REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 4 OF 2019

THE BOARD OF TRUSTEES ANGLICAN CHURCH

OF KENYA DIOCESE OF MARSABIT..........................APPELLANT

VERSUS

CHUKULISA ROBA HALAKHE............................RESPONDENT

(Being an appeal from the Judgement of Hon. T.M. WAFULA Senior Resident Magistrate Marsabit Law Court in Civil Suit No.10 of 2018 delivered on 13.12.2018)

JUDGMENT

The respondent was involved in a road traffic accident on 11th April, 2015 along the Marsabit – Moyale road. He filed suit number 10 of 2018 before the Marsabit Principal Magistrate's court. Parties recorded a consent on liability on 8th May, 2018 at the ratio of 80:20% in favour of the respondent. The trial Court awarded the respondent Ksh.3 million as general damages.

The appellant is dissatisfied with the award of damages by the trial Court and preferred this appeal. The grounds of appeal are that: -

> ***1. The learned Senior Resident Magistrate erred in law and fact in making an award of general damages that was excessively high that there must be an erroneous estimate of the damages payable to the Respondent herein.***
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> ***2. The learned Senior Resident Magistrate erred in law and fact in making an award of Kshs.3,000,000/= (3 million) as general damages and which amount is excessively high considering the injuries suffered by the Respondent herein.***
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> 3. ***The learned Senior Resident Magistrate erred in law and fact in failing to consider the submissions tendered by the appellants on the issue of Quantum and the legal authorities provided therewith.***
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> ***4. The learned Senior Resident Magistrate erred in law and fact in failing to subject himself to the rule of ratio decidendi and departing from the established principle of stare decisis.***
>
> ***5. The learned Senior Resident Magistrate misdirected himself into arriving at a wrong decision on the issue of quantum and in making an award that is obviously exaggerated and against the medical evidence tendered before court during the trial.***

Mr. Kariuki appeared for the appellant. Counsel submit that the respondent suffered C5 kledge compression fracture and soft tissue injuries to the face. The award of Ksh.3 million is excessively high and inordinate. It does not compare with awards made for similar injuries. Counsel submitted that in the case of **SIMON TAVETA –V- MERCY MUTITU NJERU (2014**) **eKLR** the Court of Appeal awarded Ksh.3,500,000 to a claimant who had 100% permanent disability and had total paralysis. Counsel is of the view that an award of Kshs.400,000 is sufficient compensation to the respondent. The proposal is grounded on the case of **IBRAHIM KALEMA LEWA –V- ESTEEL CO. LTD [2016]** eKLR. In that case Kshs.300,000 was awarded for intertrochanteric fracture of the left femur and physical and psychological pain. The claimant in that case had 25% permanent disability. Similarly, in the case of **MWAVITA JONATHAN –V- SILVIA ONGINGA [2017] eKLR**, Ksh.400,000 was awarded for left hip commuted intertrochanteric fracture which required surgery involving insertion of surgical plantings and screws, blunt chest injury, dislocation on the right knee joint and sprains at the cervical spine.

It is further submitted by the appellant that the trial court did not consider the appellant's submission and failed to take into account applicable principles in s involving the award of damages. The award is exaggerated and is against the tendered medical evidence. The respondent has fully healed with no complication.

Mr. Orayo appeared for the respondent. Counsel maintain that the respondent was managed at Marsabit County Referral hospital, Kijabe IC hospital and Gilgil General and Psychiatric hospital. The degree of permanent incapacity was assessed at 30%. Counsel relies on the case of SIMON **TAVETA V MERCY MUTITU NJERU [2014] eKLR (Supra).** It is further submitted that the authorities relied on by the appellant do not give comparable injuries.

The appeal herein is only on the issue of assessment of damages. Being a first appeal, the Court has to evaluate the evidence afresh before drawing its own conclusion. Only the respondent testified before the trial Court. On 11.4.2015 she was involved in a road traffic accident while on board motor vehicle registration number KBE 918P. She lost consciousness and found herself at Kijabe hospital on 12.4.2015. She suffered head and spinal injuries. After six months she had problems with her ears. She had fractures on her C4, C5 and C6 of the spine. On 7.9.2015 she was operated on her cervical bones and a metallic strip was inserted to align the bones. Her ears were treated at Gilgil General and Psychiatric hospital. She still uses a collarbone. She has not fully recovered and cannot do heavy work. When it is cold she feels severe pain. She was examined by Dr. Steve Sureti on 21.3.2018. She was also seen by Dr. Halake. At the time of the accident she was a student but is now employed. She started working on 2.5.2018. she wears her collarbone every time she travels. She has a scar on the left side of the neck as a result of the accident.

