REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 155 OF 2007

WAROI ELLY...APPELLANT.

VERSUS

CATHERINE MUENI MWANGANGI.......................................RESPONDENT

(Being an Appeal from the judgment of Hon Wandera, Principal Magistrate

*delivered on the 19.7.2007 in **Machakos CMCC 450 of 2006)***

BETWEEN

CATHERINE MUENI MWANGANGI..PLAINTIFF

VERSUS

WAROI ELLY...DEFENDANT

JUDGEMENT

1. Vide a plaint in the trial court as amended on 12.9.2006 the suit arose out of a road traffic accident involving motor vehicle KAN 488T that was owned by the appellant and KAK 327M that the respondent was travelling in. It was pleaded that on 24.6.2003 the appellant's driver so recklessly drove and managed motor vehicle KAN 488T that the same collided with vehicle KAK 327M causing an accident and as a consequence the respondent sustained serious injuries. The respondent instituted **Machakos CMCC 450 of 2006** where she attributed negligence to the appellant and she indicated that she sustained closed fracture cervical vertebrae C4 & C5, blunt injury to the mouth and dislocation of one incisor. She also indicated that she was still undergoing treatment and had been unable to resume her duties as a cook at Maasai Girls School and claimed loss of earnings and earning capacity. The respondent sought special damages of Kshs 3,800 and general damages, for pain, suffering and loss of amenities, costs and interest. The parties recorded a consent of 90:10 contribution by the respondent against the appellant. The suit was set down for assessment of damages and vide undated judgement delivered on 19.7.2007 the trial court awarded Kshs 540,000/- general damages to the respondent after deducting the contribution and Special damages of Kshs 1,100/- thus prompting the instant appeal.

2. The appeal is solely on quantum and challenges the same as being too high.

3. The appellant's counsel prayed that the appeal be allowed and that the lower court's judgement on quantum be set aside and substituted with this court's awards and that this court assess the damages on the basis of the evidence on record.

4. The parties agreed to canvass the appeal via written submissions which they filed and exchanged.

5. Learned counsel for the appellant vide submissions filed on 14.10.2019 submitted that from the evidence on record, the respondent did not suffer a fracture of the cervical vertebrae but a whip lash injury because the former opinion was rendered by Pw2 who was a general practitioner whereas the latter was rendered by Dw1 who was a consultant surgeon. Counsel invited the court to consider the case of **Gabriel Kariuki Kigathi & Another v Monica Wangui Wangechi (2016) eKLR,** where the court awarded Kshs 400,000/- as general damages for a plaintiff who it found that she had substantially healed from her injuries as at the time of the trial.

6. According to counsel, the award of Kshs 600,000/- was excessive and ought to be set aside and substituted with an award of Kshs

200,000/- as general damages.

7. In reply, learned counsel for the respondent submitted that the award of the trial court was not erroneous. Counsel cited the cases of **George Otieno v A.G. (2006) eKLR** and urged the court to maintain the award of the trial court on general damages. Counsel submitted that the respondent was entitled to a claim for loss of earning capacity and placed reliance on the case of **Jacob Ayiba Maruja & Anor v Simeon Obaya (2005) eKLR** where it was held that documentary evidence was not necessary to prove loss of earning capacity.

8. This is an appeal against quantum, and the role of the Appellate court in this regard was considered in the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** where the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid as down by the court of appeal in **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** where the grounds were if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

9. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, *viz*;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.

d. Where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

10. The Appellant avers that the Learned Magistrate's award was ***extremely high***. He asked the court to review the evidence and facts on record and reduce the award.

