**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 142 OF 2011**

**FRANCIS DRUMMOND & CO.LTD.....1ST APPELLANT**

**NDUNGU GATHINJI.....2ND APPELLANT**

**VERSUS**

**D M W.....RESPONDENT**

***(Appeal against judgment in Nyeri Chief Magistrates***

***Court Civil Case No. 160 of 2010(Hon. K. Cheruiyot)***

***delivered on 10th May, 2011)***

**BETWEEN**

**D M W (minor suing through next**

**friend and mother A W M).....PLAINTIFF**

**VERSUS**

**FRANCIS DRUMMOND & CO.LTD.....1ST DEFENDANT**

**NDUNGU GATHINJI.....2ND DEFENDANT**

**JUDGMENT**

**1. Pleadings:**

The appellants were sued by the respondent in the magistrates' court for general damages for pain, suffering and loss of amenities. The respondent also sought for special damages, costs of the suit and interest at court rates.

According to the plaint filed in court on 7th April, 2010, the cause of action arose out of a road traffic accident which occurred on 20th October, 2007 along Nyeri-Kamakwa road at Kamuyu shopping centre. It was alleged that the accident involved the 1st appellant's motor vehicle registration number KAJ 228 R

(Ford Taung) (herein "the motor vehicle") and which was being driven by the 2nd appellant at the material time. The respondent's contention was that the 2nd appellant drove, managed and/or controlled the motor vehicle so negligently that he caused it to lose control, veer off the road and knock down the respondent. Consequently, the plaintiff sustained severe injuries as a result of which he suffered loss and damage.

The injuries he sustained were particularised as a bruise on the temporal region; a tender, swollen and deformed left leg; a fracture of the left leg tibia bone; a fracture of the left leg fibula bone; and loss of consciousness. Because of the loss and damage he suffered as a result of these injuries, he claimed for both general and special damages.

The appellants contested the respondent's claim against them and filed a statement of defence in that regard. In it they denied that the 1st appellant was the owner or that the 2nd appellant was the driver of motor vehicle at the material time. They further denied that a road traffic accident involving this particular vehicle occurred as alleged by the respondent and if at all the accident occurred, then it was attributed to the respondent's negligence. They contended that the respondent must have been loitering aimlessly by the side of the road; he was crossing the road recklessly without due care and attention; he was walking on the road instead of using the pavement or the pedestrian path; and, finally, he was not cautious of other road users.

The appellants further denied that the doctrine of *res ipsa loquitor* was applicable in the circumstances of the case and further denied the particulars of injuries alleged to have been sustained by the respondent. Accordingly, they denied that the respondent was entitled to special damages.

They also questioned the jurisdiction of the court to try the suit on the ground that a similar suit had earlier been filed in the same court. They therefore urged that the suit should be dismissed with costs.

**2. The trial court's decision:**

After taking evidence of both parties, the trial court concluded that the appellant's were wholly to blame for the accident. The learned magistrate assessed the general damages for pain, suffering and loss of amenities at Kshs. 350,000/=; he also held that special damages of Kshs. 5,000/= had been proved. He thus entered judgment for the respondent against the defendants for a total sum of Kshs. 355,000/=, costs and interest.

The appellant's were not satisfied with the decision of the court and so they appealed against it. In their Memorandum of Appeal filed in this Court on 4th October, 2011, they raised the following grounds:

> 1) The learned magistrate erred in law and in fact in finding that the appellants were liable (for the accident).
>
> 2) The learned magistrate erred in law and in fact in awarding the respondent the sum of Kshs 355,000/= in general and special special damages.
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> 3) The learned trial magistrate erred in law and in fact in finding that the appellant was either the registered or beneficial owner or was the insured of motor vehicle registration number KAJ 228 R (Ford Taung) and that the vehicle was under the control, management and/or direction of the appellants or the driver, servant and/or agent of the 2nd appellant.
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> 4) The learned trial magistrate erred in law and in fact in failing to consider the written submissions of the defendants.
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> 5) The learned magistrate erred in law and in fact in delivering a judgment which was biased.
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> 6) The judgment of learned magistrate was against the weight of the evidence on record and that the

same went beyond the respondent's claim.

It is important at this juncture to consider the evidence on record in order to appreciate whether there is any merit in any of these grounds but more importantly, this court being the first appellate court has the legal obligation to evaluate the evidence proffered at the trial afresh and come to its own conclusions.

