



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 5 OF 2015

LUCY WARUGURU GATUNDU APPELLANT

versus

FRANCIS KINYANJUI NJUKU RESPONDENT

*(Being an appeal from the Judgement in Nanyuki Chief Magistrate Court Civil Case No. 74 of 2014
–by Hon. T W Cherere – Chief Magistrate on 19th November 2014)*

JUDGMENT

1. On 17th August 2013 **FRANCIS KINYANJUI NJUKU**, the respondent herein was riding his motor cycle registration No. KMCK 181K along Nanyuki – Nyeri road at Equator. He pleaded in his plaint, before the trial court, that the appellant **LUCY WARUGURU GATUNDU** while driving her motor vehicle KBK 467P caused her said motor vehicle to collide with the respondent’s motor cycle. As consequence thereof the respondent suffered injuries. In his claim before Nanyuki Chief Magistrate’s court the respondent sought for compensation in special and general damages. On 22nd October 2014 the parties consented on judgment on liability at 70% to 30% in favour of the respondent. The trial court was therefore to determine the quantum of those damages.

2. The trial court by its judgment of 19th November, 2014 awarded the respondent Ksh. 1.6 Million in general damages, Ksh. 198,860 in special damages; and Ksh. 171,000 for future medical expenses. The appellant was aggrieved with the award in general damages and has filed this appeal seeking that this court do vary or set aside that award.

3. The appellant by the memorandum of appeal faulted the trial courts assessment of general but in so doing wrongly stated that the trial court awarded the respondent Ksh. 2 million in general damages. The appellant in one of her grounds of appeal stated that the trial court erred in finding that the respondent’s evidence proved the degree of injuries pleaded in the plaint and that as a consequence awarded excessive award in general damages.

4. It is clear from the above that this court is called upon to determine whether the trial court’s award in general damages was excessive; and secondly whether the respondent proved the injuries as pleaded in the plaint.

5. I shall begin by considering the second issue identified above first because if indeed the respondent failed to prove his injuries the court will not proceed to consider the first issue; that is, whether the award was excessive.

6. The respondent pleaded in his plaint that he suffered the following injuries.

- **Right femur fracture**

(distal end) with bone loss;

- **Right tibia segmental fracture; and**
- **Right fibula segmental fracture**

7. The medical report which was submitted in evidence as exhibit 5(a) noted the injuries stated in the plaint, word to word.

8. It is important to note that the appellant did not adduce evidence in defence of the respondent's suit. That being so the respondent's evidence to the effect that he suffered fractures to his right leg and those injuries being confirmed in the Medical report Exhibit 5 (a) on a balance of probability was sufficient proof of the injuries as pleaded.

9. It follows that my finding in respect to the second issue is that the respondent proved the injuries pleaded in the plaint on balance of probability.

10. On the second issue in this appeal the appellant faulted trial court's assessment of general damages. The defendant before the trial court cited several authorities in her submission. It is important, however, to state that the appellant did not supply copies of some cases that she cited; namely **TARASILA WANJA & ANOTHER – V- PETER KIRIMI [2014] eKLR SOKORO SAW MILLS LIMITED – V GRACE NDUTA NDUNGU [2006] eKLR AND EASTERN PRODUCE E (K) Ltd (SAVANI ESTATE) – V- GILBERT MUHUNZI MAKOTSI.** Those authorities for the purpose of this judgment will not be considered. The other issue to be considered is that it is only the authorities that were before the trial court that will be considered in this appeal, and not the new authorities cited by the appellant in this appeal.

11. Appellant cited the High court case of **BENJAMIN SHELEMIA – V- SCOOPY ENTERPRISE LIMITED [2011] eKLR.** That case was determined on 31st March 2011. Its comparing the award made to the respondent must bear that date of its determination as compared to the date of determination in the parties case before the trial court. The parties case was determined on 19th November 2014. There is a difference of three years and eight months between those two dates. It is important for the court to take into account that in that passage of time there is undoubtedly inflationary which can affect quantum.

