trial magistrate delivered herself as follows on the question of liability:

"**The Plaintiff alleges that she received injuries as a result of reckless driving of the motor vehicle. The defendant denied this allegation and asserted that the Plaintiff fell out of the motor vehicle while trying to alight from the motor vehicle in question.**

**The defendant's who initially denied the plaintiff's claim in toto lied that the defendant was trying to alight when she was injured. I believe the testimony of the plaintiff that she fell out of the motor vehicle when the doors which were not properly secured opened while the motor vehicle was passing over bumps."**

In coming to this conclusion, the trial court took into consideration two fairly different accounts of the accident given by two opposing witnesses.

It was the evidence of DW 1 an employee of the 2nd Appellant who testified that he boarded the lorry with other co-workers and remembers the driver closing the door. The lorry started moving at a slow speed and suddenly three men alighted and three women followed. He shouted that they would fall, and immediately banged on the driver's cabin asking him to stop. The driver stopped after the women had opened the door, and two of them had fallen down.

PW 1, who is the Respondent, testified in the lower court that she remembers boarding the company lorry on the material day at 7.00 am. The lorry was being driven fast, over pot holes when the door opened causing her to fall out. She admitted that she was standing against the door which was closed, but not fastened. The lorry was packed with people.

Based on the above evidence, the trial court chose to believe the Respondent. I see no reason to interfere with the trial court's findings of fact. As the Court of Appeal in ***Makube vs Nyamuro*** ***(1983) KLR 403*** said:

"***a court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

I, therefore, agree with the Judgment of the lower court on liability.

As for quantum, Counsel for Appellant argued that the award of Kshs.150,000/= was excessive.

The Court of Appeal in the case of ***Kivati vs Coastal Bottlers Ltd*** ***C A No 69 of 1984*** laid down the

following principle upon which an appellate court would interfere with the award of general damages:

"***The Court of Appeal should only disturb an award of damages when the trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."***

Medical evidence before the lower court showed that PW 2 Dr Wambugu examined the Respondent on 3rd December, 1999 after being involved in an accident on 22nd March, 1999. He outlined the injuries as follows:

(a) Cracked left upper molar tooth

(b) Bruises on both knees

(c) Blunt trauma to the back

She also sustained tissue injuries; the scars were permanent; however no permanent incapability occurred.

Based on this evidence, the trial court awarded Kshs.150,000/=.

In the case of ***John Nguguna Mungai vs Poseidon Investment Co Ltd HCCA 4801 of 1989*** the Plaintiff suffered cuts on the lower orbit of the eye, hand and left leg. Bruises on the thighs and other soft tissue injuries and most serious was the head injury. The court awarded him Kshs.90,000/- for general damages.

In the case of ***Erastus Mbugua vs James Maina Njenga Nairobi HCC No 4087 of 1987*** the Plaintiff sustained soft tissue injuries to several parts of the body and suffered fracture of the lower jaw. The court awarded him Kshs.80,000/= for general damages.

In the case of ***Philgona Helen Pamba & Another vs Sunil Mohanlal Shah Nairobi HCCC No 5228 of 1989*** the Plaintiff suffered soft tissue injuries to the head, right knee, chest and loss of one tooth. The scars on the face were permanent. The court awarded Kshs.80,000/= for general damages.

In the case of ***Stephen Kariuki Kiragu vs Pius Karau Mutune Nairobi HCCC No 5981 of 1989*** the Plaintiff sustained soft tissue injuries involving the head, laceration of the lower lip, injury to the left knee sprain of both shoulders and loss of five teeth. The court awarded her Kshs.80,000/= general damages.

The injuries sustained by the Respondent in this case are less serious than those mentioned in the above cases. Hence, the award was manifestly excessive. However, taking into account inflation over the years since the decisions in the above cases, I believe a fair and proper award in this case is Kshs.80,000/=.

Accordingly, I set aside the lower court's award of Kshs.150,000/= for general damages and substitute the same with an award of Kshs.80,000/=. I uphold the award of Kshs.2,000/= for specific damages.

As this appeal has partly succeeded, each party shall bear its own costs at appeal.

Dated and delivered at Nairobi this 17th day of November, 2004.

**ALNASHIR VISRAM**

**JUDGE**