REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 18 OF 2019

ELIZABETH WANGUI NJIRU.....APPELLANT

VERSUS

DAVID MWANGI NGUGI.....1ST RESPONDENT

HARUN MUNGAI.....2ND RESPONDENT

(Appeal against the judgment and Decree of the Chief Magistrate's Court (Hon. E.M. Mulochi, (RM),

delivered on 3rd June, 2019 in CMCC No. 26 of 2018 at the Chief Magistrate's court at Kajiado)

JUDGMENT

1. The appellant sued the respondents before the Chief Magistrates Court, Kajiado for compensation for injuries suffered while traveling as a fare paying passenger in motor vehicle KCC 235H, driven by the 1st respondent and owned by the 2nd respondent. She sustained injury on anterior aspect of the left hand with 20% loss of function. She sought both general and special damages. The respondents denied the appellant's claim and negligence and attributed negligence to appellant.

2. The trial court found in favour of the appellant and awarded her general damages of Kshs. 250,000 but dismissed the claim for special damages as having not been proved. The appellant was aggrieved with the trial court's award of damages. She filed a memorandum of appeal dated 1st July, 2019 on 3rd July, 2019 and raised three grounds of appeal, namely:

> ***1. That the learned trial magistrate erred in law and fact in awarding the appellant Kshs. 250,000 in general damages for pain, suffering and loss of amenities which award is so inordinately low that it represents an entirely erroneous estimate.***
>
> ***2. That the Honorable magistrate misapprehended the appellant's injuries thereby arriving at an award that was inordinately low.***
>
> ***3. That the learned trial magistrate erred in law in failing to consider the appellant's submissions.***

3. Parties agreed to dispose of this appeal through their written submissions dated 23rd December, 2019 and 8th January, 2019 (should be 8th January 2020 since they were filed on 14th January 2020 and the appeal was filed on 3rd July 2019), for the appellants and respondents respectively. The appellant submitted that the trial court failed to take into account relevant factors, more so the nature of injuries she suffered, thus made an inordinately low award of damages. She relied on ***Kemfro Africa Ltd t/a Meru Express Services (1976) and Another v Lubia & Another*** [1985] eKLR, on the principles the court should consider in deciding whether or not to interfere with an award of damages.

4. According to the appellant, Dr. Kahuthu assessed her permanent incapacity at 30% while Dr. Onyango put it at 60% for the right hand and 20% for the left hand. She argued that the trial court did not consider the severity of the injuries she suffered and permanent incapacity, thus failed to consider relevant factors in arriving at the award it made.

5. The appellant also argued that comparable injuries should as much as possible attract similar awards. She relied on ***Easy Coach Ltd v Emily Nyangasi*** [2017] eKLR and ***Simon Taveta v Mercy Mutitu Njeru*** [2014] eKLR. She blamed the trial court for not taking guidance from decided cases with comparable injuries. She submitted that although both parties filed written submissions before the trial court and cited decisions, the trial court never considered those decisions or give reasons why it could not accept them.

6. According to the appellant the award of Kshs, 250,000 was inordinately low compared to the level of awards in similar injuries. She cited ***Easy Coach Ltd v Emily Nyangasi*** **(supra)** and ***John Onyango Omolo v Mary Omulo Ndege*** [2014] eKLR, which she cited before the trial court. In the Easy Coach case, an award of Kshs, 700,000 was upheld on appeal. She again cited ***Mulandi David Kole v George Odhiambo Obiewe & Another*** [2017] eKLR where an award of Kshs. 600,000 was found to be reasonable.

7. The respondents submitted in opposition to the appeal, that the award was proper, reasonable, fair and just and was within comparable awards. They relied on ***Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd*** [2013] eKLR, that awards have to make sense and have regard to the context in which they are made or strike a chord of fairness. They also cited ***Kim Pho Choo v Camden & Islingtom Area Health Authority*** [1979] 1 ALL ER 332, (per Lord Denning), that in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant.

