



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 517 OF 2017

KENYA HOSPITAL ASSOCIATION.....APPELLANT

VERSUS

DNN.....RESPONDENT

(Being an appeal from the judgment of Gesora, CM dated 29th August 2017 in the Chief Magistrate's Court Nairobi Civil Case No. 68 of 2015)

JUDGMENT

1. This appeal emanates from the judgment delivered in **Nairobi CMCC No. 68 of 2015** by **Gesora, CM**, on 29/08/2017. The said suit had been filed by **DNN** (the Respondent herein) against the **Kenya National Hospital Association** (the Appellant) for damages arising from the alleged negligence of the Appellant's employees who attended to the Respondent at the Appellant's hospital between the 1st October to 6th October, 2014. The Respondent averred that through negligence, a high vaginal swab (HVS) taken from her was lost, resulting in the collapse of a criminal prosecution in which she was the complainant following a robbery and rape incident at her house on the night of 30th September, 2014. She averred that the negligence destroyed her chances of getting justice, and that as a consequence, she suffered emotional trauma and mental anguish.

2. The Appellant had filed a defence in which they denied liability but following a full hearing, the trial court found for the Respondent and awarded her global general damages in the sum of Kshs. 4,000,000/- and the sum of Kshs. 8,476.15 for charges paid by the Respondent in connection with the lost sample.

3. Aggrieved with this outcome, the Appellants filed the present appeal challenging both the finding on liability and quantum. The memorandum of appeal contains eight grounds of appeal as follows:

1. The learned trial magistrate erred in finding the Appellant liable and in awarding damages to the Respondent.

2. The Learned Trial Magistrate erred in failing to consider the relevant authorities cited by the Appellant for the assessment of damages and ended up awarding damages without considering comparable awards. The Learned Trial Magistrate erred in awarding excessive damages.

3. The learned Trial Magistrate failed to consider that the purpose of the High Vaginal Swab ("HVS") test was to check for the presence of spermatozoa and to check for possible infections.

4. The learned Trial Magistrate erred in failing to consider the defendant's witness's testimony that it would not have been possible to identify the perpetrator using the HVS swab results unless a formal request was made immediately by the patient for a DNA test, which was not done in this case.

5. The learned Trial Magistrate erred in failing to consider that the Appellant had to manage and provide medical care to the Respondent on an extremely urgent basis and erred in failing to find that the loss of the HVS was accidental and not negligent.

6. The learned Trial Magistrate erred in failing to consider the cited authorities cited by the Appellant before making a determination on whether the loss of the HVS was negligent or accidental.

7. The learned Trial Magistrate erred in law and in fact by failing to consider that the suspected attacker was acquitted in the criminal case due to the manner in which the police, the investigating officer and the prosecution handled the criminal case. The learned Trial Magistrate erred in failing to find and should have found that if the criminal case has been handled in a better manner, a conviction would have been secured without the HVS sample.

8. The learned trial Magistrate erred in law by awarding general damages for breach of contract.”

4. The parties took directions regarding the hearing of the appeal on 15th November 2019. The appeal was canvassed by way of written submissions. The Appellant abandoned the challenge on the finding of liability choosing to submit on quantum only. The Appellant contended that a sum of Kshs. 1,000,000/- is sufficient compensation in this instance and that the trial court erred in awarding the global sum of Kshs. 4,000, 000/-. It was asserted that the level of the award was excessive and influenced by the erroneous consideration that a second head of damages was payable for breach of contract. The Appellant submitted that general damages are not awardable for breach of contract as held in the case of **Securicor Courier (K) Ltd v Benson David Onyango & Another [2008]eKLR**.

5. Several authorities were cited to support the award of Shs. 1000,000/- as general damages for mental anguish and psychological trauma including **David Gachiri Gatheru v M W M [2006] eKLR** wherein the appellate court upheld the award of Shs 200,000/- as damages to a rape victim; **AAA v Registered Trustees (Aga Khan University Hospital) [2015] eKLR** where the court awarded Shs. 500,000/- as damages for medical negligence and **W.J & Another v Astarikoh Henry Amkoah & 9 Others [2015] eKLR** where the court awarded global awards between Kshs.2000,000/- and Shs. 3,000,000/- as damages to sexual assault minor victims. However, counsel sought to clarify that in **David Gachiri** and **W.J.** cases, the awards were against the actual perpetrators unlike in this case where the Appellant is not the perpetrator but a hospital that mishandled samples taken from the Respondent.

