



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 116 OF 2017

JOSEPH KIMANI GITHAGA.....1ST APPELLANT

BLUE SKY OUTSOURCING LIMITED...2ND APPELLANT

-VERSUS-

MARY NJERI KIMANI.....RESPONDENT

(Being an appeal from the judgment and orders Senior Resident Magistrate - Hon. B. Khaemba delivered on the 7th July 2017 in Kiambu CMCC No. 438 of 2016)

JUDGMENT

1. This Appeal arose from the judgment of the trial Magistrate in Kiambu CMCC No.438 of 2016 delivered on the 7th July 2017 in favour of the Respondent, Mary Njeri Kimani.

The appellant was dissatisfied with the Award of General damages awarded in view of injuries she sustained on the 3rd July 2016 following an accident along the Nairobi-Limuru road involving motor vehicle Reg. No. KBH 929U driven by the Appellant (then plaintiff) and the 2nd Appellants vehicle Reg. No KCC 308 V.

2. Upon hearing of the suit, the Respondent was awarded Kshs.1,000,000/= in general damages for pain and suffering which the Appellants state is inordinately high hence seeks that this court set aside, vary and re-assess appropriate damages.

The matter of liability was resolved by the parties consent when they apportioned liability to 85%: 15% in favour of the Respondent (then plaintiff).

3. Quantum of damages

For an appellate court to interfere and vary or set aside a trial court decision on its assessment of damages, it ought to be satisfied that the court misdirected itself in some matter as a result arrived at a wrong decision – **Mbogo –vs- Shah (1968) EALR Page 93.**

4. Further the court will not interfere with discretion of the trial court on an award of damages unless it is satisfied that either that in assessing the damages, it took into account an irrelevant factor or left out a relevant factor, or that the amount awarded is so inordinately low or high or a wholly erroneous estimate of the damages – **Kemfro Africa T/a Meru Express Services and Another –vs- Lubia (1982 -88) KAR 727.**

5. The Respondents injuries are stated in the medical report of Dr. N.H. Bhanji dated 19th January 2017 which the trial magistrate based his assessment of damages.

They are

- **Chest pains**
- **Lower backache**
- **Pain in the lower leg**

Observations by the Doctor

- **Spasms of muscles to the lumber spine**

- **Loss of cervical curvature**
- **Physiological lordosis of lumber spine**
- **Scarring and pigmentation over the extensor aspect of right thigh and left thigh**
- **At date of examination was walking with a limp**
- **Soft tissue swelling of the left ankle joint left foot**
- **Admitted in hospital and transfused a total of 7 pints of blood**
- **Head injury cerebral concussion may cause damage to the brain tissues**
- **Predisposed to develop epileptic fits in future, 5% risk**
- **Post concessional syndromes like lack of concentration, dizziness, headaches forgetfulness and insomnia**
- **Doctor's opinion that she may not fully recover completely from the injuries.**

The said injuries were stated in the plaint.

6. In his judgment the trial magistrate captured the Respondents evidence and analysed the same in the assessment of damages, and arrived at a finding that the Respondent sustained severe injuries and cited the case two cases in support of the award of Kshs.1,200,000/=, and considering the Appellants submissions and decisions cited in support of their proposals of Kshs.500,000/=.

7. The trial court went ahead to state all the factors to be taken and supported the same with authorities.

8. It is to be noted that the appellant did not call any evidence and therefore leaves the Respondents evidence uncontroverted.

It is the award of Kshs.1,000,000/= General Damages for pain and suffering that is the subject of this Appeal.

9. I have considered the appellants submissions on the award and cited authorities.

In the analysis of the cited authorities, the trial Magistrate considered the case of **Pelican Engineering Construction Co. –vs- Daniel Ngunjiri Githendu HCCCA No. 338 of 1999** which he is faulted for not considering (Page 6 of judgment).

10. The injuries of the plaintiff therein are not comparable to those in the **Pelican** authority. They are different being amputations to the left thumb, index finger, middle finger and ring finger and an award of Kshs.400,000/= given.

11. He relied principally on the cases of **Ben Mengesa –vs- Edith Makungu Lande Kakamega Civil Appeal No. 140 of 2010** where in 2013 the court awarded **Kshs.900,000/=** and **Barry Proudfoot –vs- Coast Broadway Co Ltd Nairobi Civil Case No.1265 of 1997** where the injuries were more serious to those sustained by the Respondent.

12. The injuries sustained by the Respondent were less serious than those sustained by respondent in Kiambu HCCA No. 115 of 2017 where a sum of Kshs.950,000/= was awarded. The magistrate was properly guided by the principles stated in the **Mbogo –vs- Shah and Kemfro Africa Cases** and **Butt –vs- Khan**(Supra).

13. I have considered comparable decisions.

In **Catherine Wanjiru Kingori & 3 Others –vs- Gibson Theuri Gichubi (2005)**, an award of Kshs.350,000/= was given for multiple soft tissue injuries. In **Ben Mengesa -vs- Edith Makungu Lande (2013) e KLR** a sum of Kshs.900,000/= was granted, but the injuries were too far serious than the plaintiffs. This is the case the trial court laid emphasis on while assessing the damages.

14. A sum of Kshs.300,000/= was awarded in 2015 for injuries on the chest, thigh and fractured femur in **Bachu Industries Ltd – vs Peter Kariuki Mutura NRB. HCCA No. 503 of 2009 (2015) e KLR**. See also **Wareng Ndovu Enterprises (2005) Ltd –vs- Relvin Kisanji (2012) e KLR**.

15. Comparable injuries should attract damages that are closely similar though no injuries can be the same.

However the proposal by the Appellant for Kshs.200,000/= citing very old cases is a mockery of the purpose of compensation.

In **Civil application No. 1962 of 1984 Yuda Owuor –vs- Nairobi Bus Union** the court rendered that

“---in personal injury cases we must strive to secure some conformity in general method of approach so that as far as possible, comparable injuries should be compensated by comparable awards”

16. The Respondents injuries are of soft tissue nature for soft tissue injuries to the right arm, to the cervical spine the High Court reversed an award by the trial court of Kshs.650,000/= to Kshs.350,000/= in 2012.

17. Upon taking all relevant factors and nature of the injuries, I am persuaded that the trial court failed to consider the severity of the respondents injuries and comparable awards thus arrived at an inordinately high award of Kshs.1,000,000/=.

I therefore set aside the said award and substitute it with a more reasonable sum of Kshs.650,000/= in general damages.

18. Accordingly the Appeal succeeds in the manner stated above.

The appellant shall have costs of the Appeal.

Dated and signed at Nakuru this 23rd Day of January 2019.

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J.N. MULWA

JUDGE

Dated, Signed and Delivered at Kiambu this 21st Day of February 2019.

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C. MEOLI

JUDGE