



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 149 OF 2019**

**VITALIS KARIUKI MWANGI.....APPELLANT**

**VERSUS**

**MONICA WANGARE KIMANI.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. MUNYI (PM)***

***DATED 14<sup>TH</sup> AUGUST 2020 IN NAKURU CMCC NO. 667 OF 2016)***

**JUDGEMENT.**

1. The respondent was involved in a road traffic accident on 16<sup>th</sup> January 2016 along Nakuru –Elementaita road as she was travelling aboard motor vehicle registration number KBE 156Y owned by the appellant. She sustained bodily injuries namely, **fracture of the pelvis – bilateral fractures of inferior and superior ramii, soft tissue injuries of the elbow, laceration on the right foot and abrasions on the legs.**

2. When the matter came up for hearing the parties entered into a consent on liability where the appellant shouldered 90% against the respondent 10%. The trial court in its judgement awarded **general damages of Kshs1,200,000, special damages of Kshs25,530 and Kshs300,000 being loss of future earnings.**

3. The appellant being dissatisfied has filed this appeal only on the question of quantum. According to his grounds of appeal, the same was excessive in the circumstances and not in line with the cited authorities. That the award on loss of future earning was not proved at all and ought to be set aside. He therefore prayed that the appeal be allowed by this court lowering the award to what he had proposed at the trial court.

4. When this matter came up for hearing the court directed the same to be heard by way of written submissions which the parties have complied.

**Appellants written submissions.**

5. The appellant submitted that there was no basis for the trial court to have awarded the respondent such a colossal sum yet according to Dr. Kiamba the respondent would heal in the course of time. As a matter of fact, Dr. Jenipher Kahuthu found her having healed and was in good general conditions five months after the accident. She was walking without any support. She found her having suffered no disability and that healing was a process and with time she would be well.

6. The appellant relied in the principles laid down in the often quoted case of **KEMFRO AFRICA LIMITED (1985) eKLR** by submitting that the trial court did not consider some relevant factors in arriving at its award. That the authorities it took into account did not match the matter at hand as the injuries herein were not as severe as those in the said cited authorities.

7. In the end the appellant implored this court to consider the authorities he had cited and lower the award to a reasonable figure considering the injuries sustained by the respondent. The appellant also prayed for the costs of this appeal.

**Respondents submissions.**

8. The respondent has opposed this appeal and agreed with the findings of the trial court. She submitted that she had suffered a permanent disability as found by both Dr. Kiamba and Kahuthu. That the court had the benefit of seeing her testify as well as the other witnesses. On this score the respondent sought solace among others in the case of **STEPHEN CHEPROT V. MARY MUIA & ANOTHER (2018)**

**eKLR.**

9. She went on to state that the award of Kshs. 1,200,000 was reasonable considering the injuries she had sustained and the fact that she had suffered 30% disability. The authorities cited by her during trial had awarded the claimants a sum of Kshs 2,000,000 which she had sought and the award of Kshs1,200,000 was too conservative in the circumstances.

10. On the issue of future earnings, the respondent in supporting the findings by the trial court submitted that indeed he had suffered loss as being a farmer she was now unable to undertake her work which involves standing and or bending for several hours. She cited the case of **CECILIA M MWANGI & ANOTHER V. RUTH W MWANGI (1997) Eklr**

11. She submitted that the trial court did not consider extraneous factors in arriving at its decision and that the appeal herein was baseless. The court clearly and robustly analysed the issues well before reaching its conclusion. She prayed for the appeal to be dismissed.

### **Analysis and determination**

12. The court has perused the record of appeal, the proceedings in particular and the parties' submissions. The court will deal with this appeal and arrive at its independent conclusion as was well explained in the case of **PETERS V. SUNDAY POST LIMITED (1958) E A.**

13. The issue of liability was well settled by the parties as earlier stated. The injuries suffered by the respondent was captured by the production of the two reports of Dr. Kiamba and Kahuthu. According to Dr. Kahuthu who examined her eight months after the accident she concluded that she was in good general condition, walking with normal gait and had pain on the lower limb on walking for long. She said that there were no physical disability resulting from the injuries.

14. Dr Kiamba on the other hand who examined her about five months after the accident found that she had suffered injuries which she classified as grievous harm and would be incapacitated for about 4 months and a permanent disability of 30%.

15. It is worthy to note that Dr. Kahuthu did not award any percentage of disability, meaning that by then she had healed well. Eight months' period was of course within the 4 months' period indicated by her counterpart Dr. Kiamba.

16. In my view therefore as at the time of examination by Dr. Kahuthu, the respondent had relatively healed as anticipated by Dr. Kiamba save for the scars and other features observed.

17. In line with this, can one say that the award was excessive as advanced by the appellant.? I think the same should be viewed in the prism of the authorities cited and injuries sustained. Obviously the trial court was in a better position to see the respondent, her demeanour and her evidence.

18. The court has perused the authorities cited by the parties herein which are of course as expected at variance. Those cited by the appellant even at the lower court were of lesser awards and similarly those of the respondent were higher. I need not reproduce them here.

19. Needless to state that the case of **GEORGE NJENGA & ANOTHER V. DANIEL WACHIRA MWANGI (2017) eKLR** is in my view persuasive. In that matter the claimant suffered the following injuries, namely, pelvic fracture, unstable left knee joint, unstable left ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterolateral aspect of the left leg.

20. The trial court awarded Kshs 800,000 as general damages. The same was sustained on appeal. What is common generally in the above case and the matter at hand is the fracture of the pelvis which it appears more serious in this case but the rest of the injuries are almost soft tissue in nature.

21. The award of Kshs. 1,200,00 in my view was slightly on the higher side comparatively. This court taking note of the period since the accident, the issue of inflation and the percentage of the contributory negligence hereby set aside the above award on general damages and substitute it with an award of Kshs. 900,000 which I find fair and reasonable compensation.

22. On the issue of loss of future earnings I note that the respondent who claimed to be a farmer did not endeavour to go beyond that. There was nothing exhibited to demonstrate that as a result of the accident she was unable to carry out her farming business. There were no records produced to indicate what type of farming she was engaged in and if so what was her income.

23. The court agrees with findings of the court in **Cecilia Mwangi** (supra) which stated that;

***“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. “***

24. In this matter, although the respondent pleaded it in her plaint, she did not prove it in any way. She simply asked the court to award her. The trial court respectfully granted her wish without finding any basis for the same. The *“balance of probability”* cited above must have a minimum basis at least to permit a court make some informed decision. In the premises, the award under this head is hereby set aside.

25. The other issue of special damages was not contested and I need not waste any judicial time over the same.

26. For the foregoing reasons, the trial court's judgement is hereby set aside and this court makes the following orders.

- a) General damages is reduced from Kshs1,200,000/= to Kshs. 900,000/=
- b) The costs of loss of future earnings of Kshs300,000/= is hereby set aside.
- c) Special damages of Kshs. 25,530/= is sustained.
- d) Total sum of Kshs925,530/= less 10% (Kshs,92,553/=) =Kshs.832977/=
- e) The above total sum of Kshs. 832,977/= shall attract interest from the date of judgement at the lower court till payment in full.
- f) The appellant shall get a quarter of the costs of this appeal.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 24TH DAY OF MARCH 2022.**

**H.K. CHEMITEI.**

**JUDGE**