



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERUGOYA**  
**HIGH COURT CIVIL APPEAL NO. 10 OF 2018**

**MARGARET WAITHERA NJENGA.....APPELLANT**

**VERSUS**

**ANESTAR SECONDARY SCHOOL.....RESPONDENT**

*(Being an Appeal against the Judgment of the Hon. D. Nyaboke Sure (RM\_  
delivered on 29<sup>th</sup> January, 2018 in PMCC No. 48 of 2017 - Wanguru)*

**BETWEEN**

**MARGARET WAITHERA NJENGA.....PLAINTIFF**

**VERSUS**

**ANESTAR SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the Judgment delivered in PMCC's at Wanguru Civil Case No. 48 of 2017. In the case the appellant had filed a plaint on 11<sup>th</sup> day of April, 2017 seeking general and special damages, costs and interest against the defendant on account of injuries she sustained as a result of a road traffic accident which occurred on 17<sup>th</sup> June, 2016 along Embu Mwea Road while travelling as a passenger in motor-vehicle registration number **KBP 403 A** which is owned by the defendant/respondent.

2. The appellant in the plaint had claimed that the accident occurred owing to the negligence of the defendant as the particulars of negligence pleaded in the plaint. As a result of the accident the plaintiff sustained bodily injuries.

Which include;

- (a) **Fracture pelvis right side, superior public ramus**
- (b) **Trauma to the right hip joint as evidenced by tenderness.**

3. The claim was opposed by the respondent who though admitting the occurrence of the accident denied any negligence on his part.

4. In the Judgment of the trial magistrate delivered on 29<sup>th</sup> January, 2018 the defendant was adjudged to be **100%** liable for the accident. She proceeded to award the appellant **Kshs; 300,000/=** in general damages for injuries that the plaintiff/appellant had sustained.

5. Aggrieved by the Judgment of the trial magistrate, the appellant lodged this appeal in Memorandum of Appeal dated 3<sup>rd</sup> February, 2018 and raised the **following grounds;**

(i) That the learned magistrate erred in law and in fact by failing to consider the evidence tendered by the plaintiff

(ii) That the learned magistrate erred in law and in fact in awarding general damages of Kshs; 300,000/= an amount that was inordinately very low in the circumstances.

(iii) That the learned magistrate erred in law and in fact in failing to consider the nature and serious of the injuries suffered by the Plaintiff.

(iv) That the learned magistrate erred in law and in fact in failing to consider the Plaintiff's submissions.

6. The appellants prayed that the Judgment of the lower court be set aside and be substituted with an award on quantum as proposed in the appellant's submission dated 8<sup>th</sup> **January, 2018**. She proposes that the appeal be allowed and that the court re-assesses the general damages awarded.

7. The appeal was opposed by the respondents who filed written submissions dated 15<sup>th</sup> February, 2019. I have considered the appeal and the submissions filed by the parties.

**8. The issue which arises for determination is;**

(i) Assessment of damages.

It is submitted that the learned magistrate assessment of general damages were inordinately low and the same ought to be interfered with by this court in the interest of justice.

It is submitted that it is trite law that the trial court was under a duty to assess the general damages payable to the appellant even after dismissing the suit.

He has relied on the case of; **Mordekai Mwangi Nandwa -versus - Bhogals Garage Limited CA No. 124 of 1993** Reported in **1993 ( KLR 4448)** where the court held that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.

That the learned trial magistrate did assess the general damages payable to the plaintiff however, it is our considered view that the stated award in Kshs; 300,000/= is inordinately low in the circumstances.

He has relied on the case of; **Butt -vs- Khan Civil Appeal No. 40 of 1997**, Law, J.A pronounced himself that:

**“An appellate court will not disturb an award of 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 misrepresented the evidence in some material respect, and so arrives at figure which was either inordinately high or low.**

**Further, in the case Kemfro Africa Limited and Another -versus- A.M. Lubia & Another ( 1982 -1988) KLA the Court of Appeal rendered itself that;**

**“in deciding whether it is justified in disturbing the quantum of damages awarded by a trial**

**court, an appellate court must be satisfied 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 that, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”**

9. He submits that the trial magistrate did not consider the injuries that the appellant sustained and an award of **Kshs; 300,000/=** bearing in mind the seriousness of the injuries and the rate of inflation in the country, and she prays that she be awarded Kshs; 1,200,000/= in general damages.