**3. Evidence:**

The plaintiff's mother, A W M, testified that on 20th October, 2007, a neighbour informed her that her son had been knocked down by a vehicle. She also informed the Court that a Good Samaritan had taken him to a Clinic from where he was referred to Nyeri provincial general hospital; he was admitted in this hospital for 3 days. The witness provided the documentary proof of her son's treatment, admission and discharge from the hospital.

She reported the accident to the police who issued her with the police abstract. She also produced a certificate of registration of the motor vehicle showing that its registered owner was the 1st appellant. As at the time of the accident her son, was walking home after attending Kenyatta day celebrations in Nyeri town.

The plaintiff's uncle, **G W M (PW2),** was with him at the time of the accident. He testified that he had been travelling in a public service vehicle together with the plaintiff and his sister. They alighted at Kamuyu shopping centre and crossed the road to the opposite side. Apparently, the plaintiff's sister's shoes had dropped in the vehicle in which they had been travelling and therefore this witness crossed the road back to the vehicle together with his niece to collect the shoes. Meanwhile, the plaintiff remained on the opposite side of the road and it is while he was there that he was knocked down by the motor vehicle. It was this witness' evidence that the accident vehicle was red and registered as KAJ 228 R; it was travelling towards Nyeri town, at the material time. He also testified that the vehicle did not stop after the accident.

A clinical officer at the Nyeri provincial general hospital, **Peter Karanja (PW3)** testified that he attended to the plaintiff at the casualty department. According to his evidence, the respondent was unconscious at the time and had sustained bruises on the left side of the head and fractures of the tibia and fibula on his left leg.

**Corporal Eric Kaaria (PW4)** a police officer then attached to Nyeri traffic base confirmed that indeed a road traffic accident involving motor vehicle registration number KAJ 228 R (Toyota Prado) and the plaintiff had occurred along Nyeri-Kamakwa road on 20th October, 2007.

The officer testified that after the police were given the registration number of the motor vehicle by the plaintiff's uncle, they established from the registrar of motor vehicles that it belonged to the 1st appellant. According to him, the registrar of motor vehicle gave his report on 18th of December, 2007. As at the time he testified, the police records indicated that the matter was still under investigation.

**Dr Fred Muleshe (PW4)** examined the plaintiff on 24th April, 2009. His evidence was that the plaintiff lost consciousness after the accident and was rushed to a health clinic where it was established that he had lost cardiac activity. Fortunately, he was resuscitated and referred to Nyeri provincial general hospital for further treatment. He was established to have sustained bruises on the left side of the head; a tender shoulder and deformed left leg; he also sustained a fracture of the left tibia and fibula. He was admitted and put on treatment. The bruises were cleaned and the fractures manipulated in a plaster. As at the time he examined the plaintiff he was complaining of pain in the left leg; however, there was no other deformity noted.

The 2nd appellant testified that on 20th October, 2007, at about 3 PM, he left Tetu for Nyeri town together with three other people in a motor vehicle registration number KAJ 228 R (Mitsubishi Pajero). He admitted that he was the driver of this car. When he reached at Kamuyu trading centre he saw a matatu;

he then had some noise. He saw somebody carrying a child from the matatu running across the road, towards the side of the road on which he was driving. He also saw other people run from the matatu crossing the road towards the same direction. Initially, he testified that he stopped for a minute but later in his testimony he testified that he did not stop but drove on to Green Hills Hotel in Nyeri town.

It was in 2009 when he was attending a funeral that a female police officer approached him and told him that his motor vehicle had been involved in a road traffic accident in Nyeri on 20th October, 2007. The police officer had been tasked to investigate the case but she did not follow it up because she had been transferred to a different station. She confiscated his insurance and asked the witness to report to Nyeri police station. He went to the station as directed and there he confirmed that indeed the police had been looking for him. The police arranged for a meeting between him and the plaintiff's mother who informed him that the plaintiff was her son and that he had been injured in a road traffic accident.

The witness confirmed that the motor vehicle he was driving was red but with yellow and white stripes and as at the material time, it was registered in the name of the 1st appellant.

The 2nd defence witness **Zipporah Wangechi Kanyugo (DW2)** was one of the passengers that were travelling in the motor vehicle at the material time. She recalled that she saw a matatu at Kamakwa area and that there were a few people around it. According to her, the 2nd appellant stopped to see what was happening. She initially testified just like the 2nd appellant that she saw man carrying a child then ran across the road but later changed her testimony to say that he was running uphill instead. They then drove off. She also confirmed that the vehicle in which they were travelling was red. It was her evidence that she heard some noise at the scene of the accident as they headed towards Nyeri town.