6. Finally, citing the case of **Butt v Khan (1982-88)**, as to circumstances when an appellate court should interfere with an award on general damages, counsel submitted that the Appellant had demonstrated that the award of general damages in the lower court was inordinately high, and that this court should interfere and reduce the award to Shs. 1,000,000/-

7. The appeal was strongly opposed by the Respondent. The Respondent submitted at the outset that although professionals and experts are expected to exercise a higher standard of care than lay people, that did not mean that the burden of proving negligence against them is higher than in ordinary cases. For this proposition, counsel cited the decisions in **Pope John Paul’s Hospital and Another v Baby Kasozi [1974] EA 221** and **Hellen Kiramana v PCEA Kikuyu Hospital [2016] eKLR**. That consequently, the trial court was entitled to find in favor of the Respondent on the question of liability.

8. On the question whether general damages are payable for breach of contract, counsel submitted that although Kenyan Courts have upheld the principle that general damages are not awardable for breach of contract as held in the **Securicor Courier** case, the principle is not cast in stone. That there are exceptions to the principle as pronounced in foreign decisions such as, **Norbery v Wynrib [1992] 2 SCR 226; Watts v Morrow [1991] 1 WLR 1421** and **Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 334**. In the Respondent's view, the instant cause fell within the exception category for which an award of damages for breach of contract is justified.

9. Citing the pronouncement of the court in **Tayib v Kinanu [1983] KLR 114 counsel** asserted that no amount of money can adequately compensate the Respondent for her emotional and psychological suffering resulting from the Appellant’s negligence. It was argued that the cases relied on by the Appellant are all distinguishable from this case, and in particular, it was argued that the case of **AAA** compared with the case before the court to the limited extent that both cases relate to medical negligence. It was contended that the injuries of the plaintiffs in those cases are not comparable with those suffered by the Respondent herein. The Respondent's submission in defence of the award by the lower court was that the trial court correctly exercised its discretion in awarding general damages of Kshs. 4,000,000/- and, that the sum of Kshs 1,000,000/- urged by the Appellant is way too low as compensation for the trauma experienced by the Respondent. Therefore, the appellate court should not disturb the award.

10. The court has considered the record of the trial, the respective pleadings as well as submissions on this appeal. The court proposes to deal with the grounds of appeal relating to quantum in a composite manner but before doing so, it is pertinent to state the applicable principles. The duty of this court as a first appellate court is to re-evaluate the evidence adduced at the trial and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see and hear the witnesses testify. See **Peters v. Sunday Post Ltd (1958) EA. 424; Sele & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123; William Diamonds Ltd V. Brown [1970] EA 11**.

11. The Court of Appeal stated in **Ephantus Mwangi and Another v. Duncan Mwangi Wambugu [1982 – 1988] IKAR 287** that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have demonstrably acted on wrong principals in reaching the finding he did”.

12. Two key issues fall to be determined in this appeal. The first question is whether the award of general damages in the lower court comprised of damages for negligence and breach of contract and if so, whether breach of contract attracts general damages. The second question is whether the damages awarded were inordinately high as to represent an erroneous estimate and whether ultimately the court is entitled to interfere with the award.

13. The Appellants have in their submissions set out the contents of the last paragraph of the lower court’s judgment and asserted that the award of kshs. 4,000,000/= in general damages was inclusive of damages for breach of contract. They submit, citing the case of **Securicor Courier (K) Ltd V. Benson David Onyango & Another [2008] eKLR** that general damages cannot be awarded for breach of contract; that the breach of contract by the Appellant was a decisive factor in the quantum of damages arrived at and that the total award was therefore erroneous and ought to be interfered with. For her part, the Respondent while conceding that general damages are not awardable for breach of contract in this jurisdiction, nevertheless proceeded to cite foreign authorities where general damages were awarded for exceptional categories where physical inconvenience, discomfort, distress and mental suffering resulted from the defendant’s breach of contract.

14. The Respondent has assailed the Appellant’s rendition of the last paragraph of the trial court’s judgment as inaccurate for introducing a coma between the phrases **“breach of contract”** and **“special damages of Kshs. 8,476.15”**. The full import of the judgment of the trial court can only be discerned from a reading of the judgment as a whole and then an examination of the paragraph in dispute. This court has perused

both the handwritten judgment on the original record and the typed copy in the typed proceedings.

15. In the original handwritten copy, the learned magistrate considered part of the reasons given by the criminal court in acquitting the suspect in the Respondent's criminal case and observed inter alia that:

“There is evidence that there was 50% chance of procuring a DNA from the HVS (sample). This in my view would have helped capture the perpetrator or assist in identifying the suspect who had been arrested. This formed the basis for acquitting the suspect in the criminal case ... Having made a finding that the complainant had 50% chance of identifying the assailant had the DNA been process(ed), I find and hold that she was denied a chance to bring the attacker to book”.

16. The trial court considered the fact that the Respondent had driven from Athi River to the Appellant's medical facility in pursuit of the 'best care' possible as she had faith in the said facility, before stating:

“...this (faith) was however breached by this omission (processing of sample). The same was willful as the only reason assigned for not processing the sample was that there was no request form attached to it (sample).... The plaintiff paid for it and I can only reach one conclusion that the defendant was wholly negligent and breached the contract entered into with the plaintiff and I so hold.”

17. The trial court noting that the Respondent had suffered physical and psychological trauma, then proceeded to consider the respective submissions on quantum and concluded that:

“It is my considered view that a global sum of Kshs. 4,000,000/= will adequately compensate the plaintiff on account of general damages for negligence and breach of contract, special damages of Kshs. 8,476.15 in respect of fees for HVS. In the end I enter final judgment in the sum of Kshs. 4,008,476.15/= plus costs and interest”.

18. The original handwritten copy of the judgment contains a comma, just below the subject line, between the phrases **“and breach of contract”** and **“special damages of”**. The comma lies just above the word **“in”** on the next line. That all-important punctuation mark is evidently missing from the typed copy of the judgment in the record of appeal. By her plaint, and submissions, the Respondent had sought the following reliefs:

“Special damages of Kshs. 8,476.15 in respect of fees for the High Vaginal Swab Test;

General damages for negligence leading to compromise of justice for the plaintiff;

General damages for breach of contract;

Costs of the suit; and interest at the court's rates”.

19. While the Appellant had argued before the trial court that general damages were not available for breach of contract, it seems to this court on a reading of the original judgment of the lower Court that indeed the sum of Kshs. 4, 000,000/= awarded as general damages was in respect of the two heads; namely negligence and breach of contract which occasioned trauma and mental anguish to the Respondent. Nowhere in the judgment does the learned Magistrate indicate that the prayer for general damages in respect of the breach of contract had been declined.

20. Turning now to the question of quantum, the applicable principles are well known. The appellate court will only disturb an award of damages where such award is so inordinately high or low as to represent an entirely erroneous estimate. See **Bashir Ahmed Butt v Uwais Ahmed Khan**(supra). The court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30**. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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.” see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR; Mbogo V. Shah (1968) EA 93**.

21. Breach of Contract does not attract general damages as stated in the **Securicor Courier (K) Ltd** case. It is apparent that in awarding general damages, the trial Court took into account an irrelevant and erroneous factor; namely, that general damages were awardable for breach of contract. However, in light of the global nature of the award in general damages, it is difficult to establish what fraction of the award related to the breach of contract, or whether the breach of contract was uppermost in the learned Magistrate's mind in assessing the level of general damages payable, as asserted by the Appellants. What can be stated is that it appears that both the negligence and breach of contract by the Appellant were treated as combined heads in the judgment of the lower court.

22. It is trite that the award of damages is an exercise of the discretion of the trial Court and as stated by the Court of Appeal in **Catholic Diocese of Kisumu V. Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; [2004] eKLR**:

“An appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it

would have awarded a different figure if it had tried the case in the first instance”.

23. The instant case is a unique one and the parties recognized that none of the authorities cited were on all fours with facts herein. It is however not in doubt that the Respondent suffered emotional trauma, pain, and distress as a result of the negligence of the Appellants. The trauma may last a lifetime even if diminishing in severity over time. No amount of money can take away the trauma and the court’s role is to assess what is reasonable compensation in the circumstances, as held in **Tayib V. Kinanu [1983] KLR 114**. None of the parties furnished a readily applicable precedent to ease the court’s task as it appears that this case is a first of sorts.

24. In the lower court, both parties had cited the decision of **Waweru J. in AAA V. Registered Trustees Aga Khan University Hospital Nairobi (2015) eKLR** in urging quantum. On the Respondent’s part, it was asserted that though the facts of the case differed with the instant one, the element of lifetime impact on the plaintiff was a common factor between them. Surprisingly on this appeal, the Respondent asserted that the only link was that both cases relate to medical negligence, and that the case and others cited by the Appellant, namely **David Gachiri and W. J & Another V. Astarikoh Henry & Others (2015)** were not comparable authorities. On their part, the Appellants reiterated the authorities relied on in the lower Court in urging an award of kshs 1 million as damages. They submitted that the Appellant in this case did not commit the actual assault but mishandled the Respondent’s sample.