8. The respondents again relied on ***Millicent Atieno Ochuonyo v Katola Richard*** [2015] eKLR, for the proposition that the general picture, the whole circumstance and the effect of injuries on the particular person concerned must be looked at and some degree of uniformity must be sought and the best guide in this respect is to have regard to recent awards in similar injuries.

9. The respondents argued that according to the discharge summary, the appellant sustained injuries on the right ring finger and small finger on the right hand and soft tissue injuries on the left hand. According to the P3 form and medical report dated 23rd August, 2017, she sustained degloving injuries to the right hand and soft tissue injuries to the left hand.

10. They argued that Dr. Jenifer (DW1), produced a medical report dated 16th May, 2018 which noted that the appellant sustained degloving injuries to the right upper limb which had since completely healed. They therefore argued that the evidence pointed that the appellant had healed without permanent incapacity. They argued, relying on ***Denshire Muteti Wambua v Kenya Power & Lighting Company Ltd*** [2013] eKLR**,** that comparable injuries should as much as possible attract comparable awards. They also cited ***George Kinyanjui t/a Climax Coaches & Another v Hassan Musa Agoi*** [2016] eKLR, that an appellate court should not interfere with quantum of damages unless the award is inordinately high or inordinately low or is founded on wrong principles.

11. The respondents submitted that the award of Kshs. 250,000 was proper for the injuries the appellant suffered. They relied on ***H. Young Construction Company Ltd v Richard Kyule Ndolo*** [2014] eKLR where an award of Kshs, 350,000 was made in similar injuries where the victim had been even admitted in hospital. On appeal, the award was reduced to Kshs. 250,000. They also cited ***Mutuku Stanley & Another v Stephen Mwongela Maweu*** [2017] eKLR where and award of Kshs, 700,000 made for similar injuries was reduced on appeal to Kshs. 300,000. They again cited ***Ondingo Luora & 4 Others v Kenya Bus Services Ltd*** [2015] eKLR where the plaintiff who had his hand amputated and dislocation of right ankle was awarded Kshs. 600,000. They urged the court to dismiss the appeal.

12. I have considered this appeal, submissions by parties and the decisions relied on. This being a first appeal, it is in form of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

13. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

14. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".***

15. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR, the Court of Appeal stated;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

16. The plaintiff testified through her undated witness statement filed together with her plaint, that on 15th August, 2015 at around 5 a.m. she boarded motor vehicle registration No. KCC 235H at Kajiado headed to Nairobi. The vehicle then proceeded to Kajiado District Hospital to pick another passenger. When it approached the County Commissioner's office, it overturned due to high speed and rolled before coming to a halt. She sustained injuries on both hands and had extensive wounds. She was taken to hospital and admitted for a month. Her hospital bill was paid by NHIF. She still experienced pain and numbness on both hands. Her left small finger cannot flex and the right finger cannot straighten up which has affected her typing speed as a typist. She cannot also clean clothes or do other household chores. In cross-examination, she stated that she did not see the speed at which the vehicle was traveling and that the injuries did not affect her salary earrings.

17. DW1 Dr. Jenifer Kahuthu, a general medical practitioner, testified on behalf of the respondents, that according to the medial report of Dr. Kevin Odhiambo, the appellant was treated at Kajiado County Hospital after she was injured in a road accident on 15th August, 2018. She was treated for degloving injury with tendon involvement on the right upper limb, an injury on the right ring and small fingers and injuries on the right upper limb. The injuries were Managed through surgical debridement, pain killers and antibiotics.

18. On the day she examined the appellant, she walked with a normal gait but complained of numbness on both upper limbs. She had a healed scar on the right upper limb as well as left upper limb, her right wrist joint was stiff as well as the right small finger. Movement on the left right joint was normal. She had reduced gap on the right hand. The right wrist was also limb. She assessed permanent disability at 30% due to the stiffness at the wrist joint, right small finger and the reduced gap of the right hand. The witness stated that she had seen the report by Dr. Kevin Odhiambo, and whereas they agreed on the injuries sustained, she did not agree on permanent disability of 80% assessed by Dr. Odhiambo for the left hand and 20% for the right hand which would total to 100%. She felt this was highly exaggerated because even under WIBA (The Work Injury Benefits Act, 2007), 100% disability is for someone who is fully dependent. She produced her medical report as an exhibit.