**4. Analysis and Determination:**

I must state at the outset that the learned magistrate had the advantage of seeing and hearing the witnesses and for that reason he was best placed to assess their disposition or demeanour and their credibility. In **Thomas Nyawade versus Sule Odongo & 4 Others (2015) eKLR,** which the learned counsel for the respondent invoked in support of his submissions, the Court of Appeal had occasion to address the extent to which an appellate Court can go in disturbing the factual findings of the trial court. While the Court appreciated that an appellate Court has the obligation to re-evaluate the evidence on record and come to its own conclusions (as was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) E.A. 123),** it cautioned that since the trial court enjoyed certain advantages in assessment of some aspects of evidence, the appellate court must be slow to overturn the trial court's decision unless, of course, the decision is perverse or is not based on evidence or is based on misapprehension of the evidence on record. (**See Mwanasokoni versus Kenya Bus Services Ltd (1985) KLR 931)**.

**(a) Liability:**

With this understanding, I cannot find any basis to doubt the evidence of the plaintiff's mother, his uncle and that of the police officer that a road traffic accident in which the plaintiff was injured occurred along Nyeri-Kamakwa road, at or near Kamakwa trading center on 20th October, 2007. From the record of appeal, there is a copy of the medical examination report from the police (the P3 form) showing that this accident was reported to the police on the material date and entered in the police records as OB 12 of 20/10/2007. This piece of evidence shows that the police referred the plaintiff to the medical officer of health of Nyeri provincial general hospital for medical examination due to the injuries he sustained from the traffic accident. That evidence also shows that report was made was to the effect that the respondent was hit by a hit-and-run motor vehicle. Besides the P3 form, an abstract from the police which was also produced in evidence shows that a road traffic accident was reported at the Nyeri police traffic base on 20th October, 2007.

The medical officer who examined the respondent confirmed that the latter was taken to the hospital while unconscious and he had to be resuscitated. He had also sustained injuries at various parts of the body; these injuries which he classified as "harm" were the sort of injuries that a person hit by a vehicle

would sustain; at least there was no evidence to the contrary.

With this evidence, I must agree with the learned magistrate that he came to the correct conclusion that indeed a road traffic accident involving the respondent and a runaway motor vehicle occurred at the time and place stated in the plaintiff's pleadings and in evidence in support of his case.

The other crucial aspect of evidence which the learned magistrate had to consider was whether it had been so established, on a balance of probabilities, that motor vehicle registration number KAJ 228 R was the accident vehicle.

One thing that is so clear is that this particular vehicle was at the scene of the accident at the time it happened. The report made to the police was to the effect that the accident occurred at around 3 PM. The 2nd appellant testified that he left Tetu for Nyeri town at around the same time. It was not clear from his evidence how far Tetu is from Kamakwa or the speed at which he was travelling. What is clear, however, is that his vehicle was driven on Nyeri-Kamakwa road and, most crucially, was at the scene of accident, at Kamakwa trading centre, when the accident occurred.

But being at the accident scene at the time the accident happened is not of itself sufficient proof that this particular motor vehicle was involved in the accident. It had to be proved that indeed this motor vehicle was the cause of the accident.

Looking at the evidence on record in its entirety, I am satisfied that there was such poof, and here again I agree with the learned magistrate that it is more probable than not that this motor vehicle was the accident vehicle.

In the first place there was an eye witness who saw the vehicle. This witness was the plaintiff's uncle. When the accident was reported to the police, he gave the registration number of the motor vehicle. As a matter of fact, it is this particular detail of the vehicle that the police used to trace the vehicle's registered owner.

When he testified, he recalled not only the registration number of the vehicle but he also recalled its colour as being red. This information was confirmed by the 2nd appellant himself whose evidence was that the motor vehicle has a red colour though with yellow and white stripes. One of his passengers also testified that the motor vehicle was red.

I am minded that the respondent's uncle did not seen the vehicle hit him but I gathered from his testimony that as soon as he heard screams from members of the public apparently in response to the accident, he saw this particular car heading towards town. My evaluation of his evidence is that his attention was caught by the screams after the accident had happened; he immediately noticed the motor vehicle which, in all probability, caused the accident.

The evidence of the 2nd appellant and one of his passengers leads me to the conclusion that they must have been aware that their vehicle had caused an accident. The 2nd appellant himself testified that he saw a man carrying a child run across the road back to where the respondent had been standing. The man he saw must have been the respondent's uncle who was carrying his sister. As noted, it was his evidence that he had gone across the road to pick the plaintiff's sister's shoes which had dropped in the matatu from which they had just disembarked. The 2nd appellant's passenger also testified that she too noticed a man carrying a child running across the road. In cross examination she changed her testimony to say that he was in fact running to the right of the Matatu "up the hill" and not crossing the road.

