REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 23 OF 2018

ANGELA KATUNGE MUSAU.....APPELLANT

~AND~

CHINA WU YI LIMITED.....1ST RESPONDENT

WILSON GITHU.....2ND RESPONDENT

(Being an appeal from the whole Judgement and Decree of Senior Principal Magistrate's Court at Mavoko delivered on 9th February 2018 by the Senior Resident Magistrate Ms. A. Agonda in PMCC No. 619 of 2014)

~BETWEEN~

ANGELA KATUNGE MUSAU.....PLAINTIFF

~VERSUS~

CHINA WU YI LIMITED.....1ST DEFENDANT

WILSON GITHU.....2ND DEFENDANT

JUDGEMENT

1. By an amended plaint dated on 20th June, 2014, the appellant herein instituted a suit for damages arising from road traffic accident which occurred on 3rd January, 2012.

2. According to the Appellant, on that day, she was lawfully travelling in motor vehicle reg. no. KBC 176F along Mombasa-Nairobi Road when near Athi River area, motor vehicle reg. no. KBB 892G and ZD 4070 which was owned by the 1st respondent and driven by the 2nd respondent, suddenly, abruptly and without any warning, carelessly, negligently and recklessly entered the lane of motor vehicle reg. no. KBC 176F in which the Appellant was traveling and rammed into the same. As a result, the appellant sustained severe bodily injuries. The plaintiff pleaded particulars of negligence on the part of the Respondents.

3. According to the appellant, she sustained a cut wound to the forehead, cut wound on the lip, cut wounds on the lip, cut wounds on the left small and ring fingers, fractured left radius bone- distal aspect, fractured right acetabulum (pelvic bone) and fractured femur. She was taken to Athi River, Shalom Community Hospital before being referred to Kenyatta National Hospital for treatment where she was admitted from 4th January, 2013 to 2nd February, 2013. It was however her case that she had not fully recovered and still required further treatment in future. The appellant sought special damages of Kshs 43,780/- and general damages for pain, suffering and loss of amenities and future medical expenses.

4. Based on the determination in Machakos HCCC No. 53 of 2014, on the 5th October 2017, a consent judgement was entered in this matter in which liability was entered for the appellant against the Respondents in the ratio of 70:30 and it was agreed that the parties be allowed to produce documents without calling the makers. The matte was then stood over to 30th October, 2017 for mention. On that day, instead of the said documents being produced as agreed, the court was informed that the mention was to confirm the filing of submissions. However, as the submissions were not ready the matter was stood over to 13th November, 2017 when, upon the filing of submissions being confirmed, the matter was fixed for judgement on 9th February, 2018.

5. It is therefore clear that contrary to the terms of the consent, the documents were never produced in the matter contemplated.

6. In his judgement the learned trial court awarded the Respondent Kshs 700,000.00, Special Damages of Kshs 45,230.00, Removal of K. nail Kshs 60,000.00 making a gross total of Kshs 805,230/= which she then discounted by 30% contribution leaving a net balance of Kshs 563,661/=.

7. In this appeal, the Appellant has raised the following grounds of appeal;

a. THAT the learned trial Magistrate erred in law and fact in awarding damages that were manifestly low in the circumstances.

b. THAT the learned trial Magistrate erred in law and fact in finding and awarding damages and whilst doing so failed to consider the severe injuries sustained by the Appellant.

c. THAT the learned trial Magistrate erred in law and fact in failing to observe that the medical report presented by the Appellant was unchallenged and that there was no evidence of a second medical examination or evidence to contraband the medical evidence available.

d. THAT the learned trial Magistrate erred in law and fact in failing to find and hold that the only medical evidence presented has assessed functional disability of the Appellant at 60%.

e. THAT the learned Magistrate erred in law and fact in failing to observe and find that the Appellant has not yet recovered from the aforesaid accident and is still attending to medical treatments and failed to award damages for future medical treatment.

8. In this appeal the appellant submitted that the award of Kshs. 700,000/- as general damages and Kshs. 45,230/- as special damages before contribution of liability was manifestly low to compensate the Appellant for the injuries she sustained, noting that the Appellant in her submissions had prayed for Kshs 2,000,000/- as general damages only. According to the appellant, the medical report by **Dr. Titus Ndeti Nzina** dated 9th January 2014 produced as Plaintiff's exhibit "PEx-5(a)", the treatment notes from Athi River Shalom Hospital and Kenyatta National Hospital dated 13th February 2013 produced as Plaintiff's exhibit "PEx-1(a)", the discharge summary from Kenyatta National Hospital dated 30th January 2013 produced as Plaintiff's exhibit "PEx-1(b)" are all consistent with the injuries sustained by the Plaintiff, which are cut wound to the forehead, cut wound on the lip, cut wound on the left small and ring fingers, fractured left radius bone- distal aspect, fractured right acetabulum (pelvic bone) and fractured left femur.