19. In cross-examination, she told the court that degloving is derived from the word removing a glove. It is an injury where the skin is pulled from underlined body tissues just like removing of a glove. The injury leaves a scar which would have an effect on the beauty of a woman. She also told the court that surgical debridement involves a surgical procedure to remove dead tissues from the wounds.

20. The trial court considered the evidence and made the award the subject of this appeal. The appellant faults the trial court for the award it made arguing that it was inordinately low compared with the injuries she suffered. She therefore urged this court to interfere with the trial court's assessment of damages. Her main ground was that the trial court failed to take into account relevant factors namely; the injuries she sustained.

21. The principles on which an appellate court may interfere with exercise of discretion are clear and assessment of damages is exercise of discretion. In ***Mbogo v Shah*** [1968] EA 93, ***De Lestang***, Ag. VP stated at page 94:

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

22. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated:

> ***"[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

23. In ***Butt v Khan*** [1981] KLR 349 the Court (***Law, J.A***) held that:

> ***"An appellate court will not disturb an award 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."***

24. And in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*** [1985] eKLR, ***Kneller J.A.*** stated:

> "***The principles 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 that 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 damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."***

25. Applying the above principles, the issue before this court for decision in this appeal is whether it should interfere with the award of damages by the trial magistrate and, if so, what quantum of damages should be awarded to the appellant for the injuries she sustained.

26. The trial court stated and, this court is in agreement, that parties were more or less in agreement on the injuries the appellant suffered. The two medical reports by both the appellant and respondents were also in agreement. The only issue was on the level of permanent disability. Which the trial court also noted. The trial court referred to the decisions in ***Southern Engineering Company Ltd v Musingi Mutia*** [1985] eKLR on the measurement and discretion of the trial court to assess damages, and ***Jabane v Olenja*** [1986] KLR 661 on the approach the court should take in assessing an award of damages.

27. The trial magistrate then stated.

> ***"Considering the injuries sustained by the plaintiff I award her Kshs. 250,000 as general damages. Special damages have to be specifically pleaded and proved. The plaintiff has sought to be awarded Kshs. 5,000 as special damages being costs incurred in preparing the medical report. I however, note that no evidence, say a receipt, to prove that she paid this amount was annexed to her suit. I therefore decline to award her this amount..."***

28. The appellant blamed the trial court that it did not take guidance from decided cases with comparable injuries. She argued that although

both parties filed written submissions before the trial court and cited decisions, the trial court never considered those decisions or give reasons for not accepting them and as a result, the award of Kshs. 250,000 was inordinately low compared to the level of awards for similar injuries.

29. I have gone through the impugned judgment. It is true that the trial court never made reference to the decisions cited by parties before it. The appellant's submissions before the trial court were dated 15th March 2019 and filed on 19th March 2019. On the issue of quantum, the appellant cited the decision of ***John Onyango Omollo v Mary Omollo*** [2014] eKLR. In that case, the respondent sustained degloving injury to the right upper limb with loss of tendons and cut wound on the forearm. The court upheld an award of Kshs. 600,000.

30. She also cited ***Easy Coach Limited v Emily Nyangasi*** [2017] where the respondent sustained facial injuries, chest injury, injury to back, injury to right hand with cut wound and injury to right leg with cut wound. and this court, (***Cherere, J***) upheld an award of Kshs. 700,000.

31. The respondents filed written submissions before the trial court on 3rd April 2019. On the issue of liability, they cited ***Jackson Wanyoike v Kenya Bus Services& another*** [2003] eKLR. The plaintiff had suffered injury to the left knee and left leg which involved loss of skin and the tissue underneath on the whole knee and on the leg up to the ankle joint, (degloving injury). She was admitted in hospital for three and half months. And had to undergo skin grafting.

