



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
NAKURU
CIVIL APPEAL NUMBER 172 OF 2012

JENIFFER JEBICHI KOMEN.....APPELLANT

VERSUS

NORAH NAMBUYE WASIKE.....RESPONDENT

(Being an appeal from the judgment and/or decree of honourable

Magistrate hon. Heston Nyagah in Molo SPMCC No. 422 of 2010

delivered on 11th September 2012)

JUDGMENT

1. There is before me an Appeal filed on the 21st September 2016 and a Cross Appeal filed on the October 2012.

They both arise from the judgment and decree in **Molo SPMCC NO. 422 of 2010** delivered on the 15th September 2012.

The complaint by the appellant is on the *quantum* of damages awarded to the Respondent only. Mr. Juma advocate for the appellant abandoned the issue of liability when he argued the appeal before me on the 31st January 2017.

2. On the cross appeal, the issues raised touch on two items in the award of damages. These are:

Failure by the trial Magistrate to award the respondent costs for a domestic worker and the award on loss of earning as being too low.

3. The trial court awarded the respondent the following damages:

- | | | |
|------------------------------------|---|-----------------------|
| a) for pain and suffering | - | Kshs.1,000,000/= |
| b) Loss of earning capacity | - | Kshs. 549,264/= |
| c) Cost of future medical expenses | - | <u>Kshs. 50,000/=</u> |

Total - **Kshs.2,049,246/=**

4. As the first appellate court, I am obligated to reconsider the evidence adduced before the trial court and come up with my own findings.

5. Further, as the appeal is on the matter of *quantum* of damages and guided by principles stated in **Kemfro Africa Ltd t/a Meru Express Service Ltd & Another -vs- A.M. Lubia & Another (1982 - 1988) K KAR 272** it will be my duty to consider whether I should interfere with the trial court's assessment of the damages, and only if I am convinced that the trial court failed to take into account a relevant factor or took into account an irrelevant factor, then I shall further consider whether the awards in the various categories complained of are so low or so high as to be a wholly erroneous estimate of the damages would I exercise my discretion and interfere.

6. **The Appeal and Cross Appeal**

It is submitted by the Appellants in their written submissions and highlights that the above award is manifestly excessive in view of the injuries sustained by the respondent.

According to the medical report prepared by Dr. Kiamba on 15th July 2011 the injuries are stated as follows:

- Displaced fracture of the left acetabulum
- left iliac fracture
- Oblique fracture of the proximal
- Phalanx of the left 4th finger admission to Evans Sunrise hospital from 27th August 2010 to 6th September 2010.

Treatment:

- Open reduction and internal fixation of the fracture of the left acetabulum done
- Buddy strapping of right finger done
- Blood sugars controlled
- Discharged on analgesics antibiotics and insulin

Doctors opinion:

- Hip joint fixation place *insitu*
- Left Hip joint movements restricted due to pain developed arthritis of the left hip joint
- Will require arthroplasty (hip replacement at a cost of Kshs.500,000/=)
- Function of the left finger reduced.
- permanent disability assessed at 44%

7. **Damages for pain and Suffering**

The appellant submits that the award for pain and suffering in the sum of Kshs.1,000,000/= is excessive and the trial court took into account the respondent's diabetes which was not caused by the accident. Though he referred to a medical report by Dr. Omyoma that report was not produced as an exhibit.

I shall therefore not consider the same. What is on record is Dr. Kiamba's report and the injuries are tabulated above.

8. I have considered the cited Cases **Wilfred Obwacha -vs- Douglas Nyakundi (2015) e KLR** and **Fast Choice co. Ltd & Another -vs- Catherine Damaris Maina (2015) e KLR** and **Fast Choice Co. Ltd & another -vs- Catherine Damaris Maina (2015) e KLR**.

The injuries in the cases are not quite similar or comparable to the respondents. The awards are Kshs.230,000/= and Kshs.400,000/= respectively. It is the appellants submission that an award of Kshs.450,000/= would be more reasonable.

9. The Respondent thinks otherwise and citing **Kemfro Africa Ltd (Supra)** urges the court to uphold the award.

In awarding Kshs.1,000,000/= for pain and suffering the trial court considered the 44% permanent incapacitation assessed by the doctor and the severe limitation of body function.