9. It was submitted that the trial Court ought to have considered the injuries sustained as enumerated herein above whilst making its decision and award on the same to note that the injuries were severe. In support of her submissions the appellant relied on **John Kibicho Thirima vs. Emmanuel Parsmei Mkoitiko [2017] eKLR** and **Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR.** It was submitted that in the case of **John Kibicho Thirima vs. Emmanuel Parsmei Mkoitiko [2017] eKLR**, the plaintiff suffered the following injuries; multiple fractures of ribs of the 2nd to 5th ribs of the chest, fracture of the right ulna bone, displaced and comminuted fracture of the right mandible, fracture of the right superior and inferior pubic ramus of the pelvis bone, fracture of the left scapula, fracture of left superior pubic ramus of the pubic bone, multiple lacerations and cut wounds on the right forearm and both legs, cut wounds on the head, contusion of the chest and blood loss, physical and psychological pains. As a result, the plaintiff suffered permanent incapacity of 55%. The court awarded the plaintiff a sum of Kshs 1,800,000/= as general damages for pain, suffering and loss of amenities. The court also awarded Kshs 600,000/= as general damages for loss of earning capacity. Furthermore, the court awarded Kshs 250,000/= as cost of future medical expenses. The case was decided on 8th November 2016.

10. In the case of **Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR,** it was submitted that the plaintiff suffered the following injuries; fracture of the right femur, fracture of the ribs 3-6, pain in the right side of the chest and the right thigh and persistent pain in the right knee. The court awarded the plaintiff a sum of Kshs. 4,000,000/= as general damages for pain, suffering and loss of amenities. The court also awarded the plaintiff Kshs 650,000/= as special damages for future medical treatment- for removal of the metal implant in her right femur and a total knee replacement. The case was decided on 21st December 2017.

11. However, the trial Court relied on the authority of **Kiru Tea Factory & Another vs. Peterson Wathaka Wanjohi Nairobi High Court Civil Case No. 1045 of 2004**, in which the learned Judge awarded Kshs. 800,000/- and which case the appellant submitted is distinguished from the injuries sustained herein. Further the suit was an appeal from a judgement delivered in 2004 and the Appellant therein being aggrieved filed the appeal that was decided in 2008, there was a period of inflation for a decade (10 years) which the trial Court failed to considered and even rendered a lower amount than the one awarded a decade ago.

12. According to the appellant, it is clear from the proceedings that there is no evidence that the Appellant was ever subjected to a second medical examination and therefore the only medical examination conducted was that of the Plaintiff's Doctor and PW2 as evidenced by the medical report by **Dr. Titus Ndeti Nzina** dated 9th January 2014 produced as Plaintiff's exhibit "PEx-5(a)", the treatment notes from Athi River Shalom Hospital and Kenyatta National Hospital dated 13th February 2013 produced as Plaintiff's exhibit "PEx-1(a)". it is therefore

clear that the medical evidence as to the injuries sustained remains unchallenged. The trial Court was therefore bound to make an award in line with the injuries sustained and as proved by way of medical report and evidence.

13. It was submitted that the evidence on record is that the medical report assessed that functional disability was **60%** as shown by the medical report by **Dr. Titus Ndeti Nzina.** Therefore, the damages awarded should be sufficient to compensate her fully, which is not the case in the judgment delivered on 9th February 2018.

14. It was submitted that whereas the trial Court made an award for damages for future medical treatment of Kshs. 60,000/-, there was unchallenged and collaborated evidence that the Appellant had not recovered in full and was in need of future medical expenses which was assessed by the medical doctor in the sum of Kshs. 100,000/-. To the appellant, this is a clear error on part of the trial court which did not record the reasons for failing to make an award in this heading and the Appellant having led overwhelming evidence in support of this is entitled to the same in the award assessed by the doctor and clearly recorded in evidence by the Court of Kshs. 100,000/-.

15. In light of the foregoing, this Court was urged to allow the Appeal and enter an award in terms of quantum in the Appellant's favour to a higher and commensurate award as proposed hereunder;

a) General damages **Kshs. 3,000,000.00**

b) Special damages **Kshs. 45,230.00**

c) Future medical expense **Kshs. 100,000.00**

Sub Total **Kshs. 3,145,230.00**

Less contribution **Kshs. 943,500.00**

Total **Kshs. 2,201,730.00**

d) Costs of the appeal and interest on general damages, special damages and costs at court rate from the date of filing the suit in the Court below.

16. In reply, learned counsel for the respondent submitted that the award of the trial court was in tandem with the injuries suffered and that a critical analysis of the report established that the appellant's organs were in working condition. Counsel urged this court not to interfere with the award of damages that was given by the trial court. Counsel submitted that in the case of **Kiru Tea Factory & Another v Peterson Waithaka Wanjohi (2008) eKLR,** the court awarded Kshs 800,000/- as general damages for pain, suffering and loss of amenities where 45% disability was assessed. Counsel cited the cases of **Auto Selection Kenya Limited & Another v Charity Wanja Kagiri (2015) eKLR** and **George Njenga & Another v Daniel Wachira Mwangi (2017) eKLR** where awards of Kshs 800,000/- were made and urged the court to maintain the award of the trial court.

