



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL. NO. 147 OF 2015

PETER MUVAKE.....1ST APPELLANT

PETER NYAGA MURAGE.....2ND APPELLANT

VERSUS

VICTORIA KANINI MAINGI.....RESPONDENT

(Being an Appeal from the judgment of the Chief Magistrate Honorable Mbugua delivered on 20th August, 2015 at the Chief Magistrates Court in Machakos CMCC No 607 of 2013)

JUDGEMENT

1. The instant dispute arose out of a road traffic accident in which the Respondent was a passenger in motor vehicle registered in names of the 1st Appellant and beneficially owned by the 2nd Appellant. The same occasioned an accident in which the Respondent was injured. She thus instituted Machakos CMCC 607 of 2013 in which after trial she was awarded damages prompting the instant appeal.

2. The appeal is solely on quantum as consent on liability had been agreed upon, and sets out the following grounds:-

(i) The Learned Trial Magistrate erred in fact and in law and misdirected herself in finding that the Respondent was entitled to general damages of Kshs.2,000,000/= which amount is excessive.

(ii) The Learned Trial Magistrate erred in fact and in law and misdirected herself in awarding special damages of Kshs 763,183/=

(iii) The Learned Trial Magistrate erred in fact and in law and misdirected herself in awarding the respondent future medical expenses of Kshs 150,000/= and Kshs 455,160/= for domestic help.

(iv) The Learned Trial Magistrate erred in law and fact and misdirected herself in failing to consider the submissions by the appellant together with the authorities relied on by the appellant.

(v) The Learned Trial Magistrate wholly erred in law and fact in arriving at her decision.

3. The parties agreed to canvass the appeal by way of written submissions which they filed and exchanged.

4. The Appellant submitted that it is trite that the assessment of quantum of damages by the trial court was inordinately high. They relied on the case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** that 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.

5. They further submitted that an award of Kshs 500,000/- general damages would be satisfactory in light of the nature of injuries indicated in the medical report. They relied on the case of **Akamba Public Road Services v Abdikadir Adan Galgalo (2016) eKLR** where the court reduced an award of general damages of Kshs 800,000/- for a fractured tibia, leg bone and right fibula bone and a blunt injury to the right ankle to Kshs 500,000/-.

6. Likewise, the Appellants submitted that the prayer for future medical expenses is a general damage claim and should not be awarded separate from general damages. They rely on the holding in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku (2006) eKLR** where the Learned Judge observed that even if a medical report gives a prognosis that the claimant will require further medical treatment, until the treatment is carried out and actually paid for, there is no telling what the cost is or will be. They prayed that the court rejects this claim as unsustainable.

7. On loss of earnings, the appellants submitted that the same ought to be pleaded and proved. They cited the case of **Nathan Nyambu Maghanga v Bernard M. Wanjala & Another (2012) eKLR**, and submitted that the plaintiff had not pleaded damages for lost earnings.

8. The Appellants submitted that the special damages of Kshs 645,883/- were pleaded but not proven. They submitted that the receipts produced bore no stamp duty and thus ought not to be received in evidence, as was found in the case of **Easy Coach Limited v Emily Nyangasi (2017) eKLR**.

9. They further urge this court to set aside the award on costs for there was no service of Demand Letter and Statutory Notice as pleaded. They relied on the case of **Kajuna Idd Noor v Rapid Kate Services Ltd and 4 Others (2013) eKLR**

10. They finally submit that the appeal be allowed on its entirety with costs to them and in the alternative, prayed that the court review the award of general damages.

11. The Respondent submitted that the Appellate court will rarely interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kenfro Africa Ltd T/a Meru Express Service v A.M. Lubia & Olive Lubia (1982-88)1 KAR 727** “if the trial court took into account an irrelevant fact or, left out of account a relevant fact or, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

12. They submitted that the Respondent on physical examination by Dr. Mutuku and a report prepared therein, suffered blunt injury to the head and loss of consciousness, cracked teeth, bruises to the forehead, bilateral tibio-fibula fractures and blurred vision.

