



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 328 OF 2018

GICHINI KAGWE..... APPELLANT

VERSUS

ELIZABET.....H KUSIENYA .RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon. A.N Makau* (SRM) in Milimani CMCC No. 1892 of 2012 in which the respondent, then the plaintiff was awarded general damages in the sum of KShs.2,000,000 less 25% contributory negligence, special damages in the sum of KShs.942,055, costs of the suit and interest on both damages and costs.

2. By way of background, *Elizabeth Kusiinya* (the respondent) sued the appellant seeking general and special damages in the sum of KShs.956,939 following personal injuries sustained in a road accident whose occurrence she blamed on the appellant's servant or agent's negligence in the management and control of the appellant's motor vehicle registration number KAY 251L.

3. Though the appellant initially denied liability *in toto*, in the course of the trial, parties recorded a consent on liability in the ratio of 75:25 in favour of the respondent against the appellant. Hearing thereafter proceeded for assessment of damages at the end of which the learned trial magistrate rendered her decision on quantum on 14th June 2018. That decision is the subject of this appeal.

4. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed his submissions on 12th February 2020 while those of the respondent were filed on 28th May 2020.

5. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am alive to the duty of a first appellate court which is to subject the evidence presented to the lower court to a fresh examination to enable the court arrive at its own independent findings. In undertaking this task, the appellate court must be careful to remember that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage – See: *Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123; Peters V Sunday Post Limited, [1958] EA 424.*

6. In his submissions, the appellant faulted the trial court's award on general damages arguing that it was excessive and that the trial court erred in failing to apply the doctrine of precedent by disregarding the awards made by the High Court in *H. Young Construction Company Ltd V Richard Kyule Ndolo, [2014] eKLR* and *Agroline Hauliers Ltd & Another V Michael Abongo Kisemba, [2015] eKLR* to plaintiffs who had sustained comparable injuries.

7. As would be expected, the respondent in her submissions supported the decision of the trial court. She submitted that in arriving at her decision, the trial court considered the authorities submitted by the parties and properly exercised its discretion after taking into account the nature of the injuries she had sustained and the pain and suffering they had caused her. In her view, the award of general damages was not inordinately high as to warrant this court's intervention.

8. This being an appeal on quantum, it is important to bear in mind the principles that guide appellate courts in deciding whether or not to disturb an award of damages made by a trial court. It is imperative to point out at this juncture that damages for personal injuries are at large. They are always at the discretion of the trial court but that discretion must be exercised judiciously in accordance with established legal principles and the facts and circumstances of each case.

9. As a general rule, an appellate court should be slow to interfere with awards made by a trial court. The principles which guide the court in deciding whether or not to interfere with awards made by a trial court have now been settled in a long line of authorities. Citing two of those authorities will suffice for purposes of determining this appeal.

In *Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another*, [1987] KLR 30 the Court of Appeal enunciated those principles as follows:

“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 to be that; it must be satisfied that either 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...”

10. The same court in *Mariga V Musila*, [1984] KLR 251 appreciated that the assessment of damages is at the discretion of the trial court and advised that an appellate court should avoid the temptation of substituting its own discretion with that of the trial court. The court expressed itself as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..”

11. Guided by the above principles, I will now proceed to consider whether the learned trial magistrate erred in any way in her assessment and award of general damages to the respondent. In order to do so, it is important to revisit the evidence presented before the trial court on the injuries the respondent suffered in the accident. That evidence was adduced by the respondent who testified as PW1, her witness *Prof. Stanley Ominde Khainga*, a constructive anaesthetic surgeon (PW2) and the appellant’s witness *Dr. Wambugu Mwangi* (DW1).

12. In her evidence, PW1 narrated how bus registration number KAY 251L ran over her left leg. She sustained severe injuries on that leg which caused her admission to Kenyatta National Hospital, Coptic Hospital, Melchizedek Hospital and finally Gatundu General Hospital where she was admitted intermittently between the date of the accident on 17th April 2009 to 13th September 2010. Her total period of hospitalization was about five months. She recalled that in the course of her treatment, she underwent five surgical procedures.

13. In addition, she testified that at the time she appeared before the trial court nine years later, the injuries had not healed. She still experienced pain on the degloved leg. She showed the trial court a wound in the leg from which blood was still oozing which the trial court noted. She complained of difficulties when walking and that sitting, standing or sleeping was a problem.

14. PW2, *Prof. Khainga* recalled having examined the respondent on 23rd March 2017 about eight years after the accident. He noted that her left leg had been severely deformed; that there was significant loss of tissues in the left knee area which resulted to poor lymph drainage of the lower end of the leg causing significant lymphoedema, a condition commonly known as elephantiasis. In his opinion, the plaintiff needed three further corrective surgeries to cure the defect on the affected leg. He assessed the degree of permanent disability as 50%. He produced his medical report as *PEXhibit 1*.

15. *Dr. Wambugu*, the appellant’s witness testified as DW1. He recalled having examined the respondent on 28th May 2013. In his medical report (D Exhibit 1), he confirmed that the respondent had sustained a degloving wound on the left lower limb extending from the lower thigh to the mid-calf region. He noted that she walked with a left sided limping gait and that the leg was deformed and grossly scarred. He confirmed that Elizabeth had lost the ability to exert herself using that leg. He assessed the degree of her permanent incapacity as 12%. He clarified in his evidence that this assessment was based on whole body incapacity and not on the leg itself which is what had informed *Dr. Khainga*’s assessment of permanent incapacitation at 50%.

16. In her judgment, the learned trial magistrate considered the evidence placed before her, the proposals on quantum made by each of the parties in their respective written submissions and the authorities cited in support thereof. In arriving at her decision, she stated as follows:

“DW1 confirmed she has not fully healed and that she cannot assert herself using the left leg. Her life is not what it used to be before the accident. Even if she has stopped seeking medication it is clear that she may require more medical attention according to the doctors say her injured leg, it has a big visible scar that runs vertically from the left thigh downwards to the knee, I confirm what pw2 said it is indeed ugly and heavy to lift. It was confirmed by her witness Prof. S. Ominde that the lymph nodes were affected and fluid cannot freely flow causing a condition known as elephantiasis making her walking to be a problem. Her leg was described as ugly, I saw it and it tells how serious the injuries were. Considering what was cited and provided as case law by the defendant, I find the appellants therein suffered minor injuries as compared to what the plaintiff herein suffered.”

17. In my part, having analysed the evidence on record and having read the authorities cited by the appellant, am unable to fault the trial court’s finding that the injuries suffered by the plaintiffs in the cited cases were not comparable to the injuries sustained by the respondent. In *H. Young Construction Company Ltd V Richard Kyule Ndolo*, [2014] eKLR, the degloving injury was on the plaintiff’s left leg’s calf region and it completely healed leaving only scars. Unlike the respondent, the plaintiff in that case did not suffer any permanent incapacity. In *Agroline Hauliers Ltd & Another V Michael Abongo Kisemba*, [2015] eKLR, the court found that the plaintiff had sustained several soft tissue injuries and a knee fracture which bore no relation to the injuries sustained by the respondent.

18. Given the evidence on record, I find that the respondent’s injury was more extensive and intense when compared to the injuries suffered by the plaintiff in *H. Young Construction Company Ltd*. The injury started from the lower thigh and extended to the mid-calf region. It led to substantial loss of muscle around the knee area which affected lymph drainage in the lower leg causing another medical complication which was permanent unless corrected by future surgery.

19. The gravity of her injuries is further illustrated by the fact that unlike the plaintiff in *H. Young Construction Company Ltd* whose

injuries apparently healed after three months, the respondent's injuries had not healed *nine years* after the accident. The trial court which had the benefit of seeing Elizabeth when she testified noted that her swollen left leg had a wound and long visible scars. She agreed with PW2 that the leg appeared ugly and heavy to lift.