Determination

17. As indicated at the beginning of this judgement, contrary to the terms of the consent, the documents were never produced in the matter contemplated. However, before the said consent was entered the Appellant had adduced evidence in support of her case in which she testified that she sustained injuries on the head, in the mouth, on her left fingers, left leg, fracture of the right hand, fracture of the right leg and hip joint. She was treated at Shalom Hospital and was referred to Kenyatta National Hospital where she was admitted for one month from 3rd June, 2013 to 3rd February, 2013. She produced the treatment notes and discharge summary as exhibits. According to her when she was admitted she incurred medical expenses and produced a bundle of receipts for Kshs 43,780/=. In cross-examination she stated that she had an implant in her left leg and was continuing with treatment. She stated that her first implant was removed due to infection and new implants were inserted.

18. In support of her case, the plaintiff called **Dr Titus Nditi** who on 9th January, 2014 examined the appellant who was aged 40 years. He reduced his finding in a medical report dated 9th January, 2014 which report he exhibited. According to the said report, the Appellant sustained soft-tissue injuries and fractured bones which caused her pain, blood loss and suffering. She had restrictions of joint movements in the right hip and could not walk without assistance. She had permanent deformity in the hip joint and the degree of permanent incapacity was assessed at 60%. According to the doctor the Appellant would require removal of the K-nail at the approximate cost of Kshs 60,000.00 in a low cost Hospital while a high cost Hospital would cost her about Kshs 100,000.00. She however would be unable to perform her business as before the accident.

19. In this appeal, the appellant is only challenging the quantum of damages. The general law is that 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 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 be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.**

20. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

21. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

22. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

23. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

24. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

25. In this case according to the medical report of **Dr Kimuyu**, the Appellant's injuries were cut wound on the forehead, lower lip and left small and ring fingers; fracture of the radius bone, right acetabulum and left femur. I have considered the authorities relied upon by the Appellant and I find that the injuries sustained by the plaintiffs in those case were more serious than those sustained by the appellant herein. However, the injuries sustained in the cases cited by the Respondent were less serious than those sustained by the appellant herein. It is my considered view that the case that comes nearest to the instant case is **Bethwel Mutai vs. China Road & Bridge Corporation [2008] eKLR**. In that case, following the accident in which the plaintiff was knocked down by a motor vehicle, the plaintiff sustained fracture of the left clavicle, fracture of the right humerus and fracture of the right femur. He was admitted in Hospital from 9th December, 2006 till 21st December, 2006 and was subsequently followed up in Nairobi. He was operated on the clavicle and the humerus and the same were professionally fixed while the 3rd injury was fixed with an interlocking nail. As a result, the plaintiff complained of occasional pain on the

right arm and thigh. The plaintiff was on 25th April, 2008 awarded Kshs 800,000.00 as general damages. That case was determined 10 years before the instant case was determined. Considering the lapse of years and the inflationary tendencies as well as the resultant consequences in both cases, I find that the award made by the learned trial magistrate was so inordinately low as to represent an entirely erroneous estimate. Accordingly, I substitute the award of Kshs 700,000.00 in general damages with Kshs 1,000,000.00.

26. As regards the award for future medical expenses, authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. **Ringera, J** (as he then was) in **Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002** held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993,** held that cost of future medical operation is special damages, which must be pleaded. See also **Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246.**

27. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> **"The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."**

28. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> **"In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages…General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."**

29. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. In this case, the Appellant treated future medical expenses as general damages with the result that the same was not expressly pleaded. Nonetheless the award under that head is not challenged by the Respondents in this appeal. The doctor in his medical report stated that the Appellant would require removal of the K-nail at the approximate cost of Kshs 60,000.00 in a low cost Hospital while a high cost Hospital would cost her about Kshs 100,000.00. The trial court deemed it fit to award Kshs 60,000.00 under that head which was within the range proposed by the doctor.

30. In **Woodruff vs. Dupont [1964] EA 404** it was held by the East African Court of Appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them…The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

31. It is therefore my view that since the cost of future medical expenses as awarded fell within the range suggested by the doctor, this court ought not to substitute its opinion for that of the trial court.

32. Consequently, this appeal in so far as the award of general damages is concerned succeeds and I substitute the award of Kshs 700,000.00 with Kshs 1,000,000.00. This shall be discounted by 30% being the agreed contribution leaving a sum of Kshs 700,000.00.

33. Save for the foregoing the appeal otherwise fails.

34. The appellant will have half the costs of this appeal since she has only partly succeeded.

35. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of April, 2020.

G V ODUNGA

JUDGE

Delivered the absence of parties who were duly notified through their provided email addresses.

CA Josephine