



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 182 OF 2019**

**CATHERINE BUKACHI.....APPELLANT**

**VERSUS**

**FLORENCE WANJIKU WAHOME.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**J.M Kimani & CO. Advocates for the respondent**

**Onyikwa & CO. Advocates for the Appellant**

**J U D G M E N T**

1. What is before the court is an appeal against the damages awarded in the judgment of Hon. N. Wairimu as she then was in Eldoret CMCC No. 903 of 2017 delivered on 6<sup>th</sup> December 2019.
2. The respondent instituted the suit vide a plaint dated 10<sup>th</sup> February 2017 wherein he sought general and special damages from the Appellant as a result of a traffic accident that occurred on 12<sup>th</sup> January 2017.
3. The trial court heard the suit and the parties recorded a consent on liability of 80/20% in favour of the respondent. After the close of the case the trial court awarded the respondent special damages of kshs. 14,190/- and general damages of kshs. 500,000/-
4. The appellant instituted the appeal by lodging a memorandum of appeal dated 27<sup>th</sup> December 2019 on the grounds that the award;
  - a) Was not consistent with the injuries sustained
  - b) Was not supported by evidence on record
  - c) Was manifestly excessive in the circumstances
5. The appellant filed submissions on 8<sup>th</sup> July 2021. He submitted that the medical report by Dr. V. V Lodhia indicated that the respondent sustained two injuries, an injury to the left side chest and an injury to the knee. It did not indicate any head injury as pleaded by the respondent and therefore from the judgment of the trial court it is evident that the trial magistrate failed to consider the second medical report.
6. The appellant further submitted that the trial court failed to consider comparable authorities in awarding the damages. In buttressing the submissions on behalf of the appellant learned counsel made reference to the following authorities **Eldoret CMCC NO. 903 OF 2017; Florence Wanjiku Wahome –v- Catherine Bukachi, Kenya Ports Authority –v- Kuston(Kenya) Limited 2009 2 EA 212, Bhogal –v- Burbridge & Another (1975) E.A 285, Siaya HCCA NO. 4 OF 2009 Elizabeth Wambui Gichoni –v- Virginia Achieng Achola (2019)eKLR, Siaya HCCA NO. 3 OF 2019 Elizabeth Wambui Gichoni – v- Bernard Ouma Owuor (2019)eKLR.**
7. The respondent filed submissions on 23<sup>rd</sup> August 2021 and submitted that the respondent sustained the following injuries; blunt injury to the head with loss of consciousness, blunt injury to the chest and a blunt injury to the left knee. She referred to the medical report by Dr. Sokobe and submitted that it reflected the injuries pleaded. She also referred to the report by Dr. Lodhia and noted that the respondent had been advised to get an orthopaedic review.

8. The respondent submitted that the award given by the trial court was commensurate with the injuries sustained and within the range of comparative injuries. She cited the case of **Damaris Mwongeli Muia v Kenya Wildlife Service (2017) eKLR** and **Godfrey Mwaure Karagu v Kenya Railways Corporation (2020) eKLR**.

9. Upon perusal of the pleadings, the record of appeal and submissions by both parties I have identified the following issues for determination;

a) **Whether the injuries pleaded were proven on a balance of probabilities.**

b) **Whether the general damages awarded were excessive**

#### **DETERMINATION**

10. The jurisdiction in any appeal is exercisable in terms of the principles in **Jackson KAIO Kivuva –v- Peninnah Wanjiru Muchene (2019)eKLR**, **Ephantus Mwangi – V- Duncan Mwangi (1984)eKLR**, **Peters Sunday Post Limited (1958) EA 424** and **Selle and another –v- Associated Motor Boat Company Limited (1968) EA 123**. This being a first appeal it is in the nature of a rehearing, it is the duty of the court to re-evaluate the evidence analyse it to its conclusion but in doing so the court must give allowance to the fact that it has neither seen nor heard the witnesses an advantage only accorded to the trial court.