I am prepared to find that if these two defence witnesses are taken at their own word, then it is logical to conclude from their evidence that the motor vehicle in which they were travelling hit the plaintiff. They were both in agreement that they heard some noise and even stopped before they drove on. On her part Wangeci Kanyugo, the passanger in the motor vehicle testified that they stopped for "about two minutes" apparently after they heard some noise at the scene of the accident; to quote her she said:

***"I was seated behind the driver on the right back seat. Ndungu gathinji was driving the vehicle. We heard noise. Someone near Kamakwa-just after Kamakwa. We were heading towards Nyeri town."***

She then went on:

***"None of us went out of the vehicle. We only stopped for about two minutes to see what was going on. We proceeded with our journey."***

Similarly, the 2nd appellant testified that they heard some noise. Initially, he said they stopped after they heard the noise but later in his testimony he said they did not stop. This is what he said:

***"On reaching Kamuyu just before Kamakwa on Nyeri-Kamakwa Road. I saw a matatu a pick-up turned into a matatu. We had (sic) some noise. I slowed down. I saw a person run from the matatu across the road to some building on our side of the road. We stopped for a minute. The person was carrying a child. We did not stop. We went to Green Hills Hotel."***

It is quite possible that the noise that these two people heard was the impact of the collision of their vehicle with the plaintiff. It is clear from their evidence that it is after they heard the noise that that they both saw the plaintiff's uncle run across the road apparently to where the plaintiff was.

It is also possible that if they stopped, albeit momentarily, it is then that the respondent's uncle had the opportunity to read the vehicle's registration number.

Consequently, I am satisfied, as the learned magistrate was, that it is the motor vehicle registration number KAJ 288 R that hit the plaintiff. The appellant's sought to make most of the particular model of the vehicle but nothing ought to have turned on this aspect of the vehicle if its registration number was correctly captured. I note that the 2nd appellant himself testified that it was a Mistsubishi Pajero yet the extract of its records from the Registrar of Motor Vehicles as represented in the certificate of search shows that it was a "Ford Taunq". In my humble view, it did not matter that a person could have described it as a "Toyota Prado". I accept the evidence of **Corporal Eric Kaaria (PW4)** that the different descriptions might have come about because of the similarity of the body shape of all these different types of vehicles; as a matter of fact, they are all station wagons.

In conclusion therefore, I am persuaded that the learned magistrate came to the correct finding when he held the appellants 100% liable for the accident.

**(b) Quantum:**

The learned magistrate made an award of Kshs 350,000/= as general damages for pain, suffering and loss of amenities and special damages of Kshs 5,000/=.

I note however, that besides enumerating the injuries which the respondent sustained, the learned magistrate did not give any basis upon which he arrived at the figure of Kshs. 350,000/=. All he said in this regard was this:

***"I am urged to award Kshs 500,000/= by the plaintiff's advocates and Kshs. 50,000/= by the defendant's advocates. I have considered the submissions by both counsels (sic) and I find an award of Kshs. 350,000/= would be adequate, fair and reasonable compensation in general damages in pain, suffering and loss of amenities."***

I am minded that it is trite that the award of general damages falls within the discretion of the trial court; it is a principle which has been reiterated in several decisions of which the oft-cited ones are **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 728**. In the former decision the C**ourt of Appeal noted:**

> ***"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

And in the latter case, the same Court said at page 730 that:

> ***The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

Of the various factors that the trial court has to bear in mind, it must make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. If not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.

In the absence of such comparisons, it becomes difficult for this Court, in exercise of its appellate jurisdiction, to tell whether, the award in question is far removed from what one would consider to be the appropriate award. In other words, it is impossible to tell whether an award is 'inordinately high' or 'inordinately low' if the basis of its assessment is not known. To the extent that the learned magistrate took this path his judgment is vitiated. It is not enough to state, as he did, that he had considered the learned counsel's submissions; it should be apparent on the face of his judgment that indeed he considered the precedents set before him on the extent of general damages that the respondent was entitled to and that it is upon his evaluation of these precedents that he arrived at the award he made in favour of the respondent.

Be that as it may, nothing stops this Court from doing what the trial court ought to have done. It has adequate material before it to reach a just conclusion in this regard; at any rate, it has, as earlier noted, the legal obligation to evaluate the evidence on record afresh and come to its own conclusions.

The uncontroverted evidence of **Dr Fred Muleshe (P5)** who examined the respondent was that the respondent lost consciousness after the accident and had to be resuscitated after it was established that he had lost cardiac activity. It was his evidence that upon examination of the respondent, he was found to have sustained a bruise on the left temporal region and a tender, swollen and deformed left leg. An X-ray of this particular leg revealed a fracture of the left tibia and fibula bones. He was admitted for four days during which period the respondent underwent a closed manipulation of the fractures under anesthesia followed by application of plaster of Paris cast. After being discharged he continued treatment as an outpatient for three months and thereafter the plaster was removed. At the time of examination, almost two years later, the respondent, who was now aged 6, was experiencing a mild pain in the left leg though there was no noticeable deformity.

Counsel for the respondent opined that the sum of Kshs 500,000/= would be adequate compensation under the head of general damages, pain, suffering and loss of amenities. In this regard he relied on the decision in **Nairobi High Court Civil Case No. 2643 of 1986, Peter Kabibi Kinyanjui versus Francis Mburu Njoroge** where the claimant sustained fractured ribs, a fracture of the index figure and lacerations in a road traffic accident and was awarded the sum of Kshs 500,000/= in general damages. He also cited **Nairobi High Court Civil Case No. 3214 of 1993, Mary Mwihaki Mutie versus Joseph Katunge Muswii** where the claimant was awarded Kshs. 500,000/= in general damages for a fracture of the left ulna, fracture of the left femur and injuries on the left forearm.

The appellant's counsel, on the other hand, proposed an award of Kshs 50,000/= in general damages; he relied on the decision in High **Court Civil Appeal No. 17 of 2008 Kiwanjani Hardware Ltd &**

**Another versus Laban kiilu Mwithoka** for this proposal.

I have considered the three decisions which the learned counsel relied upon to support their respective positions as far as general damages are concerned. Unlike in the respondent's case, the claimant in the **Peter Kabibi Kinyanjui versus Francis Mburu Njoroge** case (ibid) is said to have sustained multiple fractures of femur, ribs and radius. He also sustained a fractured index figure and lacerations. Similarly, the plaintiff's injuries in **Mwihaki Mutie versus Joseph Katunge Muswii** (ibid), appear to have been more severe. Although the plaintiff sustained fractures of the left ulna and femur and injuries on her left forearm, she had a K-nail inserted in her left leg and underwent three surgeries. She was permanently incapacitated and the rate of this incapacity was assessed at 15%. Consequently, she could not continue with her employment.

In the case cited by counsel for the appellants, on the other hand, it was established that a fracture on the right wrist was sustained 8 months before the accident in issue and should not have been taken into account in assessment of the damages due to the claimant; the Court (Lenaola, J., as he then was), reduced the damages from Kshs 250,000 to Kshs 175,000 for a blunt injury to the right eye; blunt injury to the mouth with loss of the upper incisor tooth; blunt injury to the neck; blunt injury to the right side of the chest. The injuries were superficial and in case the award in general damages was not Kshs 50,000/= as suggested by the appellants.

It is important to note that all these decisions are fairly old; those cited by the learned counsel for the respondent were delivered more than 15 years ago while the only decision that the appellants relied on was delivered in 2008, about ten years ago.

Taking all these factors into consideration I would opine that general damages of Kshs 400,000/= would have been a near adequate compensation in general damages; however, the respondent did not cross appeal but instead defended the award made by the learned magistrate. It is for this reason that I will not disturb the award of Kshs. 350,000/= under this head.

As for special damages, the sum pleaded and prayed for under this head was Kshs 2,700/=. The court awarded the sum of Kshs. 5,000/= of which the sum of Kshs. 2000/= was for the medical report while the balance of Kshs. 3,000/= was for the doctor's court attendance. Only a receipt of Kshs. 2000/= for the medical report was produced. Although the doctor testified that he had charged Kshs. 3,000/= for his attendance, there was no evidence that this sum had been paid. And even if it was paid, the plaint was not amended to cater for this sum. Accordingly, the amount that was specifically pleaded as special damages was Kshs 2,700/= but what was proved was only Kshs. 2000/=. This is the amount that the respondent was entitled to under this head.

In the final analysis I have reached the conclusion that except for the variation of the sum awarded under the head of special damages, the appellant's appeal lacks merit and it is hereby dismissed; parties will bear their own costs.

**Dated, signed and delivered in open court this 1st December, 2017**

Ngaah Jairus

**JUDGE**