11. The lower court file has not been availed to this court. However, the evidence in the trial court as elicited from the record of appeal was as follows; Pw1 was the respondent who testified that she was involved in the accident that occurred on 24.6.2003 and she was injured on her neck and tooth. She testified that she was taken to Machakos General Hospital where she was admitted for 9 days and that she had been going to hospital for further treatment. She testified that she was examined by Dr. Kaburu and she incurred expenses in buying medicine and travel expenses worth Ksh 1,100/-. She told the court that she was working as a cook at Maasai Girls high school and could not do her work. She stated that she had not fully healed and she felt pain. On cross examination she admitted that the receipts she produced did not bear a revenue stamp and that she did not have a letter showing that she worked at Maasai Girls School. It was her testimony that the doctor installed a collar on her neck that she wore for over two years.

12. Pw2 was Dr. David Kaburu who testified that on 19.6.2006 he filled a P3 form in respect of the respondent who had a history of a road accident that occurred on 24.6.2003. He testified that the respondent suffered a fracture cervical vertebrae C4 & C5, blunt injury to the mouth and dislocation of one incisor. The P3 form was tendered in evidence. He told the court that he also prepared a medical report on 26.7.2006 in respect of the respondent who was being followed up at Machakos Orthopedic clinic and it was noted that the respondent required further physiotherapy and was prone to develop arthritis of the neck. He noted that the respondent required extraction of the incisor tooth and replacement at a cost of Kshs 6,000/- and he assessed the degree of permanent disability at 15%. He opined that complete recovery was not expected and the medical report was produced in evidence. He pointed out to court that there were medical treatment notes from Machakos General Hospital that were issued by Dr. Osumba and Dr. Kilonzo (who are consultant surgeons) in respect of the respondent who was indicated as having suffered fracture of the cervical vertebrae C4 & C5 neck bones. The treatment notes were tendered in evidence. In cross examination, he testified that he is a general practitioner and that he did not agree with Dr. Wokabi that the respondent did not suffer a fracture but that he agreed with the reports of Dr. Osumba and Doctor Kilonzo. He told the court on reexamination that the respondent could only do light duties that did not require bending her neck and movement of the neck. After the close of the respondent's case, the appellant presented their case.

13. Dw1 was Dr. Washington Wokabi who testified that the x-rays that he reviewed in respect of the respondent did not reveal any sign of a fracture but there were signs of a whip lash injury. He told the court that he concurred with the assessment of 15% permanent disability that was awarded by Dr. Kaburu. However, he did not agree that there was need for dental replacement for the gap would close. He testified that he prepared the medical report and signed it on 26.10.2006; the report was tendered in evidence. On cross examination, he testified that the respondent could cook in an institution but not cultivate.

14. I have analyzed the evidence tendered before the trial court as well as the submissions. The issues for determination as elicited from the appeal are:

1) Whether a case for disturbing the award by the trial court has been made.

2) If yes, how much is the respondent entitled to as compensation for the injuries suffered.

15. The respondent testified that she was involved in a road traffic accident and was injured. The parties agreed by consent on liability in the

ratio of 90% to 10% in favour of the respondent which was duly adopted by the trial court.

16. On quantum, the appellant pleaded that she suffered fracture of the cervical vertebrae C4 & C5, blunt injury to the mouth and dislocation of one incisor.

17. According to the examination sheet from Machakos General Hospital where the respondent was attended to by Consultants Dr. Osumba and Dr. Kilonzo, it was noted as at the date of discharge on 30.6.2003 that she had a stable C4 and C3; a cervical collar was applied and she was on analgesics. The outpatient record for the respondent indicated that the respondent made repeat visits to the hospital on 18th, 20th and 25th January, 2005 complaining of headaches. I also note that there were visits to the hospital on 18th, 25th September and 2nd and 9th October, 2003. The respondent was noted as having been issued with a P3 form on 12.8.2003 but however the details of the observations are not on the record of appeal. On record is a medical report by Dr. Kaburu who examined the respondent on 26.7.2006 and it was noted that the respondent suffered a fracture of the cervical vertebrae C4 & C5, blunt injury to the mouth and dislocation of one incisor. It was opined that the respondent required Kshs 6,000/- to replace the lower incisor with a denture and the degree of permanent disability was assessed at 15%. It was also opined that the respondent would develop post traumatic osteoarthritis of the neck.