It is trite that no two injuries will be similar in all aspects. The purpose of an award of damages for injuries is not to enrich oneself but to give a reasonable compensation taking into account that no amount of money can restore or renew a shattered physical frame.

10. I have considered other authorities for guidance.

Gilbert Nicholas Otieno -vs- Oil Crop Development co. Ltd (2009) e KLR.

The 3rd plaintiff had sustained fracture dislocation of the patella bone, fracture of the right hip joint, superior and interior pubic *rumia* and fracture of the right humerous.

The court awarded Kshs.500,000/= damages for pain and suffering. That wain July 2009.

In the present case, the respondent has developed arthritis of the left hip and will require hip replacement.

Taking all the injuries and the degree of incapacitation, I m persuaded that the award of Kshs.1,000,000/= is on the higher side and therefore ought to be reduced to reflect current awards for comparable injuries .

I have taken into account inflation and age of the cited authorities. I shall therefore reduce the award on pain and suffering to Kshs.700,000/=.

11. **Loss of earning and earning capacity:**

The trial court award Kshs.549,264/= to the respondent on the basis of an income of Kshs.4,577/= per month for a period of 10 years (Kshs.4,577 X 12 X 10 = Kshs.549,264/=). Thought no documentary proof of the *Mitumba* business the respondent, then 38 years old was doing, I fully agree with the magistrates rationale in adopting the Minimum Wages of a general worker not working in a city or town council. On the multiplier of 10 years, it is on record the respondent testifying that she would no longer engage in her business due to the injury but at least not forever.

At the time of testifying in August 2011, the appellant was still on crutches. The doctor did not say in his report that she would not be able to work in future especially after the hip replacement that he recommended.

I therefore find the multiplier of 10 years to be excessive.

I shall reduce the same to 5 years.

12. The injury was in 2010, August. The Minimum Wages for a general worker was then Kshs.4,577/=

as stated in the Regulation of Wages Amended 2012. There is no evidence that the respondent was a sales lady as submitted by the respondent and so entitled to Kshs.13,539/20 as stated in the above Regulations. The Respondent could be classified as a general worker, cleaner, sweeper, gardener, children ayah or house servant. Under the said guidelines that became effective on the 1st May 2012, she would not still have been entitled to the said sum of Kshs.13,539/20 other towns and municipalities other than Nairobi, Mombasa and Kisumu.

I find no good reason therefore to interfere with the trial Magistrates adoption of the income of Kshs.4,577/=.

(c) I uphold the same save for the multiplier that I have reduced to 5 years thus,

Kshs.4,577 X 5 =274,620/=.

13. **Future Medical Expenses.**

In his medical report, Dr. Kiamba recommended a hip replacement to ease movement of the hip joints that had already developed arthritis. Though he did not provide a quotation from any hospital, it was his testimony that he obtained the opinion from several hospitals and the surgery can be done at Kenyatta National Hospital. He stated that if the hip replacement is not done, the arthritis would become severe but also that the respondent would not use crutches for the rest of her life but this was to be made possible by the hip replacement. I find that the trial Magistrate erred in rejecting the said claim and allow the cost of future medical expenses towards the hip replacement at Kshs.500,000/=.

14. **Domestic helper**

I agree with the appellant that the respondent did not adduce credible evidence of having employed a helper.

In her evidence, she stated different salaries to the alleged helper.

I uphold the trial magistrates finding in rejecting the claim.

15. Having rendered myself as above, I come to the finding and conclusion that the cross appeal has no merit. It is dismissed. The appeal is however allowed partially as follows:

Damage under

(a) **Pain and suffering is reduced to** - **Kshs. 700,000/=**

(b) **Loss of earning capacity is reduced to** - **Kshs. 274,620/=**

(c) **Future medical expenses is upheld at** - **Kshs. 500,000/=**

Total - **Kshs.1,474,620/=**

12. Each party shall bear own costs.

Dated, Signed and Delivered this 18th Day of May 2017.

J. N. MULWA

JUDGE