25. The court has considered the authorities. In the **David Gachiri Gatheru** case, the Appellant who was a victim of rape was awarded a sum of Kshs. 200,000/= as general damages, against the Respondent who had assaulted her. The **W. J.** case involved two minors defiled by their head teacher over an extended period. They were awarded Kshs. 2 million and Kshs. 3 million (to the 1st and second minor respectively) against the teacher and others, including the Attorney General. In both **W. J.** and **David Gachiri Gatheru**, the awards were for psychological trauma and emotional distress. In the case of **AAA**, the plaintiff had conceived a child despite implantation of a birth control device at the defendant’s facility. She was awarded Kshs. 500,000/= from pain, distress, and mental anguish arising from the defendant’s negligence.

26. While it is true that in first two cases, the defendant, was unlike in this case, the actual assailant, it cannot be denied that the Appellant herein compounded the Respondent’s situation by their negligence. She was subjected to further trauma and distress. In my considered view therefore, the first two authorities are in the circumstances of this case useful, notwithstanding the necessary caveat that the Appellant herein is not the primary offender. Equally, the **AAA** case like the two other cases is useful in the assessment of general damages for psychological trauma, distress, and mental anguish. And on account of the fact that it was founded on medical negligence.

27. The Respondent while distinguishing and dismissing these authorities did not proffer any other authorities in the lower court or on this appeal. The learned trial magistrate equally correctly distinguished the facts of this case from the **AAA** case in the judgment but made no reference to the other authorities cited before him. He also correctly observed that the award of kshs. 1,500,000/= and Kshs. 500,000/= urged by the Respondent and Appellant respectively were inordinately high and low, respectively.

28. The trial court grappled with the difficulty presented by the yawning gap between these proposals because, there is a clear dearth of decided authorities comparable to the case at hand. However, having dismissed the **AAA** case, the trial court proceeded to award the sum of Kshs. 4,000,000/- without reference to any decided comparable case or giving any justification. The trial magistrate was clearly put in a difficult situation but in my view, could still have applied the closest authority placed before him for this purpose.

29. In my considered view, this was erroneous for another reason; the Respondent herself had relied on the **AAA** authority, and in the unique circumstances of this matter and with necessary caveats, the **AAA** case, and indeed the others cited by the Appellants could supply the much-needed guidance in reaching an assessment. After all, an assessment of damages is just that, the application of the closest and most comparable precedents available at the time, on the facts of the case. The court can only do what it possibly can, given the available material before it, as **Waweru J.** did in the **AAA** case.

30. Based on the foregoing, this court finds that the trial court erred, firstly, by awarding general damages in respect of breach of contract, and secondly, by dismissing or ignoring the authorities availed to the court in determining a reasonable level of compensation. This court, therefore, finds that the award of Kshs. 4,000,000/= as general damages were excessive. The court must interfere with the award in the circumstances. The award of General damages in the sum of Kshs. 4,000,000 is hereby set aside.

31. In considering the appropriate award, the court has considered that indeed the Respondent suffered psychological trauma, mental anguish, and distress as a result of the negligence of the Appellants and will probably suffer residual trauma for the rest of her life. The decision of **Waweru J. in AAA** though based on a different set of facts lends itself for application in this case, because it arose from medical negligence. However, it was decided in 2015 and inflation must be factored in, and secondly, the plaintiff therein had not suffered sexual molestation but only conceived while having a birth control device implanted at the defendant’s facility.

32. The case of **W.J.** is also useful even though the minors suffered sexual molestation over an extended period at the hands of one of the Respondents because it relates to physical and psychological trauma. Ditto for **David Gachiri’s** case which involved an element of emotional trauma and is also useful as a basic minimum guide. It is important to remember however that these two latter cases were against the actual perpetrators of sexual assault. However, even bearing all these caveats in mind, this court is not persuaded that the proposed award of Kshs. 1 million by the Appellant is reasonable. It is on the lower side, given the possible long-lasting impact of the Appellant’s negligence on the Respondent. As her counsel put it, she may never truly experience closure of the entire traumatic incident.

33. In my considered view, an award of Kshs. 2,000,000/- [shillings two million] would be adequate compensation in this instance. Having set aside the award of Kshs. 4,000,000/=-, the court hereby substitutes therefor an award of Kshs. 2,000,000/- as general damages for mental anguish, distress and psychological trauma suffered by the Respondent due to the Appellant’s negligence. The award of Kshs. 8,476.15 as special damages is sustained. In the result, judgment is entered for the Respondent against the Appellant in the total sum Kshs. 2,008,476/15 [shillings two million, eight thousand four hundred and seventy-six cents fifteen]. As the appeal has partially succeeded, the Respondent is awarded half the costs of this appeal and in the lower court, and interest at court rates.

Delivered and signed electronically at NAIROBI on this 27th Day of May 2021.

C.MEOLI

JUDGE

In the Presence of:

For the Appellants: Mr Kiarie

For the Respondent: Ms Muriuki

Court Assistant: Carol