



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL DIVISION**

**CIVIL APPEAL NO. 646 OF 2017**

**WURANO TOSHA..... 1<sup>ST</sup> APPELLANT**

**SAID NUROW SHUNU..... 2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**DMK(Suing through the mother**

**and next friend JNN).....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Honourable M. Mbeja (Mr.) Senior**

**Principal Magistrate delivered on 01/11/2017 in**

**Milimani CMCC No. 3254 of 2014)**

**JUDGMENT**

This is an appeal by Wurano Tosha and Said Nurow Shunu against the judgement and decree of the Honourable M. Mbeja (Mrs.), Senior Principal Magistrate in Milimani CMCC No. 3254 of 2014 delivered on 1st November 2014. The Appellants were the Defendants while the Respondent was the Plaintiff before the trial court. The firm of Cheron Chirchir & Co. Advocates represents the Appellants while the firm of S.W Orege & Co. Advocates represents the Respondent.

The respondent who is the mother and next friend of the minor instituted a suit against the appellants herein for damages arising from injuries sustained by the minor via a plaint dated 9th June 2014 filed before the Chief Magistrate's court. The respondent pleaded that the 1st Appellant was the registered owner of Motor Vehicle Registration No. KBP xxxx and the 2nd Appellant was the non-registered beneficial owner of Motor Vehicle Registration No. KBP xxxx. The facts are that on or about 29th March, 2013 the respondent was lawfully crossing a bridge along Juja Road when the driver/agent and or owner of Motor Vehicle Registration No. KBP xxxx so carelessly and negligently drove the suit motor vehicle that it lost control and hit the bridge pillars causing it to collapse while the respondent was crossing.

The parties through their counsel recorded consent on liability on 5th April 2017 in favour of the respondent against the appellants at the ratio of 85: 15. Subsequently, the parties by consent dated 5th June 2017 admitted the medical documents dated 9th June 2014, medical report by Dr. Okere and the second medical report dated 18th June, 2015 by Dr. Wambugu. The trial court made the following award on damages:-

Pain and Suffering - Kshs. 3,200,000

Less 15% Contribution

Special damages - Kshs. 2,500

Costs and interest at courts' rates awarded to the plaintiff.

Being dissatisfied with the judgement and decree of the subordinate court the Appellants have preferred this appeal by way of a Memorandum of Appeal dated 22nd November 2017 filed in court on 23rd November, 2017. The four (4) grounds of appeal are THAT: -

**1. The learned Magistrate erred in law and fact in assessing damages which was manifestly high and disproportionate to the**

**injuries suffered by the respondent.**

**2. The learned Magistrate erred in law and fact by failing to address his mind to the appellants' submissions and to the authorities cited by the appellants.**

**3. The learned Magistrate erred in law by failing to be guided by the relevant factors in assessment of damages.**

**4. The Learned Magistrate erred in making an excessive award which was too excessive in the circumstances.**

On 6<sup>th</sup> November, 2020 Hon. Mbogholi Msagha J. directed that the appeal be canvassed by way of written submissions. The Appellants have on record submissions dated 2<sup>nd</sup> March, 2021 while the Respondent's submissions are dated 7<sup>th</sup> July, 2021.

#### **Appellant's Submissions:**

The sole issue for determination as outlined by the Appellants is on general damages which they submit was erroneously awarded by the trial court as it was inordinately high. The Appellants have relied on the court's reasoning in the case of **Kemfro Africa Ltd T/a Meru Express Service & Ano vs Lubia & Another No. 2 [1985]eKLR** cited with approval by Mutende J. in **Bidii Muimi & another v Patricia Munanie Mutemi & another [2020] eKLR** where the court held that:-

**“... The principles to be observed by an appellate court in deciding whether it is justified in distributing 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 wholly erroneous estimate of the damage...”**

The appellants have also relied on the case of **Rahima Tayab & Others vs. Anna Mary Kinanu – Civil Appeal No. 29 of 1982 (1983) KLR 114, KAR 90** as cited in the **Bidii Muimi Case (Supra)** where **Potter, JA** had this to say:-

**“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”**

The Appellants confirm that the parties consented to the production of the medical documentation and medical reports by Dr. Okere dated 18<sup>th</sup> December, 2013 which placed the permanent disability at 40% and Dr. Wambugu's dated 18<sup>th</sup> June 2013 which placed the permanent disability at 22%. The Appellants further confirm the injuries sustained by the respondent according to the medical reports as;

- i) Fracture of the 2<sup>nd</sup> rib
- ii) Left sacroiliac distruption
- iii) Pelvic fracture
- iv) Perineal laceration
- v) Symphysis public diastasis.