The respondent was seen by Dr. Sureti and Dr. Halake both of Marsabit County Referral hospital. The medical report by Dr. Sureti dated 21.3.2018 describes the respondent's injuries as follows:-

DR. STEVE M. SURETI

MBchB – UON

KMPDB NO.A7882

MEDICAL REPORT FOR CHUKULIZA ROBA

AGE: 24 YEARS

SEX: FEMALE

DATE OF ACCIDENT: 11.04.2015

DATE OF EXAMINATION: 30.03.2018

INJURIES SUSTAINED

i) Head injury with loss of consciousness

ii) C5 kledge compression fracture

iii) Multiple injuries to the face

iv) Spinal injury

v) Pain in the left ear

vi) Hematoma in the mastoid region

TREATMENT

Was managed at Marsabit county referral hospital then referred to AIC Kijabe hospital then to Gilgil General & Psychiatric hospital then to Medanta Africare hospital where the following management were instituted.

i. X-rays

ii. CT-Scan MRI

iii. CS – corpectomy

iv. Cervical alignment

v. Surgery

vi. Cervical alignment

vii. Surgery

viii. Cervical myelopathy

ix. C0colla

x. Analgesic's

xi. Antibiotics

<u>EXAMINATION</u>

- **Convulsions**

- **Migraines**

- **Headaches on and off**

- **Still wearing c-collar**

<u>CONCLUSION</u>

- **Following the accident Chakuliza sustained multiple injuries with permanent scars. She is still being managed for convulsion and she normally attends physiotherapy sessions. Permanent disability assessed at 30%.**

The report by Dr. Halake is dated 30th march, 2018. The report describes the injuries as a C5 kledge compression fracture and soft tissue injuries on the face. Recent results from Madenta Africare hospital shows that there are complications arising from the surgery.

Although there has been reference to the respondent's C4 and C6 of the spine, it is clear from the medical reports that only the C5 was fractured. The respondent has not fully healed and still uses a collar bone. Permanent incapacity is estimated and 30%. The respondent's age is given as 24 years old in 2018.

The Principles upon which a superior Court can interfere with the findings of trial Court with regard to assessment of damages are well settled. Way back in **1961**, the **East Africa Court of Appeal** in the case of **HENRY HIDAYA ILANGA –V- MANYEMA MANYOKA** (Sir Kenneth O'Connor J.A) observed as follows:

> ***The appellant alleges that the sum of shs.5,000/- awarded as general damages by the learned Judge was excessive; and the respondent alleges that it was inadequate. In considering this question I apply the rule laid down by the privy Council in <u>Nance V British Columbia</u> <u>Electric Railway Co. Ltd (4), [1951] A.C. 601 at</u> <u>p.613,</u> when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge:***
>
> ***"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage(Flint V Lovell, [1935] l K.B. 354), approved by the House of Lords in Davies V Powell Duffryn Associated Collieries Ltd, [1942] A.C 601."***

Counsels for both parties referred the court to the case of **SIMON TAVETA -V- MERCY MUTITU NJERU** (**Supra).** In that case the complainant suffered total paralysis of the lower limbs and could not voluntarily move any part of the lower limbs. The injury to the spinal code disturbed the bladder and bowel function. She had to wear diapers. The Court of Appeal reduced the award of general damages from Ksh.4 million to Ksh.3.5million. The reduction was caused by the inclusion of future medical attention in the global sum of Ksh.4 million which item had not been pleaded. The victim was 100% incapacitated.

The respondent has not fully recovered but is now working. The reports indicate that she was 24 years in 2018. Her earning capacity has not been affected. The other authorities relied upon by Mr. Kariuki does not provide comparable injuries and are not relevant to this claim. The respondent sustained spinal injuries which cannot be compared to fractures of the limbs. The accident occurred in 2015 but three years later in 2018 the doctors concluded that the respondent had not fully recovered. However, I cannot equate her injuries to those suffered by the claimant in the **Simon Taveta case**.

Since the respondent has made improved recovery and is fully working and considering that the permanent incapacity is 30% compared to 100% in the Simon Taveta case, I do agree with the contention by the appellant's counsel that the award is quite high. Comparable injuries should attract comparable awards. Although the Simon Taveta case was decided in 2014, I am convinced that inflation cannot fill up the difference.

I do hereby set aside the award of Ksh.3 million as general damages and replace it with Kenya shillings two (2) million. The award shall be subjected to the agreed contributory negligence of 20% leaving a net award for general damages at Kshs.1,600,000.

In the end the appeal herein succeed and the respondent’s general damages are hereby reduced from Ksh.3 million to Ksh.2 million. The award shall be subjected to 20% contribution. The respondent shall have the costs awarded by the trial Court. Parties shall meet their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24TH DAY OF SEPTEMBER, 2019

S. CHITEMBWE

JUDGE