REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 85 OF 2017

NELLY WANJIKU MIKHAIL VOSTOV.....APPELLANT

VERSUS

LYDIA KEMUNTO MORIASI.....RESPONDENT

J U D G M E N T

1. By the Amended Memorandum of Appeal dated 4/4/2018 and filed in court on the 4/5/2018, the appellant by some 4 grounds of appeal, only challenge the award of both general and special damages as manifestly too high, inordinate and excessive. The four grounds are couched:-

> **i. THAT the learned trial Magistrate erred in law and infact in awarding general damages for pain, suffering and loss of amenities at Kshs.1,800,000/= which was manifestly too high and excessive.**
>
> **1A. THAT the learned trial Magistrate erred in law and in fact in awarding special damages at Kshs.1,452,000/= which was manifestly too high, inordinate and excessive.**
>
> **ii. THAT the learned trial Magistrate erred in law and in applying wrong principles while assessing both general and special damages and the decision therein being exorbitantly high and excessive in the circumstances.**
>
> iii. **THAT the learned trial Magistrate erred in Law and in facts in disregarding the evidence in the trial and thus arriving at the wrong decision in assessing the general and special damages exorbitantly high and excessive in the circumstances.**

2. Obviously, from those grounds, the appeal does not challenge the trial court's finding on liability which held the Appellant 100% liable.

3. The established law an assessment of damages is that it invokes a courts discretion and on appeal, the court ought not freely and slightly interfere with such discretion unless it be demonstrated that the exercise was erroneous for reason that it failed to consider the relevant principle or misapprehended the principle applicable and short of that the ultimate decision reached is wholly and obviously untenable or just perverse[1]. It must be demonstrate that the trial court proceeded upon wrong principles, or that evidence was misapprehended in some material respect and thereby arrived at a figure that wholesomely represent entirely erroneous estimate[2]. It has equally be said that assessment of damages is a difficult task and once undertaken at the trial by the court which took evidence and observed the witness testify, an appellate court should not just interfere with that discretion at whim. With those principles in mind I will seek to determine the only issue being:-

What is the error in principle shown to have been committed by the trial court in the assessment of damages?

General damages

4. In coming to the sum of Kshs.1,800,000/= the trial court at page 136-137 of the record, took into account the evidence of injuries suffered as told by the Respondent including the court's observation that the plaintiff was using scratches, injuries confirmed by the doctor who said it would take the plaintiff six (6) months to heal if no complication occurred and that it would require another surgery to remove the metal implants and that there was 9% permanent incapacity.

5. The court also took into account the decisions cited to it by both sides and the three medical reports produced. Ultimately the court said:-

> **"The court is guided by the now settled principles of assessing general damages. They include the requirement that comparable injuries should be compensated by comparable awards; awards must be within limits afforded by the economy**

and that awards should only afford reasonable compensation and should not be used to punish the defendant as a wrong doer. Having considered the submissions, the cited cases generally offer useful guidance to the court in arriving at a reasonable award. The authority of Gabriel M. Mohamed "supra cited by the plaintiff however, relates to relatively more serious injuries. The decisions cited by the defendant also tend to understate the gravity of the plaintiff's injuries herein. Dr. Muthuri's report is however, useful".

Taking into account all the relevant factors and principles including the incident of inflation owing to passage of time since the cited decisions were rendered, I grant the plaintiff. Kshs.1,800,000/= in general damages for pain, suffering and loss of amenities". (emphasis provided)

6. On own on appreciation, taking into account that no injuries in two different case could be all the same but can only be comparable, I have formed the opinion that the trial court took only and all it was expected and mandated to take into account and I have not discerned any error to entitle this court, as an appellant court, to interfere. The challenge on assessment of general damages lack merit and the same is dismissed.

Special damages

7. The crystalized rule of law is that special damages must not only be specifically pleaded but strictly proved.

Here the sums awarded for treatment costs in the sum of Kshs.1,003,000= is not contested. The Appellant only contests the sums awarded as follows:-

- Loss of motor vehicle Kshs. 400,000/=
- Towing charges Kshs. 11,000/=
- Assessors fess Kshs. 6,000/=
- Loss of phone and chain Kshs. 30,000/=
- Doctors fees to prepared

Medical report Kshs. 2,000/=

Total 449,000/=

8. Of those sums, towing charges, doctors' fees to prepare a medical report and assessors fees should not present any difficulty The three ought not to present any difficulty because all were duly pleaded and at trial PW 1 produce **Exh P2** for Kshs.6000, PW 3 produced his own receipt for Kshs.2,000 as exhibit P11 while plaintiff produced towing receipt as exhibit P10.