32. The respondents also cited ***H. Young Construction Company Ltd v Richard Kyule Ndolo*** [2014] eKLR where an award of Kshs. 250,000 was made for a degloving injury on the left calf region. They also relied on ***Moraa Maangi v Kerumbe Tea Estate & another*** [2011] eKLR where an award of Kshs. 200,000 was made for a compound fracture and bruises which had healed leaving no permanent incapacity.

33. It is clear to this court that the learned trial magistrate did not consider any of the decisions cited by parties so as to guide him on the assessment of the damages. If he had done so, he would probably have come to a conclusion that the award he made was not in tandem with decided cases. The learned trial magistrate failed to appreciate that in assessing damages for personal injuries, the general method of approach is that **comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases** (***Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others*** **[2004] eKLR).**

34. Although award of damages was at the discretion of the trial magistrate, the discretion should be exercised judicially. That cannot be said to have been the case where the court failed to consider the authorities cited before it as a guide on the level of award to make so as to be in consonance with those decided cases.

35. It is the view of this court that the award of damages by the learned trial magistrate was inordinately low that it was a wholly erroneous estimate of the damage, to call for this court's interference.

36. In assessment of damages in this case, regard should be had to the nature, severity and extent of the injuries suffered by the appellant which, as is clear from the evidence and medical reports, were multiple injuries. Both parties' doctors agree on the mature and extent of the injuries. Disagreement is only on the degree of permanent incapacity.

37. Dr. Kahuthu for the respondents saw the appellant on 16th May 2018 and agreed with the appellant's doctor (Dr. Kevin Odhiambo) whose medical report on the appellant is dated 23rd August 2017, that the appellant had suffered permanent incapacity. According to Dr. Kahuthu, whereas Dr. Odhiambo put permanent incapacity at 80% for the left hand and 20% for the right hand, she felt this was ***"grossly exaggerated as the left hand had normal functions."*** She opined that the appellant's right hand had some good degree of functionality and the appellant still worked as a secretary. She assessed permanent incapacity at 30%. Without saying whether it was for the right or left hand.

38. I have perused the medical report by Dr. Odhiambo dated 23rd August 2017. He concluded that the appellant had lost function of the right hand 60% and left hand 20%. The appellant experience on and off numbness due to nerve involvement. She had healed with scarring.

39. Taking the two medical reports into account and the fact that Dr. Odhiambo had assessed 60% loss of functionality on the right hand while Dr. Kahuthu assessed general permanent incapacity of 30%, this court will take the average of higher assessment of 60% by Dr. Odhiambo and 30% by Dr. Kahuthu, bringing permanent incapacity to 45%.

40. The appellant confirmed during cross examination that she was still employed and her salary had not been affected following the accident and resultant injuries.

41. The authorities show that awards such range between Kshs. 300,000 and 700,000 going by the decisions cited by parties. However, the decisions cited by the respondents are fairly old and do not reflect the true position in current awards. The appellant asked this court to be guided by the decision in ***Mulandi David Kole v George Odhiambo Obiewe & another*** [2019] eKLR where an award of Kshs. 600,000 was made for injuries to the hand and the appellant had been admitted to hospital for one month.

42. As the Court of Appeal observed in ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd*** [2013] eKLR

> ***"[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness."***

43. Similarly, ***Lord Morris*** of ***Borthy-Gest*** stated in ***West (H) & Son Ltd v Shepherd*** [1964] A.C. 326 pg. 345:

> ***"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 endeavor 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."***

44. With those principles in mind, and after considering the authorities cited by parties and having regard to the injuries the appellant sustained, as well as the level of incapacity, it is my considered view, that an award of Kshs. 500,000 is fair compensation in the circumstances of this appeal.

45. Consequently, this appeal succeeds and is allowed. The trial magistrate's award of Kshs. 250,000 is set aside and in place therefor, the appellant is awarded general damages of Kshs. 500,000 for pain and suffering. The appellant shall also have costs of this appeal.

Dated, signed and delivered at Kajiado this 26th day of February, 2020.

E.C. MWITA,

JUDGE