He relies on the case of; **Florence Hare Mkaha -versus- Pwani Tawakal Mini Coach & Another (2012)eklr** where the plaintiff were awarded between **Kshs; 2,040,000/=** for similar injuries.

**10. For the respondents, he submitted that:**

Damages are awarded as a compensation and not meant to punish the offending party or to enrich the aggrieved party but the same are reasonably to compensate an injured party for the injuries sustained.

Pain cannot be quantified and hence any award is a token and an attempt to put back the injured party to its previous status before the accident.

The sum awarded must be in proportion to awards in other cases of those who have suffered injuries of comparable severity.

He submits that the appellant sustained Fracture pelvis right side, superior public ramus, Trauma to the right hip joint as evidenced by tenderness, she said that she have not fully healed as the leg injury is permanent.

She prays that the Judgment of the trial court be upheld as the same was arrived at having considered all the relevant factors, including but not limited to the injuries suffered and sums awarded in other cases, where similar or comparable injuries were suffered.

They rely on the case of: **Eastern Produce Kenya Limited -versus- Joseph Mamboleo Khamadi (2015) eklr** where Justice Kimondo awarded Kshs; **50,000/=** for injuries which were more serious than the ones sustained by the plaintiffs. In the case of; **Joseph Agwenyi –versus- Samuel Ochillo ( 2010) eklr** where Justice A. Makhandia awarded Kshs; 50,000/= for injuries that were more severe than the ones that were suffered by the plaintiff herein.

**11.** This is a 1<sup>st</sup> appeal and this court has jurisdiction to consider both facts and law. The court is called upon to evaluate the evidence which was tendered before the trial court and draw an independent conclusion. See the Case of; **SELLE -vs- Associated Motorboat Company limited (1968) EA 123.**

The court is supposed to leave room for the fact that it neither saw nor heard the witnesses testify before the trial court.

12. The plaintiff Margaret Waither Njenga testified before the lower court that she sustained Fracture pelvis right side, superior public ramus, Trauma to the right hip joint as evidenced by tenderness, she said that she have not fully healed as the leg fracture is permanent. She is unable to conduct farming because she has been cautioned not to bend. She said that she did not have this problems before the accident and she prays to be compensated. She was treated at Kimbimbi hospital and thereafter referred to Naivasha District hospital .

**Medical report by Doctor A. O. Wandugu stated that;**

- The injuries have resulted in a chronic disabling pains in the affected areas, a source of chronic ill health **which Might** need medication on and off.

- The injuries have resulted in PERMANENT WEAKNESS of the right leg which is going to be progressive due to the inevitable early onset of post – traumatic arthritis in the hip joint
- The pelvis is the anchor of legs.

The part of the management treatment included X-rays, strict bed rest, complete Antibiotics and Analgesics (NSAIDS), physiotherapy and allied management according to such injuries.

13. The award of damages is an exercise of discretion by the trial magistrate or Judge and as a general rule the court will not normally interfere with the award of damages unless the award is so high or inordinately low or founded on wrong principles as stated in the case of; **Butt -vs- Khan ( supra) and Kenfro Africa Limited & another -vrs- Lubia & another ( supra)** so as to be an obvious erroneous assessment of damages.

In the case of: **Arrow Car Limited –versus- Elijah Shamara Bimomo & 2 others ( 2004) eklr C.A.** The court stated “**the principle to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge are that it must be satisfied that either the trial judge in assessing damages took into account an irrelevant factor or left out of account a relevant one or short of this the amount is so inordinately low or high that It must be a wholly erroneous estimate. “**

14. In this case the appellant had sustained Fracture pelvis right side, superior public ramus, Trauma to the right hip joint as evidenced by tenderness, she said that she have not fully healed as the leg fracture is permanent. She is unable to conduct farming because she has been cautioned not to bend. She said that she did not have this problems before the accident.

Considering the authorities cited by the appellant, I find that the case cited by the appellant **Catherine Wanjiru Kingori & 3 others -versus- Gibson Theuri Gichobi (2005)eklr** is a persuasive decision which is not binding on this court.

15. It is trite that damages awarded in cases where a party has sustained injuries, are meant to compensate the party for the pain and suffering as a result of the injuries but are not meant to enrich the party and in assessing the damages the court will look at the injuries sustained and comparable awards as awarding of damages is a matter of discretion of the court.

In this case the issue at hand is not whether the appellant is entitled to damages, rather it is the quantum of damages to be awarded.

