



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 12 OF 2018**

**MARTHA WAITHERA KINYANJUI.....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 CMCC No. 45 of 2017 - Wanguru)

**BETWEEN**

**MARTHA WAITHERA KINYANJUI.....PLAINTIFF**

**VERSUS**

**ANESTAR SECONDARY SCHOOL.....DEFENDANT**

**JUDGMENT**

1. This appeal arises from the Judgment delivered in PMCC's at Wanguru Civil Case No. 45 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 he sustained as a result of a road traffic accident which occurred on 17<sup>th</sup> June, 2016 while travelling as a passenger along Embu -Mwea road in motor-vehicle registration number KBP 403 A which is owned by the defendant.

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. Trauma to the left upper arm as evidenced by pain.**

**b. Trauma to the right hand as evidenced by pain**

**c. Trauma to the left knee as evidenced by pain**

3. The claim was opposed by the defendant 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; 30,000/= general damages that the appellant had sustained.

5. Aggrieved by the Judgment 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; 30,000/= 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 seriousness 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 raised 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 9<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 for the applicant.

It is submitted that the learned magistrate's assessment of general damages was 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; 30,000/= 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 a 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; 30,000/= bearing in mind the seriousness of the injuries and the rate of inflation in the country, and she prays that she be awarded KShs; 200,000/= in general damages.

He relies on the case of; **Catherine Wanjiru Kingori and 3 others -versus- Gibson Theuri Gichuhi (2005) eKLR** where the plaintiff were awarded between KShs; 100,000 up to 350,000/= 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 to reasonably compensate an injured party for the injuries sustained.

Pain cannot be quantified and hence any award is a token at 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.

11. He submits that the appellant had sustained soft tissue injury and testified that she had completely recovered when the injury sustained and they urge the court to uphold the Judgment of the Trial court 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 awarded by the plaintiff herein.

12. This 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.

13. The plaintiff Martha Waithera Kinyanjui testified before the lower court that she was injured on the chest and had general pains and she was treated at Kibibi hospital. She told the court that she has fully healed and prays to be compensated.

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

The plaintiff sustained the following injuries, however;

**i. Trauma to the neck as evidenced by pain**

**ii. Trauma to the chest as evidenced by pain**

**iii. Trauma to both shoulder joints as evidenced by pain.**

The plaintiff was treated with analgesics ( NSAIDS) and allied management according to such injuries.

The doctors opinion are that the injuries have resulted to chronic disabling pain in the affected areas, and a source of chronic ill health which might need medical attention on and off. However, it was the plaintiff's case that she has healed.

14. 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.

15. In this case the appellant had sustained soft tissue injury in nature which healed completely and considering the authorities cited by the appellant the plaintiff are persuasive. The case cited by the appellant **Catherine Wanjiru Kingori & 3 others - versus- Gibson Theuri Gichobi** is persuasive decision which is not binding to this court.

16. 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 suffered 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.

17. There is no dispute that the appellant suffered trauma to the neck, trauma to the chest, and trauma to both shoulder joints. The injuries were not severe and according to the plaintiff they healed with no residue complications.

In the case of; **Eastern Produce Kenya limited –versus- Joseph Mamboleo Khamadi (2015) eklr** a decision of the High court was delivered in 2015, where the plaintiff had sustained an injury involving a cut on the finger, 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 contusion, 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 plaintiff.

18. 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 injuries resulted in chronic disabling pain which may require medication on and off, and found that Dr. Wandugu's report is an exaggeration of the injuries sustained by Kinyanjui. The witness appeared very agile to me.

He further stated that;

**“the presumption being that she was further healed by the time she testified, Kinyanjui's proposal and cited**

**authorities are in explicable whereas those of the defendant are not on point and I find an award of Kshs; 30,000/= will suffice.”**

19. From the fore-going I find that the trial magistrate did not take into consideration irrelevant factor or failed to take into consideration relevant factors which are the grounds upon which the court would set aside an award of damages.

The award is not erroneous, and is based on a consideration of facts, that the appellant had fully recovered.

Considering the injuries sustained, the award by the trial magistrate was in line with awards in comparable injuries.

The award is a fair assessment of the injuries of damages in line with the injuries sustained.

**IN CONCLUSION:**

- I find the award was sufficient in the circumstances.
- I find no reason to interfere with the exercise of discretion of the trial magistrate in assessing the award of damages.
- The upshot is that this appeal is without merit and is dismissed.
- Each party to bear its own cost in the appeal and in the lower court.

**Dated, signed at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**