REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 45 OF 2015

DAMARIS MWONGELI MUIA……APPELLANT

VERSUS

KENYA WILDLIFE SERVICE……..……RESPONDENT

(Appeal from the Judgement and Decree of the Hon. J.N. Wandia, Resident Magistrate, Malindi delivered on 9th October, 2015 in CMCC No. 320 of 2012)

JUDGEMENT

1. Damaris Mwongeli Muia, the Appellant was the plaintiff in Malindi Chief Magistrate's Court Civil Case No. 320 of 2012. She had sued the Respondent, Kenya Wildlife Service for damages as a result of injuries sustained in an attack by a bloat of hippopotamuses. In the course of the trial a consent was recorded by the parties apportioning liability at 30% against the Appellant and 70% against the Respondent.

2. At the conclusion of the trial, the Appellant was awarded Kshs. 500,000/= as general damages for pain and suffering, Kshs. 150,000 for future medical expenses and Kshs. 9,000 as special damages. The Appellant has appealed to this court on the ground that the trial Magistrate erred in fact and in law by awarding her a paltry sum of Kshs. 500,000 as general damages. In her view, the said amount is meagre as it is a result of an erroneous estimate of the damage and loss she has suffered.

3. Her other ground of appeal is that the trial Magistrate erred in fact and in law in disregarding or failing to accord proper consideration to her evidence and submissions on quantum. She therefore urges this court to allow the appeal with costs and set aside the judgement on quantum.

4. This appeal proceeded by way of written submissions. Counsel for the Appellant submitted that the Appellant suffered deep cuts on the left lower limb leading to her admission in hospital for 28 days. The nature and extent of the injuries resulted in skin grafting to patch up the deep cut wound on the left thigh. At the time of the trial the Appellant was still walking with the aid of crutches. The Appellant's counsel submitted that the Appellant no longer uses a bicycle as she used to do prior to the accident. She could not walk with ease and neither could she engage in sporting activities. That there were large unsightly scars on the affected limb and the limb would at times become numb.

5. The Appellant's counsel contends that the injuries sustained were severe and an award of Kshs. 500,000 as general damages was meagre in the circumstances of the case. He proposed an award of Kshs. 1.5 million relying on the decision in **Laban Buyole Mamboleo v Rift Valley Textiles [1998] eKLR** where the plaintiff was awarded Kshs. 650,000 as general damages in 1998.

6. On future medical costs, counsel for the Appellant asserts that the Appellant and her witness Dr. Ajoni Adede testified that she would require KShs. 300,000 for treatment in future but despite this evidence the trial Magistrate had gone ahead to award her Kshs. 150,000 without giving reasons for the award.

7. The Respondent opposes the appeal and seeks its dismissal with costs. Counsel for the Respondent takes the view that the award was within the parameters of the law.

8. Counsel for the Respondent states that from the evidence of the doctor there was no general conclusion as to whether the Appellant will suffer any form of disability. This, counsel submits, would dispense with the Appellant's submission that her mobility was affected by the attack. Further, that the Appellant's doctor had admitted during cross-examination that the Appellant suffered soft tissue injuries with no broken bones.

9. It is the Respondent's claim that the Appellant's assertion, through submissions, that she walks with the aid of crutches is an attempt to subvert the rules of engagement as this is a novel matter which was not before the trial Court. Reliance is placed on the decision of the Court of Appeal in **Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR** where it was stated that: -

> **"This being a first appeal, we are reminded of our primary role as the first appellate court namely to re-evaluate, reassess and re-analyze the facts that were placed before the learned trial Judge and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."**

10. The Respondent's position is that the Appellant's request for award of Kshs. 1.5 million as general damages is not based on any medical evidence or law. The Respondent submits that award of damages is to compensate and not to enrich a claimant. On this, reliance is placed on the words of Denning MR in **Lim Poh Cheo v Camden and Ishington Area Authority [1979] 1 All ER 332,** as cited by the Court of Appeal in **Ziporah Wambui Wambaira & 17 others v Gachuru Kiogora & 2 others [2004] eKLR** that: -

> **"In considering damages in personal injury cases, it is often said: "The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay."**

11. Still on principles applicable in determining the quantum of damages to be awarded, counsel for the Respondent also cites **Sino Hydro corporation Ltd v Daniel Atela Kamuda [2016] eKLR** and **Kemp & Kemp on the Quantum of Damages In Personal Injury & Fatal Accident Claims Volume 1, page 1004**.

12. It is the Respondent's assertion that the Appellant has failed to establish the basis for claiming Kshs. 1.5 million as general damages. The decision of Abida Aroni, J in **Martha Agok v Kampala Coach [2017] eKLR** where the claimant was awarded Kshs. 350,000 as general damages is cited as a good authority for a comparable award for comparable injuries. Counsel asserts that the claimant in the **Laban Buyole Mamboleo** case cited by the Appellant had suffered a series of fractures that left his brain with 60% disability and those kind of injuries cannot be compared with the injuries sustained by the Appellant.

13. On the Appellant's claim that the learned trail Magistrate erred in awarding meagre damages for future medical costs, it is submitted for the Respondent that this is a novel issue not found in the appeal and should thus be dismissed. Reliance is placed on the decision of the Court of Appeal in **Kenya**

Commercial Bank v Osebe [1982] KLR 296 in which it was held that: -

> **"It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal."**

14. Turning to the question as to whether the claim for future medical expenses is sustainable, the Respondent asserts that the same is not since the Appellant's doctor did not specify the costs and neither did he specify the availability of the procedure. Further, that future medical expenses are in the nature of special damages and they should not only be pleaded but specifically proved. **Sabina Nyakenya Mwanga v Patrick Kigoro & another [2015] eKLR** is cited in support of this proposition.

15. Two issues arise for the determination of this court namely whether the award of Kshs. 500,000 as general damages is commensurate with the injuries sustained by the Appellant and whether the award for future medical expenses was in accordance with the legal principles governing such awards.

16. I will start with the award of Kshs. 150,000 for future medical expenses. Counsel for the Respondent correctly captured the law applicable to an award for future medical expenses. A claim for future medical expenses should be pleaded and proved as special damages - see **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR**.

17. In the amended plaint the Appellant had prayed for future medical expenses for skin grafting and indicated the cost as Kshs. 300,000/=. Dr. Ajoni Adede never talked of requirement for skin grafting in the evidence in chief. It is only during cross-examination that the witness stated that the **"wound may require skin grafting which is done when wound has taken too long to hasten the process of healing."** He therefore did not say that skin grafting was necessary and neither did he estimate the cost. Still on this particular issue, the medical report dated 9th May, 2012 simply stated that the **"long duration before a complete healing of the left lower limb wound is noted and this wound may require skin grafting."** Skin grafting is not specifically recommended and neither is the cost disclosed.

18. Though the claim for future medical expenses was pleaded by the Appellant, she did not specifically prove the same. She would have been entitled to the amount pleaded and proved. The basis of an award of Kshs. 150,000 on this head by the trial Court is not explained. Indeed the Appellant was not entitled to anything for future medical expenses as she did not avail any evidence. However, there is no cross-appeal and the award shall remain as made by the trial Court.

19. Computing general damages is not a scientific precision. The court considers the nature and extent of the injuries sustained and awards made in the past for similar injuries. Inflation has to be taken into account. The trial Court has discretion in assessing damages and an appellate court will only interfere with an award where it is shown that the same is inordinately high or low or that the court took into account irrelevant facts in reaching the decision or that the award was not based on any evidence at all.

20. In **Sino Hydro Corporation Ltd** (supra) Majanja, J listed other factors to be taken into account in assessing damages as follows: -

> **"I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind the following principles;**
>
> **1. Damages should not be inordinately high or too low.**
>
> **2. They are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered.**
>
> **3. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.**

4. Where past awards are taken into consideration as guides, an element of inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of the judgement."

21. I agree with counsel for the Respondent that the injuries sustained by the claimant in the **Laban Buyole Mamboleo** case where much more severe compared to those sustained by the Appellant herein. In the cited case the claimant had, among other injuries, multiple fractures. He suffered permanent disability including amnesia, generalized weakness on the left side of the body and urine incontinence.

22. As for **Martha Agok** (supra), which was cited by the Respondent, the claimant lost one tooth and fractured another. She also received injuries to the lower abdomen, chest and right leg. The doctor formed the opinion that the injuries were soft tissue injuries which had healed. A comparison of the claimant's injuries therein with those of the Appellant herein would disclose that the Appellant's injuries were more severe.

23. Taking all the cited principles into account and considering the nature of injuries sustained by the Appellant, I find no reason for disturbing the award of Kshs. 500,000 as general damages. I therefore find no merit in the appeal. It is only necessary to point out that the global sums of Kshs. 659,000 awarded to the Appellant is subject to a deduction of 30% (Kshs. 197,700) being her portion of liability. The amount due to the Appellant from the Respondent will therefore be Kshs.461,300 together with interest on this amount from 9th October, 2015 when the judgement was delivered by the trial Court.

24. Otherwise this appeal is dismissed. The Appellant shall meet the Respondent's costs for the appeal.

Dated, signed and delivered at Malindi this 28th day of September, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT