



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 20 OF 2015**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**AND**

**ISABELLA KENDI.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. C. Maundu, SPM***

***dated 20<sup>th</sup> May 2015 at the Chief Magistrates Court***

***at Mauain Civil Case No. 237 of 2014)***

**JUDGMENT**

1. It was not disputed that the respondent was attacked by a buffalo while walking home from fetching water near Meru National Park on 11<sup>th</sup> October 2014. The parties agreed to apportion liability in the ratio 80:20 against the appellant. The respondent was awarded Kshs. 800,000/- as general damages for pain and suffering following the injuries she sustained as a result of the incident.
2. The appellant appeals against the decision primarily on the ground that the award was excessive as the respondent sustained minor injuries. It complained that the trial magistrate failed to take into account its submissions and departed from the principle of precedent. The respondent supported the award and countered that the award was reasonable in the circumstances.
3. The respondent's injuries were confirmed by Dr Koome Guantai (PW 1), the doctor who examined the respondent on 4<sup>th</sup> February 2015, produced his report dated 7<sup>th</sup> February 2015. He testified that she sustained the following injuries; multiple injuries on the face, hands and chest, fracture of the 4<sup>th</sup> rib, cut on the right posterior aspect of the chest approximately 4 cm, bruises on the abdomen and a cut on the inner aspect of the thigh. He told the court that at the time of examination, she had a scar on the chest wall, a scar on the umbilical region and multiple scars on the hands. She complained of pain in the umbilical region. PW 1 opined that the respondent sustained serious injuries which he classified as harm. When cross-examined, he told the court that she did not suffer any incapacitation and that the injuries had fully healed. Although she complained of pain in the umbilical area, PW 1 stated the pain may have had a different cause.
4. Before the trial court, the respondent's counsel submitted that an award of Kshs.1,500,000/- as general damages would be reasonable. He cited the case of *Esther Dorca Bochere Onyancha v Zacharia Okemwa Manono and Another KSI HCCC No. 50 of 2007 [2008] eKLR* where the plaintiff sustained burn like wounds in most parts of the body from head to toe deep lacerated wound on the anterior aspect of the left ankle joint with loss of skin tissues, a lacerated wound on the occipital part of the head, multiple rib fractures on the left side and deep cut wounds on the scalp and face. She was awarded Kshs. 600,000/- in 2008.
5. Counsel for the appellant suggested that a sum of Kshs. 100,000/- would be adequate in the circumstances. Its counsel cited *John Mbutia and Another v Stephen Muiruri Njenga [2008] eKLR*, the plaintiff sustained fractures of the 4<sup>th</sup> and 5<sup>th</sup> ribs on the right side, fracture of the pubic ramii, fracture of the right fibula, cuts on the forehead and on both left. He was awarded Kshs. 300,000/- by the trial court which was reduced to Kshs. 100,000/- on appeal in 2008. In *Patrick Mwenda Bucha v Raphael Mainka Ole Seya and Another HCCC No. 1091 of 2002 [2007] eKLR* where the plaintiff sustained fractures of the 2<sup>nd</sup> to 7<sup>th</sup> right ribs and two fractures on the site of the 3<sup>rd</sup> and 4<sup>th</sup> and the 5<sup>th</sup> ribs. He was awarded Kshs. 100,000/- in 2007.

6. The trial magistrate considered the decision cited on behalf of the respondent and discounted it on the ground that it was not suitable and that the claimant did not suffer similar or comparable injuries. He held that the decisions cited by the appellant were dated and in his view the sum of Kshs. 800,000/- would be adequate as general damages.

7. The general principle upon which this Court, as an appellate court, will interfere with an award of damages was summarised by the Court of Appeal in **Mariga v Musila [1984] KLR 251**, 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 ....*

8. In awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards bearing in mind that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

*Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.*

9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

10. As I have noted in other cases, there is a tendency for advocates to cite cases that are polar opposites and hope that the judge or magistrate strikes a mid-point. The gap between the cases cited by the parties was too wide and in fact the trial magistrate discounted the case cited by the respondent as being irrelevant. I wish to reiterate that it is the duty of counsel to assist the court by citing several decisions in order to assist the court come to a fairer outcome consistent with its duty outlined in the **Salome Maore Case (Supra)**. The cases cited by the respondent were too low and were in fact an outlier on the opposite side of the scale.

11. Considering the injuries sustained by the respondent and particularly the fact that the respondent had fully recovered and suffered no permanent disability, I find the sum of Kshs. 800,000/- excessive. I think a sum of Kshs. 350,000/- would keep the award within the margin of prevailing awards. Consequently, I allow the appeal to the extent that I set aside the judgment of the subordinate court awarding the respondent Kshs. 800,000/- as general damages and substitute the same with an award of Kshs. 350,000/-. The sum shall accrue interest at court rates from the date of judgment before the trial court.

12. The respondent shall bear the appellant's costs assessed at Kshs. 30,000/-.

**SIGNED AT KISII**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this 21<sup>st</sup> day of June 2018.**

**A. MABEYA**

**JUDGE**

Mr Kariuki instructed by Mithega and Kariuki Advocates for the appellant.

Mr Mwanzia instructed by Muia Mwanzia and Company Advocates for the respondent.