13. It was submitted for the Respondent that the award of Kshs 2,000,000/- as general damages for pain and suffering is not inordinately high because in the case of **Zipporah Nangila v Eldoret Express Limited & 2 Others (2016) eKLR** Kshs 2,400,000/- was awarded for similar but less severe injuries.

14. On the award for future medical expenses, it was submitted that the award of Kshs.150,000/- was well buttressed by the report of Dr. Mutuku that was not objected to and no second medical opinion was sought by the appellants. On the cost of hiring domestic help, it was submitted that the appellants did not controvert the evidence that the respondent had to stop working for over a year and was unable to do her daily chores hence had to hire a labourer to assist her at home. It was further submitted that the amount awarded was reasonable in light of the country minimum wages of 2011 at the rate of Kshs 200/- per day and this award could not be disturbed because the trial court took into account a relevant factor. On special damages, no submissions were made. It was finally submitted that the appeal lacks merit and should be dismissed with costs to the Respondent.

15. The role of the Appellate court is to evaluate the evidence afresh and subject it to its own analysis so as to reach its own independent conclusion.

16. In the case of **Lukenya Ranching and Farming Coop. Society Ltd –Vs- Kavoloto (1979) EA** the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kangu –Vs- Manyoka (1961 EA 705, 709, 713 and in Lukenya Ranching and Farming Coop. Society Ltd –Vs- Kavoloto (1979) EA** that if the trial court;

a) Took into account an irrelevant fact or,

b) Left out of account a relevant fact or,

c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

17. The Appellants aver that the Learned Magistrate’s award was **extremely high**. They ask the court to review the evidence and facts on record and the foregoing submissions, the law and case law cited herein to allow their appeal and set aside the award of **Kshs.2,000,000.00/= as general damages and substitute the same with an award of around Kshs.500,000/=**

18. Further, they urge the court to set aside the award of future medical expenses, special damaged and loss of earnings and reject the claims as unsustainable.

19. The Respondent Victoria Kanini Maingi testified that she was an ECD teacher and on the date of the accident, she was injured. She had fractured both legs below the knees, was cut on the forehead, her teeth parted, was hit on the ribs and injured on the left hand.

20. She further stated that she was treated at Machakos Level 5 Hospital and admitted for 21 days and later she was transferred to PCEA Kikuyu Hospital where she was admitted for 20 days and went back for a metal plate to be put on the left leg and then reported to Athi River Police Station. She testified that she cannot work. She hires labour for housework, washing and shamba work. She had not recovered and cannot walk without the frame. She testified that she stayed home for almost a year and had a labourer to date. She tendered the Medical Report by Dr. Mutuku, the Police Abstract, Receipts for Kshs 763,183/, Demand letter and Statutory Notice as documentary evidence. On cross-examination, she stated that she had no record of payment of the casual labourer, admission letter from Machakos Hospital, Referral Letter to PCEA Hospital and no records to show that she was employed as a teacher.

21. PW2 was Dr. Judith Kimuyu who testified of a medical examination that was conducted on the respondent on 14.12.2011 after being involved in a road traffic accident by her colleague Dr. Mutuku. According to the report, the respondent complained of incapacitation and she was on a wheel chair and thus Dr. Mutuku opined that she was maimed as a result of the accident and lost the capacity to earn. The estimated cost of removal of implants was given as Kshs 150,000/-. The plaintiff's case was closed.

22. The Appellants did not call any witness and closed their case.

23. I have analyzed the evidence that was adduced before the trial court. The issues for determination are:-

1) Whether the case for disturbing award herein has been made

2) If yes, how much is the Respondent entitled to?

3) What is the order as to costs?

24. The Respondent testified that on 1.5.2011, she was involved in a road traffic accident and was injured. Parties entered into a consent on liability in the ratio of 80:20 in favour of the Respondent.

25. On quantum, the Respondent testified that she had fractured both legs below the knees, was cut on the forehead, her teeth parted, was hit on the ribs and injured on the left hand.

26. She was treated at Machakos Level 5 Hospital and admitted for 21 days and later she was transferred to PCEA Kikuyu Hospital where she was admitted for 20 days and went back for a metal plate to be put on the left leg.