The appellants submit that the assessment by Dr. Wambugu who is a consultant surgeon, with a Masters Degree in Surgery, is more persuasive as opposed to Dr. Okere who is a lung specialist, for the reason that the injuries sustained by the respondent are mostly bone fractures. Additionally, the appellants further submit that Dr. Wambugu's examination of the respondent conducted slightly over two (2) years after the accident gives a more realistic assessment of the respondent's injuries and recovery thereof as opposed to an examination done nine (9) months after the accident.

The Appellants submit that an award of Kshs. 600,000 is fair compensation and have sought to rely on the case of **Joseph Njeru Luke & Others vs Stella M. Kioko[2020]eKLR** where the respondent sustained pelvic fracture and soft tissues injuries with no assessment of permanent disability but a possibility of pain in future was awarded Kshs. 750,000 by Majanja J. in 2020. Reliance has also been placed on the case of **Edwin Otieno Japaso vs Easy Coach Bus Co. Ltd [2016] eKLR** where Majanja J. enhanced the award for general damages of Kshs.1,500,000 by Kshs. 500,000 in consideration of loss of earning capacity where the Appellant had sustained a fracture dislocation of the right little finger, soft tissue injuries to the chest, dislocation of the right hip with a fracture of the acetabulum, fracture of the pelvis involving both superior and inferior pubic rami bilaterally, lacerated cut wound on the anterior left leg and lacerated wound on the anterior right leg. The Appellants have also cited the case of **Cynthia Nelima vs Patrick Kabiro Gitahi [2020]eKLR** where Mbogholi Msagha J. (as he then was) dismissed the appeal and upheld the lower court award of Kshs. 600,000 for chest injuries, fractured rib on the left side and left haemothorax (blood collection on the chest cavity) and fracture of the pelvis.

In their submissions before the lower court which they still seek to rely on, the appellants had sought reliance on the case of **Julius**

**Kiprotich vs Eliud Mwangi (Nakuru HCCC No. 207/2004)** where Kimaru J. awarded Kshs. 450,000 in 2006 for general damages where the plaintiff had sustained fracture of the pelvis, severe injury to the abdomen resulting into peritoneal haematoma and deep cut wound on the right parietal region of the scalp. While in **John Kamore vs Simon Irungu Ngugi & Ano. (Murang'a HCCA No. 113/2013)** Ngaah J. upheld an award of Kshs. 500, 000 subject to apportionment where the respondent sustained blunt injury to the head, fracture to the cervical spine and blunt injury to the left lower limb with reduced muscle power. Lastly, in **David Kiplangat vs Richard Kipkoech (Kericho HCCC No. 91/04)** the court awarded the plaintiff Kshs. 550,000 in general damages for severe head injuries with loss of consciousness for four days, blunt chest injuries with fracture of two ribs, fracture of the tibia fibula, upper tibia (tibial plate) and left acetabulum, with hip dislocation and a fracture of the left medial malleolus with permanent disability placed at 30%.

#### **Respondent's submissions:**

In opposition to the appeal, the Respondent while pointing out the duty of this court to subject the whole evidence to a fresh and exhaustive scrutiny and make its own conclusions, made reference to the holding in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** as cited by the court in **Ndungu Dennis bs Ann Wangari Ndirangu & Another [2018]eKLR**. The issue for determination identified by the Respondent is whether the general damages of Kshs. 3,200,000 was inordinately excessive given the circumstances of the case.

The Respondent submits that it had sought general damages amounting to Kshs. 5,000,000 as adequate compensation for the injuries sustained by the Plaintiff and in consideration of the rate of inflation. According to Dr. Cyprianus Okoth Okere's medical report dated 18<sup>th</sup> December, 2013, the Respondent suffered 40% permanent disability as a result of the grievous injuries he sustained. That due to the fracture of the L5 and the complex pelvic fracture, the Respondent would have difficulties with normal child delivery.