18. I have not had an opportunity to see the report that was prepared by Dr. Wokabi. However, the said doctor did testify for the appellant and gave his professional opinion in which he disputed the findings by Dr. Kaburu save only on the 15% disability.

19. I had the benefit of going through the written submissions that were filed by the counsels of either parties as well as the authorities that were supplied therein.

20. The trial court had noted that there were several medical reports on record. Save for Dr. Kaburu's report, it is not possible to decipher which reports were prepared by specialists and or those prepared by persons not specialized in the area of injury that affected the respondent. The trial court ought to have gone ahead to give an opinion that it formed in the light of the three different reports and what report it believed and why it opted to believe one report over the other. However, the court seemed to have indicated that there was consensus that the respondent suffered 15% permanent disability and proceeded to awarded general damages for pain, suffering and loss of amenities.

21. I am satisfied that the respondent had permanent disability at 15%. In **Kenyatta University v Isaac Kamma Nyuthe (2014) eKLR** for fracture of right femur, soft tissue injuries to head and bruises of right knee, and with a permanent incapacitation of 20% the court on appeal reduced an award of Kshs. 700,000/= to Kshs. 350,000/= in 2014. In **Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok [2019] eKLR**, for occasional pains on the left thigh during the cold season, shortening of limb deformity, likelihood of developing early osteoarthritis of the left hip joint and knee joints, assessed permanent disability at 40%, the court set aside an award of 900,000/- to 600,000/- on appeal. In this regard bearing the fact that it is only one report that mentioned fractures i am not convinced that the respondent suffered fracture but suffered soft tissue injuries and as a result the amount awarded for general damages for pain and suffering without taking into account loss of amenities was high. This is however without prejudice to my finding on loss of amenities as analyzed below.

22. The respondent did not plead for what amounts to future medical expenses but however the medical report by Dr. Kaburu imputes that the same were to be awarded at Kshs 6,000/. The same was discounted in the evidence of Dw1 where he opined that the same was a cosmetic procedure that was unnecessary.

23. The evidence that was led in court indicated that the respondent was a cook and she was not able to go back to work; she did plead loss of amenities. In loss of amenities, courts regard loss of the enjoyments of life: and in this case I have considered the permanent disability assessed at 15%. It would be difficult to ascribe meaningful monetary value to the same. However, once loss is recognized, there is a duty and courts must compensate the victim. As is with all such compensation, that, as Lord Devlin observed in **West v Shephard (1964) A.C. 326, 357**, the wrongdoer must be able to "*hold up his head among his neighbours and say with their approval that he has done the fair thing*." It is necessary that there be fairness on both sides and not a venture of unjust enrichment. With the available evidence on record, I am satisfied on a balance of probabilities that the respondent proved that she is entitled to loss of amenities. Having considered the same, in totality, I find that an award of Kshs 600,000/- for pain and suffering and loss of amenities was reasonable. I am therefore unable to interfere with the award by the learned trial magistrate as the same was not inordinately high as claimed by the appellant.

24. As to the future medical expenses, it is trite law that the same ought to have been specifically pleaded as the same was in the nature of special damages. I find that the same was not pleaded. However, the evidence on record speaks on the fact that the respondent made repeat visits to the hospital; this court cannot award an amount not pleaded though I feel that the respondent was entitled to future medical expenses. In **Simon Taveta v Mercy Mutitu Njeru [2014]** eKLR that placed reliance on the case of Kenya bus Services Ltd v Gituma, (2004) EA 91, the court stated:

> "*And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded*".

25. The plaint claimed for special damages of Kshs 1,100/- and the court awarded the sum pleaded. Because the amount is not disputed, I see no reason to disturb the same.

26. In the result I find the appeal is devoid of merit. The same is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

<u>Judge</u>