12. With the above in mind the injuries suffered by the claimant in the case of **BENJAMIN SHELEMIA (supra)** were sustained chest confusion, fracture of the right tibia bone, fracture of the right fibula bone, dislocation of the right ankle joint and bruises on the left knee. In that case the High Court reduced the award in general damages of the Senior Resident Magistrate from Ksh. 450,000/= to Ksh. 250,000/=. As stated before that reduction in the award was made more than three years before award was made in the case under consideration. But perhaps more importantly is that the medical examination carried out on the respondent in this case, a year later after the accident revealed long term consequences of the injuries the respondent would endure. The doctor's report revealed that a year later after the accident the respondent complained of right lower limb pain, right low limb immobilization. On examining of the respondent the doctor stated that the respondent, a year later after the accident, was still supported by bilateral axilla crutches he was having sever tenderness and stiffness of the right knee joint; and his left lower limb and shortened by 3cm. The doctor stated that the respondent was having sever right knee joint osteoarthritis.

13. It follows from the above discussion from trial court did not err in departing from the award made in the case of **BENJAMIN SHELEMIA (supra).**

14. The appellant cited the case **GIBSON KARIITHI KAIRU & ANOTHER – V- JOSEPH MUTIO PETER [2009] eKLR.** This case was determined in November 2009. That is five year before the determination of the case under consideration and the injuries suffered by the claimant in the case of **GIBSON KARIITHI KAIRU (supra)** were also not comparable to the case at hand. In this courts view because of the passage of five years and because of disparity in injuries the award in that case of Ksh. 400,000 in general damages could not be a guiding award for the case under consideration due to

inflation. This court cannot fault the trial court's refusal to be guided by that award.

15. The case **CHRISTOPHER MUVO NDETI – V- KENNETH MWANIKI [2004]** eKLR was determined in May 2004. That is ten year prior to the determination of the present case. The trial court, again, cannot be faulted for failing to follow the awards made ten years previously. The award of Ksh. 500,000 in general damages may have been appropriate in the year 2004 but cannot have been appropriate in the year 2014.

16. The case **SHREE ENTERPRISES (K) LTD & ANOTHER – V- PETER NDIRANGU KARIUKI [2010]** eKLR was decided in May 2010. That is four years previous to the present case. The injuries suffered in the case of SHREE (*supra*) were comminuted fracture of the right radius and ulna, a fracture of the right scapula/shoulder blade and soft tissue injury to the right leg and scalp. A casual consideration of those injuries and those suffered by the respondent reveals that the respondent's injuries had long term ramifications. It follows the award of Ksh. 300,000 for general damages, in the case SHREE (*supra*), was not applicable to the present case.

17. The trial court was guided the award made in the case **RAPHAEL MUTHOKA MAILU – V- ERNEST JACOB KISAKA [2009]** eKLR which was determined in the year 2009. The court, in that case, awarded Ksh. 1.6 in general damages. The injuries in that case were comparable to the present case. The trial court relied on that decision, even though there was a passage of five years. That was the trial court's exercise of its discretion. In the case of **BUTLER – V- BUTLER [1984] KLR 225**, the court had this to say about trial court's assessment of damages:

“The assessment of damages is more like an exercise of discretion by the trial court and an appellant court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would, or he has taken into consideration matters he ought not to have considered, and in the result arrive at a wrong decision.”

18. The court is also mindful of the caution stated in the case **S J V DINELLO & ANOTHER [2015]** eKLR as follows:

“The assessment of damages... is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market.”

19. Although the above case of **DINELLO** (*supra*) was for damages for loss of earning capacity, the holding is applicable to an award of damages such as in this case.

20. Since the trial court has power to exercise its discretion in making an award of damages, and because appellant court should only interfere with that discretion if the trial court acted on wrong principles or awarded excessive damages; and this court having found that there is no basis to interfere with the award of damages to the respondent the first issue identified above is found in the negative. The award was not excessive nor were wrong principles applied by the trial court.

21. The appellant erred in stating in her ground of appeal that the trial court, in making its award, did not consider her authorities. To the contrary, the trial court considered all those authorities but found them to be inapplicable.

22. In the end the appellant's appeal fails and it is dismissed. The trial court's award is hereby upheld. The respondent is awarded costs of this appeal.

DATED AND DELIVERED THIS 30th DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Ndungu

Appellant: Lucy Waruguru Gatundu

For Appellant:

For the Respondent :

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE