



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 126 OF 2018

BETWEEN

BENUEL BOSIRE.....APPELLANT

AND

LYDIA KEMUNTO MOKORA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.N.S. Lutta, SPM dated 30th October 2018 at the Magistrates Court at Kisii in Civil Case No. 413 of 2016)

JUDGMENT

1. The respondent was walking along the Kisii – Kilgoris road at Omosocho area on 25th June 2016 when she was hit by the appellant’s motor vehicle registration number KBS 272Q. She sustained injuries and filed suit for damages. The issue of liability was agreed in the ratio 75:25 against the appellant. The matter proceeded for assessment of damages and the trial magistrate awarded Kshs. 2,000,000/- as damages for pain and suffering, Kshs. 300,000/- for loss of amenities, Kshs. 500,000/- for loss of earning capacity and Kshs. 285,000/- as special damages making a total of Kshs. 3,085,000/- subject to the agreed liability. It is this award that has precipitated this appeal.

2. Mr Mose, counsel for the appellant, captured the appellant’s grievance in the memorandum of appeal dated 29th November 2018 by submitting that the award of damages was excessive in the circumstances bearing in mind the injuries sustained by the appellant and the decisions cited. He pointed out that award was unreasonable in light of the submissions made before the trial court.

3. Ms Kusa, counsel for the respondent, supported the decision of the trial court. She pointed out that the respondent sustained serious injuries and her assessed to have permanent disability of 40%. In her view, the appellant had not established any basis for the court to interfere with the award.

4. In exercising appellate jurisdiction, I am guided by the well-worn principle articulated by the Court of Appeal in ***Kemfro Africa Ltd v/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30*** that:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

5. According to the plaint, the respondent sustained the following injuries; Compound fracture of the mid femur leg, extreme degloving injury of the left thigh extending from the kneo to the iliac area, deep degloving injury on the left popliteal area and extreme laceration on the upper 3rd of the left leg. Stephen Ngare (PW 3), a clinical officer at Tenwek officer, testified that the respondent was admitted to the Hospital on 29th December 2015 and was discharged on 9th February 2016 after 43 days. He recalled that she had a degloving injury on the posterior of the left thigh and an open knee and femur fracture. The wound was washed and skin was grafted while the fracture was treated with external fixations. He told the court that the injuries were grievous and that the respondent nearly lost her limb.

6. The parties agreed to admit the report of Dr Ezekiel Zoga who examined the respondent on 18th February 2016. He confirmed her injuries and concluded that the respondent, “sustained severe injuries i.e Compound fracture of the left femur which is uniting with malunion. Has extreme scaring which are disfiguring on both limbs. The limb is unlikely to achieve the original state hence permanent disability which is assessed at 40%.”

7. The appellant submitted that an award of Kshs. 300,000/- as general damages was reasonable based on the case of ***Johnson Mose***

Nyaundi (minor suing through next friend and father Wilfred Wadibe Nyaundi) v Petroleum Industries Limited KSM HCCA No. 183 of 2010 [2014] eKLR where the plaintiff sustained bruises on the face, chest, contusions, cerebral concussion, bruises on the elbows and fracture of the right tibia and fibula was awarded Kshs. 180,000/- in 2014. He also cited the case of **Mwavita Jonathan v Silvia Onunga HCCA No. 17 of 2017 [2017] eKLR** where the claimant sustained a left hip comminuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg which cause lot of blood. He was awarded Kshs. 400,000/- in 2017.

8. The respondent proposed a sum of Kshs. 3,000,000/- as general damages. She cited the case of **Kirinjit Singh Magon v Bonanza Rice Millers Ltd NRB HCCC No. 373 of 2008 [2012] eKLR** where the plaintiff suffered a penetrating bullet wound to the right upper thigh gluteal region lateral aspect including the lower abdomen, comminuted compound fracture of the lower end of the left femur as evidenced by multiple fractures and shattering of the condyles with fragments and damage of the knee ligaments. He was 90% disabled. He was awarded Kshs. 2,500,000/- as general damages in 2009. In **Florence Hare Mkaha v Pwani Tawakal Mini Coach and Another HCCC No. 85 of 2010 [2012] eKLR** where the plaintiff sustained a fracture of the left iliac crest, superior ramus of left pubis, fracture of the left acetabulum and left knee-fracture of the lateral condyl femur. She was permanently disabled and on two crutches as the left leg was short by 4 cm. She was awarded Kshs. 2,040,000/- as general damages in 2012.

9. In addition to the general damages, the respondent submitted that she was entitled to Kshs. 500,000/- for loss of amenities based on the decision in **Mwaura Muiruri v Suera Flowers and Another NKU HCCC No. 189 of 2009 [2014] eKLR** where Emukule J., awarded Kshs. 300,000/- for loss of amenities as a head of damages separate from general damages.

10. The nature and extent of injuries was not dispute. The medical reports and P3 were admitted by consent hence the issue for determination is the appropriate level of of compensation bearing in mind that in assessing damages comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR**:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

11. This point has been emphasised by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd v Shepherd [1964] AC. 326,345**, where he observed that:

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

12. The principles were further summarised by the Court of Appeal in **Jabane v Olenja [1986] KLR 661** as follows;

The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

1. Each case depends on its own facts;

2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);

3. comparable injuries should attract comparable awards.