11. The appeal by the appellant challenges the assessment of damages for pain and suffering occasioned by the accident involving the respondent. In the submissions by the appellant she takes issue on the discretion exercised by the trial court which she considered to be an overreach and generous culminating into an excessive award of quantum on general damages for pain and suffering. It is necessary at this point to reflect on the principles in Ephantus Mwangi’s supra case. **“The hallmark of this case is that an appeal’s court will not normally interfere with a finding of facts by the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown the demonstrably to have acted on wrong principles in reaching the finding he/she did.”** (see also **Butt -V- Khan (1978)eKLR**)

12. It is against this backdrop the court in **Livingstone Rawyards Coal Co. (1880) 5 ARP** laid down the following principles on assessment of damages **“Lord Blackburn said, I do not think there is any difference of opinion as to it is being a general rule that where any injury is to be compensated by damages, in setting the sum of money to be given for the reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in, if he had sustained the wrong.”**

Similarly, **Wooding C.J Cornilliac –v- St Louis (1965) 7 WIR 491** It was urged that in the assessment of damages the following formulated guidelines are key. Thus; **the nature and extent of the injuries sustained, the nature and gravity of the resulting physical disability, the pain and suffering which had to be endured, the loss of amenities suffered, the extent to which consequentially the claimant’s pecuniary prospects have been materially affected.”** It is with this background Lord Ackner in **Hansard (HL) 16 June 1994 Vol 555** states that **“the calculation of pecuniary loss is simple, straight forward and wholly intelligible to the man in the street but that in contrast I can well understand criticism being made as to how one evaluates the pain and suffering and the loss of amenities.”**

13. The lesson to be drawn from the several authorities is in my opinion very difficult even in the realm of discretion the trial court to discharge the burden of precision that satisfies the threshold of a fair and proportionate assessment of damages to the eyes of the claimant. The proper test in addition to the principles in the above cases is what has been elucidated by learned author by **Mcgregor on damages 15<sup>th</sup> edition (1988)** in which he states as follows **“pain and suffering is now almost a term of art in so far as they can be distinguished pain means the physical hurt or discomfort attributable to the injury itself or consequence upon it. It thus includes the pain caused by any medical treatment which the plaintiff might have to undergo suffering. On the other hand it denotes the mental or emotional distress which the plaintiff may feel as a consequence of the injury, anxiety, worry, fears, torment, embarrassment and the like. It is not however usual for judges to distinguish between the two elements. Whereas loss of amenities includes physical and social limitations inherent in the injury itself, but it extends also to loss of special amenities which are peculiar to the particular plaintiff, such as no longer been able to engage in pre-accidental hobbies or interests.”** Perhaps that is the basis of the principles in **West –v- Shephard (1964) AC 326** that damages will only be awarded for such a loss as is the natural and probable result of the injury complained of. Also the question on the amount of damages that ought to be allowed to an injured person is completely distinct from the question of apportioning fault or negligence. The general rule in the West case is that in calculating damages courts are only to consider what is the pecuniary sum which will make good to the injured so far as money can do so. Hence the maxim that Money will not constitute *restitutio in integrum* in fact, because there cannot be complete or perfect compensation for physical or mental hurt. (See **Phillips –v- L & S W Ry(1879) 4 Q.B.D 406**)