There is no dispute that the appellant sustained Fracture pelvis right side, superior public ramus, Trauma to the right hip joint as evidenced by tenderness, she said that she have not fully healed as the leg fracture is permanent. She is unable to conduct farming because she has been cautioned not to bend. She said that she did not have this problems before the accident.

In the case of; **Eastern Produce Kenya limited –versus- Joseph Mamboleo Khamadi (2015) eklr** a decision of the High court which was delivered in 2015, where the plaintiff had sustained an injury involving a cut on the finger, which I consider more severe, the plaintiff was awarded general damages of Kshs; 50,000/=.

In the case of; **Joseph Agwenyi -versus- Samuel Ochillo ( supra).** The plaintiff had sustained deep cut wounds on the back, bruises on both legs, chest contortion, bruises to both hands and cerebral coercion and pain to the back. The court awarded some Kshs; 70,000/= in general damages.

This injuries were more severe than those sustained by the appellant herein.

It is Trite that the established methods of assessing damages is that comparable injuries should as far as possible be compensated by comparable awards.

In assessing the general damages, the trial magistrate stated that

Doctor Wandugu opined that Margaret Waithera Njenga was in chronic pain he availed proof of P.Exhibit 1. P.Exhibit. 2a & b, and P. Exhibit. 3.

I have considered the above authority's vis-a-vis Dr. Wandugu's documented injuries and find an award of Kshs; **300,000/=** will suffice.

From the fore-going although the trial magistrate does not seem to have taken into consideration irrelevant factors or failed to take into consideration relevant factors which are the grounds upon which the court would set aside an award of damages, nevertheless the award of damages was too low as to amount to an erroneous assessment.

The authority cited by the appellant, the case of; **Lawrence Hare Mkaha -versus- Pwani Tawakal Mini Coach & Another ( Civil Suit No. 2012) eklr** where the plaintiff had suffered "fracture of the left iliac crest, Superior Ramus on left pubis, fracture left acetabulum, left knee - fracture lateral condyl of femur" was awarded general damages of Ksh; 2,400,000/= in consideration of Madina Gathoni -vs- AL Shelo Shosiad Mwi Shariff HCCC No. 11 of 2006 Malindi Kshs; 400,000/=.

Daniel Irungu Mwangi -versus- Loice Wambui Karanja and Andrew Kamau HCCC No. 42 of 2002 Embu was awarded general damages of Kshs; 2,500,000 including Kshs: 200,000/= for future operation to remove implant.

Johnston Okumu -versus- John Magolo HCC No. 142 of 1991 and Francis Ngera -vs- John Matolo HCC. 3648 of 1989 both cases awards KShs; 480,000/= and Kshs; 600,000/=.

The relevant issue to be considered in the award of damages in this case is the injury the plaintiff sustained.

The appellant had sustained fracture of the pelvis right side, superior public ramus, trauma to the right hip joint as evidenced by tenderness. She attended A.I.C. Kijabe hospital where X-rays, strict bed rest, antibiotics , Analgestics ( Nasaid), Physiotherapy and allied management according to such.

At the time of operation she had pain in the pelvis worse in the right hip joint disabling her from standing for long walking fast, long distances or running and climbing stairs.

In the Doctors professional opinion the appellant suffered severe injuries ( Grievous harm), much suffering inconvenience a lot of pain and mental anguish.

The injuries are consistent with the nature of the force that caused them - Blunt.

The injuries resulted in Chronic disabling pain and permanent weakness of the right leg which is going to be progressive due to the inevitable early onset of the post traumatic arthritis in the hip joint.

These injuries are permanent in nature and there is a likelihood that she will leave with the pain and the disability for a long time.

Am persuaded by the case of **Julian Anyango Kuni -vs- United Millers HCC 35 of 2004** where the plaintiff in the case was awarded Kshs; 1, 500,000/= for pain and suffering in injuries to those which are similar sustained by the plaintiff and also the case of; Florence Hare Mkaha -vs- Pwani Tawakhal Mini Coach & Another where the authority was quoted with approval.

I find that an award of Kshs; 2,400,000/= would suffice.

**IN CONCLUSION:**

- I find the award would be a reasonable award of general damages.

- For the reason I have stated above I would interfere with the assessment of damages by the trial magistrate and

I order as follows:

- I allow the appeal.

- The Judgment of trial magistrate is set aside.

The Judgment is replaced with an award of Kshs; 2,400,000/= in general damages for pain and suffering.

- Costs to the appellant.

**Dated, signed at Kerugoya this 29th day of May 2020**

**L.W. GITARI**

**JUDGE**