4. inflation should be taken into account; and

5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

13. I have re-evaluated the injuries sustained and the cases cited by the parties in light of the above principles. The injuries sustained by the respondent can be classified as multiple serious soft tissue injuries and a compound fracture. The fact that the respondent was in hospital for period of 42 days confirms the seriousness of the injuries. Both advocates cited cases where the parties sustained serious fractures. In **Mwavita Jonathan v Silvia Onunga (Supra)**, the plaintiff sustained multiple fractures. In the cases cited by the respondent, **Kirinjit Singh Magon v Bonanza Rice Millers Ltd (Supra)** and **Florence Hare Mkaha v Pwani Tawakal Mini Coach and Another (Supra)**, the plaintiffs' sustained multiple fractures hence the injuries hence in my the injuries in those cases were more serious. In the former case the level of disability was assessed at 90%.

14. Before I conclude my finding on general damages, I need to consider the complaint by the appellant that the trial magistrate erred in law in making a separate award for loss of amenities. In **Mwaura Muiruri v Suera Flowers and Another (Supra)**, the learned Judge expressed the view that:

[12] Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of his life as a result of the accident are diminished. Essentially the quality of life of the Plaintiff is reduced due to the inability to do the things he would otherwise have done had it not been for the injuries.

He relied on a passage in *Halsbury's Laws of England (4th Ed, Vol. 12(1))* at Page 348-

884. Loss of amenities -

In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it.

15. The decision by Emukule J., in making of a separate award for loss of amenities runs against the grain of precedent and practice in this country where a single award of general damages is made to compensate the injured party for pain, suffering and loss of amenities. I would adopt the sentiments given by Kamau J., in ***Peninah Mboje Mwabili v Kenya Power and Lighting Co., Ltd VOI HCCC No. 2 of 2015 [2016] eKLR*** she explained that:

[25] General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages.

[26] A claim for loss of amenities is thus encompassed and/or is included in a claim general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.

16. Having reached the conclusion that the award for loss of amenities is not tenable, I also consider the award of Kshs. 2,000,000/- on the higher side in light of the decisions cited above. The respondent sustained a single compound fracture for which disability had been assessed at 40% as a result of malunion and serious soft tissue injuries. I would reduce the award to Kshs. 700,000/- as general damages.

17. I now turn to consider the claim for loss of earning capacity. The gravamen of the appellant's case is that the respondent did not provide documentary evidence to support this claim. In the plaint, the respondent pleaded that as a result of permanent disability assessed at 40%, her studies as a student would be affected hence affect her future earning capacity.

18. In ***Mumias Sugar Company Limited v Francis Wanalo CA KSM Civil Appeal No. 91 of 2003 [2007] eKLR***, the Court of Appeal considered the principles applicable as follows:

*From the above analysis of the English case law and the decision of this Court in ***Butler v Butler [1984] KLR 225***, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.*

19. In the submissions before the trial court, the respondent proposed compensation on a multiplier basis. However, this was not a case where the respondent was in employment or in business that would be affected. In fact, she did not demonstrate either in her witness statement or testimony how she would be affected by her injuries. She did not give her anticipated nature of work or profession and the evidence available is that she was 19 years when she was examined. As the Court of Appeal pointed out in ***Mumias Sugar Company Limited v Francis Wanalo (Supra)*** each case must depend on its own facts and circumstances. The trial magistrate did not state how he arrived at the sum of Kshs. 500,000/-. Since the plaintiff was still young and a student, I would award her Kshs. 300,000/- as a global sum under this head.

20. The last item of damages challenged by the appellant is the award of Kshs. 285,000/- as special damages. In ***Maritim and Another v Anjere [1990-1994] EA 312, 316***, the Court of Appeal emphasized that:

*In this regard, we can only refer to this court's decision in ***Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR)*** where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.*

21. I have scrutinised the evidence and I am satisfied that the respondent produced receipts to support treatment at Tenwek Hospital, medical report charges, doctor's attendance charges and motor vehicle search fees all amounting to Kshs. 285,000/-. I am satisfied that these special damages were proved.

22. Having considered the submissions of the parties and the evidence alongside the findings to the trial court, I am constrained to allow the appeal to the extent that I set aside the judgment on damages and substitute it with the following awards:

General Damages	Kshs. 700,000.00
Loss earning capacity	Kshs. 300,000.00
Special Damages	Kshs. 285,000.00
TOTAL	Kshs. 1,285,000.00
Less 25%	
AMOUNT DUE	Kshs. 963,750.00

23. The appellant shall have costs of this appeal which I assess at Kshs. 50,000/- only.

SIGNED

D.S. MAJANJA

JUDGE

DATED and **DELIVERED** at **KISII** this 25th day of **APRIL** 2019.

R. E. OUGO

JUDGE

Mr Mose instructed by Mose, Mose and Milimo Advocates for the appellants.

Ms Kusa instructed by Khan and Associates Advocates for the respondents.