27. According to the undated medical report that was prepared by Dr. P.N Mutuku on an examination carried out on 14.11.2011, he made a deduction that the Respondent suffered blunt injury to the head and loss of consciousness, cracked teeth, bruises to the forehead, bilateral tibio-fibula fractures and blurred vision. She was maimed due to the road traffic accident, was incapacitated, moved around in a wheel chair and lost her capacity to earn. There is no indication of the percentage of permanent disability but a cost of Kshs 150,000/- was estimated for removal of the exofix in situ.

28. The Respondent was not examined by the defense doctor.

29. I have had the benefit of going through the written submissions that were filed by the counsels for both parties and the authorities that were supplied therein.

30. The trial court relied on the only medical report that was on record and I note that there is no second medical opinion, neither did the appellants object to the said report. The trial court rightly relied on what was opined by Dr. Mutuku, and that consideration was very much relevant and thus the trial court did not err in making reliance on the same in arriving at the final award of general damages.

31. The Trial Court was entitled to take into account the inflation trend in this country and the ages of the cited authorities in making the award. However taking into account the medical report relied on, the award of Kshs. 2,000,000/- was inordinately high in the circumstances and I hereby set aside the same and substitute it with an award of Kshs. 1,000,000/- as **general damages** for pain and suffering. According to Dr. Mutuku's medical report the Respondent was indeed incapacitated. The Appellant has offered Kshs. 500,000/- and I am guided by the case of **Isaac Mwenda Micheni v Mutegi Murango (2004) eKLR** that the appellants have quoted. The said case was decided in 2004. Hence in view of inflation and passage of time, the award of Kshs 1,000,000/- is sufficient and reasonable in the circumstances.

32. As to cost for future medical operations, I decline to set aside the award of Kshs 150,000/- as opined by Dr. Mutuku so as to cater for the removal of implants and this was what he opined in 2011. However in 2019, that is almost 7 years later, inflation on the Kshs.150,000/- shall have skyrocketed but that notwithstanding the court cannot go on a voyage beyond the corners of the pleadings and the Respondent will have to be contended with the said sum.

33. On loss of earning capacity, the appellant submitted that the same was not pleaded and proved and thus ought not to be awarded. This is not the correct position, for, under paragraph c of the prayers in the plaint, the same is pleaded. In any event in the case of **Butler v Butler (1984) KLR 220**, the issue of awarding damages for loss of earning capacity was substantively considered and it was held inter alia that;

“..... a person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid before the accident are lessened by his injury...

...whilst loss of earning capacity should be included as an item of general damages it is not improper to award it under its own heading. a victim of personal injury who lost his earning capacity is entitled to compensation in the form of

damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity.....”

34. In view of the above, the bone to crack is whether the chances of the future of the respondent’s work in the labor market were lost as a result of the accident. From the evidence on record, during cross-examination it was clear that the respondent did not present evidence to prove that she was a teacher or that she lost earning pay as a teacher due to the accident. In the circumstances I find that the trial court did not err in disallowing the amount.

35. The trial court awarded Kshs 455,160 as the award for hiring domestic help. I find this a novel claim, that could fall in the nature of special damages and there being no amount attached to it in the plaint, nor any proof vide receipts of the amount claimed I would entirely set aside the amount awarded by the trial court.

36. The trial court awarded Kshs 763,783/- as Special Damages, and yet what was pleaded was Kshs 645,883/-. However the receipts produced amounted to Kshs 294,365/-. This means the award of the trial court was erroneous and must be set aside and substituted with an award of Kshs 294,365/-.

37. Costs follow the event. Indeed the Appellants opted not to tender evidence on quantum after consent on liability was agreed. Hence the order on costs for Respondent remains undisturbed.

38. In the result the appeal partly succeeds. The award of Kshs.2,847,311/= by the trial court is hereby set aside and substituted with the sum of **Kshs.1,155,492/=** made up as follows:

General damagesKshs.1,000,000/=

Costs of future medical expensesKshs. 150,000/=

Special damages Kshs. 294,365/=

TotalKshs.1,444,365/=

Less 20% contributionKshs. 288,873/=

NETKshs.1,155,492/=

Orders accordingly.

Dated and Delivered at Machakos this 30th day of May, 2019.

D.K. KEMEI

JUDGE