14. In the instant appeal it is suggested by the appellant that the award of ksh 500,000/= as general damages for pain and suffering and loss of amenities is inconsistent with the settled principles of a fair and reasonable award going by the precedents on similar injuries and awards. For this court to establish whether the learned trial magistrate was too generous in exercise of her discretion to assess the impugned award one has to review the evidence as presented during the hearing of the case. The nature and extent of the injuries sustained are to be found in the testimony of the respondent on subsequent medical reports dated 26/1/2017, being exhibit 3. The medical report by Dr Sokobe dated 7/2/2017 and a subsequent medical report dated 2/7/2019 by Dr Lodhia. These reports are indicative of a claimant who suffered soft tissue injuries to the head, chest and left knee. She was taken to Moi Teaching and Referral Hospital as an outpatient and upon diagnosis she was treated and discharged. On routine examination her injuries were found to have healed without any post-injury functional disability. On further evaluation there is no evidence of her deficit to perform any of the expected functions of her limbs. In her evidence and on review of the medical reports the respondent did not seem to have suffered decreased loss of amenities as a consequence of the injury. What is somehow to be quantified is on the pain and suffering occasioned on the material day of the accident and the short period of recuperation. In the case before me it is instructive that the learned trial magistrate relied on the case of **Damaris Mwongeli Muia –v- Kenya Wildlife Service (2017)eKLR**. It is worthy to note that this authority shows clearly that the plaintiff Damaris suffered very serious injuries of deep cuts on the left lower limb leading to her admission in hospital for 28 days. As reflective in the judgment Damaris Mwoneli Muia Supra (the nature and the extent of the injuries resulted in skin grafting to patch the deep cut wound on the left thigh. At the time of the trial the

appellant was still walking with the aid of crutches. I am of the view therefore this case is not similar to the case at bar. I must also mention that the respondent as formerly assessed by the medical doctors on 7/2/2017 and on 2/7/2019 there was no risk of any post-traumatic permanent disability. The discomfort experienced to her limbs were of soft tissue in nature with no disability to accommodate her daily activities. I note also that the respondent injuries do not require claims for costs of medication or future cost of treatment. In my opinion the injuries are as settled by the doctors mild soft tissue in nature.

15. It is clear to me that the set factors in **Mkubé –v- Nyamuro(1983) LLR at 403 and Butt –v- Khan** supra, the questions of fact and law that arose in the court below were misapprehended and on this court’s view the discretion in the circumstances of the case was wrongly exercised. Judicial discretion is the exercise of judgment by a judge or magistrate or court based on what is fair under the circumstance and guided by the rules and principles of law. The exercise of discretion may either be judicial or judicious, it is judicial, if it is exercised in accordance with the enabling statutes while it is judicious when it carries or conveys the intellectual wisdom or prudent intellectual capacity of the judge or magistrate as Judex. See **African Continental Bank Ltd –v- Nnamani(1980) JELR 33940 (SC)**. Also in **Gen & Aviation Service –v- Thahal(2005) 1 CNQLR 107 Uwaifo JSC** held as follows “**There is always the need for a court exercising discretion to give reason in justification of the exercise. See Solanke –v- Ajibola17. There can hardly be any justifiable reason for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. See Birkett –v- James18. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated19.**”

16. Given the existing principles on assessment of damages there was a total deviation by the learned trial magistrate and on that premise the assessment ought to be interfered with by this court as the next best alternative to do justice to the parties. The appellant has identified the specific error of fact and law from the discretion exercised by the learned trial magistrate in the making of the value judgment. In examining the state of the law on this subject by reference to the established principles soft tissue injuries with no permanent disability range from the bracket of Ksh 70,000/= to Ksh 300,000/= depending on the specifics of each particular case. A close eye of the facts of this case calls for this court to keep a tight rein on exercise of discretion which is not within the armpit of the settled principles. I thought the case of **Elizabeth Wambui Gichoni –v- Beranrd Ouma Owuor(2019)eKLR** falls within the metaphorical as well as the literal sense as a basis of assessing damages in favour of the respondent. Following these reasons I review the award of Ksh 500,000/= by substituting it with the permissible assessment of Ksh 200,000/=. This tier of scrutiny or tears of frustration on review of damages on appeal remains to be the touchstone of our legal system. In these circumstances I would therefore allow the appeal partially as herein stated with costs to be borne by each party to this appeal. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 23<sup>rd</sup> DAY OF FEBRUARY, 2022.**

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**R. NYAKUNDI**

**JUDGE**