20. The two doctors who examined the respondent confirmed in their reports that the degloved leg was grossly scarred and according to *Prof. Khainga*, the leg no longer served its purpose and was equivalent to loss of a limb. He made this point in the following words “...**loss of part of the body is better than what she has -heavy leg, ugly looking leg that is more work than having an artificial limb...**”

21. In view of the foregoing, I agree with the learned trial magistrate that the respondent sustained much more serious and severe injuries than the plaintiff in the authority relied on by the appellant. I am satisfied that the learned trial magistrate correctly distinguished the authorities cited by the appellant from the respondent's case and it cannot be said that she violated the principle of *stare decisis*.

22. Having found as I have above, I have no doubt in my mind that Elizabeth endured intense pain and suffering while undergoing treatment and while recuperating thereafter considering that she had to undergo five surgical procedures and daily dressing of the wound. From the evidence, it is clear that she will be saddled with the resultant deformity and excessive swelling on the degloved leg with all its attendant discomforts for the rest of her life unless she undergoes the recommended three other surgeries to cure the deformity which, needless to say, will cause her more pain and suffering.

23. In my view, the injuries sustained by the respondent as described in the evidence on record had not only caused Elizabeth immense pain and suffering for many years but must have been a source of constant discomfort and low self-esteem. They must have significantly diminished her quality of life.

24. I am alive to the purpose of award of general damages for personal injuries which is not to pay the plaintiff for injuries sustained but to give fair and reasonable compensation for the pain and suffering caused by the defendant's negligent acts. As correctly stated by Lord Morris in *West H. & Son Limited V Shephard (1964) AC 326*:

“... money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is award sums which must be regarded as giving reasonable compensation...”

25. Having carefully evaluated the judgement of the trial court, I am satisfied that in arriving at her decision, the learned trial magistrate considered all the material placed before her and all factors relevant to assessment of damages. There is no indication to suggest that she considered any irrelevant factor or failed to consider a relevant one or that she applied any wrong legal principle.

26. Given the severity of the injuries sustained by the respondent, am unable to say that the trial court's award of KShs.2,000,000 was arbitrary or that it was inordinately high as to lead to an inference that it constituted an erroneous estimate of the damage suffered. Taking all relevant factors into account, I find that the award was fair and sufficient recompense for the pain and suffering the respondent had suffered after the accident. I thus find no reason to disturb the trial court's award. The same is accordingly upheld.

27. Regarding the claim for special damages, the appellant submitted that the trial court erred in awarding KShs.942,055 instead of KShs.868,444 which in his view was the amount that was pleaded and proved. I wholly concur with the appellant's submissions that it is trite law that special damages must not only be specifically pleaded but must also be strictly proved- See: *Coast Bus Service V Sisco E Murunga Ndanyi, CA No. 192 of 1992*.

28. In this case, the respondent specifically pleaded KShs.956,939. She supported her claim by tendering documentary evidence in the form of receipts produced collectively as *Pexhibit 3*. I thoroughly scrutinized all the receipts produced in evidence by the respondent and noted that some of them were duplicated.

29. According to my calculations, the total amount incurred as medical expenses was KShs.932,019 and not KShs.868,444 as submitted by the appellant. The trial magistrate therefore erred in awarding special damages in the sum of KShs.942,055 which exceeded the amount specifically pleaded and strictly proved. The award of KShs.942,055 is consequently set aside and is substituted with an award of KShs.932,019.

30. For all the foregoing reasons, this appeal partially succeeds to the extent that the trial court's award of general damages is upheld while the award of special damages is set aside and is substituted with an award of KShs.932,019.

31. The trial court's judgment is consequently set aside and is substituted with this court's judgment in favour of the respondent against the appellant in the total sum of KShs.2,932,019 which will be subject to the respondent's agreed contribution of 25%. The award of general damages will attract interest at court rates from the date of the trial court's judgment while the award of special damages will earn interest from date of filing of the suit.

32. As the appeal has partially succeeded, each party will bear its own costs of the appeal but the appellant will bear the respondent's costs in the lower court.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 18th day of June 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ngechu for the appellant

Mr. Matunda holding brief for Mr. Qsuma for the Respondent

Ms. Mwinzi, Court Assistant