9. Having heard the parties, the court did accept the documents as proof of the expenses and awarded same and I do not find any fault with the court. It cannot be the law as submitted by the appellant that the towing receipt being in another person's name could not be awarded to the plaintiff when the plaintiff did say in cross examination that the sum was paid on her behalf by her husband in whose name the receipt was issued.

Lost phones and gold chairs

10. It was pleaded that there was a damaged telephone, alcatel one- touch, together spectacles valued at Kshs.27,000 and lost Sony M2 phone and a gold chain both value at Kshs.35,000/=. To prove that loss the plaintiff produced two police abstracts showing the damaged and lost items valued at one aggregate sum of Kshs.62,000/=.

11. On cross examination, no serious challenge was mounted against that loss except a confirmation sought whether or not a gold chain was one of the personal effects lost in the accident. On a balance of probabilities, the loss and damage of the four identified items was not controverted nor was the value thereof. The contest now being raised in the Appellants submissions is that there was no evidence on the value of the items.

12. This court follows the learning that receipts is not the only way to prove loss and that the burden of proof expected from the Respondent was on a balance of probabilities[3]. That a police abstract was produced without objection and no challenge mounted by way of any cross examination was to me sufficient discharge of that burden. With that evidence and with the trial courts finding that the evidence of damage and loss had not been discredited and that the facts were accepted by court, there was no basis for the court to disallow the pleaded and proved sum and come by a different figure from nowhere. In that regard, the trial court erred and that portion of the judgment is set aside and in its place is substituted a sum of Kshs.62,000/= being the pleaded and proved sum. I set aside that award and in its place substitute a sum of Kshs.62,000.00.

Value of the motor vehicle

13. The plaintiff pleaded and led evidence that the motor vehicle was a constructive total loss in terms of the assessment of a motor vehicle assessor. The totality of the evidence of PW 1 and PW 2 was that the pre-accident value of the motor vehicle was Kshs.680,000/= and there remained a salvage value. That salvage value was put at Kshs.100,000/= by the expert while the plaintiff herself said it was later sold at Kshs.80,000/=.

14. The trial court having accepted the pre-accident value and the fact of constructive total loss, his duty was only to determine the salvage value to come with the net loss. He did doubt the evidence of the plaintiff that the salvage was sold at Kshs.80,000/= but failed to take into account the evidence of the assessor that the salvage was valued at Kshs.100,000/=.

15. In doing so, the court failed to have regard of a relevant matter of evidence he was bound to take into account. When confronted with the professional opinion and evidence of the litigant given an oath, and having observed the litigant testify, he had the latitude to doubt the litigant as he did but he had to take into account the expert's evidence one way of the other. That he did not have regard to the assessment report in that aspect of the salvage value, the trial court seem to have dissected the report into two believe one part and used it as a basis a determination but just ignored the other. To that extent the court erred.

16. The Court of Appeal in **Abdi Ali Dere vs Firoz Hussein Tundal** & 2 others [2013] eKLR said:-

> **"In view of the evidence before court, as well as the standard of proof required in civil cases, we cannot fathom how the learned judge could find that the loss assessment report was the property of norbivin…in the present appeal, the assessor had put the pre-accident value of the appellants lorry at Kshs.2,600,000/= less Kshs.270,000/= which was recovered from the sale of the salvage leaving a claim of Kshs.2,330,000/= which is what the appellant would have required to replace his lorry at the date and time of the accident". Emphasis added**

17. I understand the court to say the loss in such situations is the pre-accident value less the value of the salvage. In the instant appeal, that loss was Kshs.680,000/= less 100,000/= which gives a sum of Kshs.580,000/=. That was the loss proved by the Respondent and which the court had no reason to substitute with a figure of Kshs.400,000/= not availed to it by any of the parties. Here again the court erred. The court had not reason to pick a sum for the air and substitute it with a sum pleaded and proved. Under this subhead the Respondent is awarded Kshs.580,000/=.

18. The upshot is that the appeal as presented by the appellant lacks merit and I hereby dismiss the same with. However upon the courts mandate on a first appeal, I have adjusted the judgment as far as the lost and damaged property is concerned as above and therefore the lower court judgment would now be summarized to read as follows:-

- **General damages - 1,800,000.00**
- **Special damages - 1,664,000.00**

20. I award the costs of the appeal to the Respondent.

Dated and delivered at **Mombasa** this **29th** day of **October 2018**.

P.J.O. OTIENO

JUDGE

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[1] Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR

[2] Nduta Mbile v John Gachau Gitonga [2017] eKLR

[3] Ignatius Makan Mutisya vs Reuben Musyoki Mili [2015] eKLR