The Respondent has relied on the case of **Simon Taveta vs Mercy Mutitu Njeru[2014]eKLR** where the Court of Appeal reduced an award of Kshs. 4,000,000 awarded by the High Court to Kshs. 3,500,000 subject to 15% apportionment awarded for total paralysis of the limbs from the waist downwards due to a spinal cord injury with a 100% permanent disability.

#### **Analysis and Determination:**

This being a first appeal, as rightly submitted by the respondent, it is indeed the duty of the Court to review the evidence adduced before the lower court before drawing its own conclusion. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:-

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

The only issue for determination in this appeal is on quantum. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well established guidelines. In the case of **BUTT -V- KHAN (1981-88) KLR 349** the court held as follows:-

**"The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates."**

The trial court awarded Kshs.3,200,000 general damages for pain and suffering. Part of the trial court judgment reads as follows:-

**"The plaintiff in the instant case has been left with a permanent limping gait and cosmetic scars. This court has given due consideration to the findings in the two medical doctor's opinion as per the medical reports produced by consent of the parties. The plaintiff suffered serious injuries which have healed with permanent disabilities coupled with the anticipated difficulty in giving birth. The injuries were fractures that affected the pelvic region albeit adversely with future ramifications."**

According to the medical report by Dr. Wambugu dated 18<sup>th</sup> June 2015, the respondent suffered the following injuries:-

- Complex pelvic fractures associated with diastasis of the symphysis.
- Extensive perineal tear.
- Fracture L5 left transverse process.
- Fracture coccyx
- Fracture left 4<sup>th</sup> metatarsal.
- Fracture right 2<sup>nd</sup> - 4<sup>th</sup> ribs.

The two reports are largely consistent as to the nature and extent of the injuries and the respondent's prognosis. They however differ on the

extent of the permanent disability. While the medical report by Dr. Cyprianus Okoth Okere dated 18<sup>th</sup> December, 2013 places the permanent disability at 40%, Dr. Wambugu P.M in his medical report places permanent disability at 22%. In both medical reports, the doctors have acknowledged that the residual effects of the pelvic fracture is the associated difficulty in normal child delivery. It is only instructive to note that the medical reports were written at different period during the respondent's healing process and therefore i agree with the appellants that the medical report of Dr. Wambugu gives a more accurate state of the respondent's disability.

Having found that the trial court addressed itself to both medical reports, the only other question in respect of general damages is whether the award made was inordinately high as submitted by the appellants. While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varying awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions for purposes of certainty and uniformity.

In the case of **David Kiplangat vs Richard Kipkoech(Kericho HCCC No. 91/04)** relied on by the appellants, the plaintiff albeit with comparable similar injuries with the respondent with a 30% permanent disability, was awarded Kshs. 450,000 in 2006 i.e 15 years ago. Similarly, in a recent court decision as cited by the appellant, Majanja J. in **Joseph Njeru Luke & Others vs Stella M. Kioko[2020]eKLR** awarded the respondent Kshs. 750,000 general damages for pelvic fracture and soft tissues injuries. However this is distinguishable from the present case as there was no assessment of disability. In my opinion, the case of **Simon Taveta vs Mercy Mutitu Njeru [2014]eKLR** relied on by the Respondent does not relate to the present case as the injuries sustained thereon were of very serious nature with 100% permanent disability.

In the case of **Milicent Atieno Ochuonyo vs Katola Richard [2015]eKLR**, Onyancha J. awarded the Plaintiff Kshs. 2,000,000 for pelvic injuries with fracture of right pubic ramus and diastasis of the symphysis pubis with a small abdominal wall haematoma and minimal haemoperitoneum. There were two medical reports confirming the injuries but with varying degrees of permanent disability of 20% and 40% respectively just like in the present case.

Taking into account the similar decisions cited herein, I do award the respondent Kshs. 2,500,000. I find that the trial court's award is quite excessive. Consequently, the appeal succeeds, the award of Kshs. 3,200,000 by the subordinate court is hereby set aside and substituted with an award of Kshs. 2,500,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court. The respondent shall have costs and interest awarded by the trial court. Parties shall meet their own costs in this appeal.

**DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2021.**

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**S. CHITEMBWE**

**JUDGE**