



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 6 OF 2016

PETER KOLEE AMODHE APPLICANT

Versus

FLORENCE KAINDARESPONDEN

(Being an appeal from the judgment delivered by Hon. J N Nyaga Chief Magistrate at Nanyuki Chief Magistrate Court Civil Case No. 59 of 2009 dated 20th November 2013

JUDGMENT

1. **FLORENCE KAINDA** (Florence) was on 18th November, 2008 travelling, as a passenger in motor vehicle registration No. KXX 885 which was driven by **PETER KOLEE AMUTHEE** (Peter). The vehicle rolled and Florence was injured. She sued Peter before the **Nanyuki Chief Magistrate’s Court, in Civil Case No. 59 of 2009**, for damage for injuries suffered.

2. The trial court by its judgment of 20th November, 2012 awarded Florence Ksh. 450,000 in general damages. Peter being aggrieved by that judgment has filed this appeal

3. Although Peter file 5 grounds of appeal by his submissions before court it is clear that his appeal is limited to the award of general damages by the trial court. Strangely however the Counsel for Peter argued that the award in general damages was excessive because the doctor who testified on behalf of Florence did not state the percentage of temporary disability of Florence.

4. In my view degree of percentage of disability is not the only way a court can assess damages. It is important to state that counsel for Peter erred in citing the case: **JOSEPH MUSEE MUA – VERSUS - JULIUS MBOGO MUGI & 3 OTHERS [2013] eKLR** and stating that the Judge found that the doctor in that case failed to state the degree of percentage of disability. The Judge in that case stated thus on that matter:

“In the present case the disability has been assessed at 5%”.

5. Florence in this case as noted by the doctor suffered the following injuries:

- *Fracture (LT) humerus;*
- *Dislocation of the (LT) elbow joint;*
- *Blunt injury to the (LT) hip.*
- *Cut wound on the (LT) ankle region,*
- *Scalp cut on the (LT)occipital region*

6. The doctor on examining Florence found she had the following persisting condition.

- *Stiffness of the left elbow joint.*
- *Stiffness on the left shoulder joint.*
- *Haematoma on the left calf Muscles.*
- *Hip pain*
- *Scars (scalp and one of the ankle joint)*

7. The future effect of those injuries, which can translate to the degree of disability were noted by the doctor as:

FUTURE EFFECTS

1. Osteoarthritis of the elbow joint: This is expected to get worse with age.

2. Deformity – There is a marked deformity of the left humerus due to fracture. This makes the bone susceptible to fracture in future.

3. The scars are permanent features.

4. She is likely to develop hip arthritis as a direct effect of the accident.

8. The Learned trial Magistrate in making the award was guided by the cases: **JOEL MULATYA – VERSUS – KENYA RAILWAYS CORPORATION [2004] eKLR** where an award of Ksh. 400,000 was given for comminuted fractures of humerus and head injury; and **JANE HUKA OMEGA – VERSUS – JAMES KIARIE WAMBURA HCCC NO. 4216 OF 1993** where an award of Ksh. 200,000 was made for comminuted fracture of right numerous lower third chest and injury to right side of the chest wall.

9. It is pertinent to note that Peter's Learned Counsel at the trial submitted that an award of Ksh. 700,000 would be adequate and in that regard relied on the cases, **MARY ANYANGO – VERSUS- JONES AKULA & ANOTHER NAKURU HCCC No. 671 OF 1995** where an award of Ksh. 500,000 was made for compound fracture at the left femur, fracture of the pelvis, fracture of the molar tooth and soft tissue injuries to the left shoulder. The claimant in that case was left with deformity on the left thigh mal union of the fracture of the left femur and had developed arthritis of left knee; and **TAJADIN SHEMSHUDIN TOJAPAR & OTHERS – V- ASHRAF DAVID HASSAN KASAM HASHAM MOMBASA HCCC NO. 89 OF 1999** where an award of Ksh. 300,000 was made for laceration on the face, left hand and knees, fracture of 9th, 10th, and 7th, rib of left scapula.

10. The trial court in awarding Florence Ksh. 450,000 relied more on the awards made in the cases **JOEL JUMA (supra) and MARY ONYANGO (supra)**. Bearing in mind as stated in the case in the court of Appeal **KOIGI WAMWERE- VERSUS- ATTORNEY GENERAL [2015] eKLR** that an award of damages is not an exact science, and this court having re-evaluated the trial court's record before me I do not find that the trial court misdirected itself to invite interference by this court of its award.

11. Accordingly the appellant's appeal has no merit and is dismissed with costs.

Dated and Delivered at Nanyuki this 14th December 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue /Mariastella

For Appellant

For Respondent

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE