



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 637 OF 2007

ROSEMARY WAITHIRA MBURUAPPELLANT

VERSUS

VIRGINIA MUTHONI NJAMBI1ST RESPONDENT

BEATRICE WAIRIMU KAMANDE.....2ND RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of *Hon Mr Kimani Ndungu Principal Magistrate* (as he then was) delivered on 27th June 2007 in Muranga PMCC No. 2004.

In that suit, the respondents herein sued the appellant in their capacity as legal representatives of the estate of the deceased Regina Njambi Maina, who died on 9th June 2002. It was contended that she was involved in an accident on 1st October, 2001 while she was travelling as a passenger in motor vehicle registration No. KAL 378 J which collided with motor vehicle registration No. AE 100- 300064A and that she sustained serious injuries. Her death however was unrelated to the injuries sustained during the road traffic accident on 1st October 2001.

At the time of her death, the deceased had not filed suit for compensation. The respondents filed suit for compensation after her death in 2007 and the lower court awarded them Kshs 650,000/- general damages for pain, and suffering of the deceased on 26th June 2007.

The appellant herein who was the defendant in the lower court was dissatisfied with the judgment and decree of the lower court and filed a Memorandum of Appeal on 23rd July 2007 setting out 6 grounds of appeal namely:

1. That the learned trial magistrate erred in law and fact in awarding excessively high award and not comparable to the injuries sustained.
2. That the learned trial magistrate erred in law and in fact in awarding excessively high damages for injuries where no residual effect of the injury was known.
3. That the learned trial magistrate misdirected himself on the past authorities and the law.
4. That the learned trial magistrate erred in law in awarding damages to the estate of a deceased in a

suit that was instituted long after the death of the injured person.

5. That the learned trial magistrate erred in not finding that the plaintiff had not proved her case on a balance of probability.

6. That the learned trial magistrate misdirected himself on all points of law.

The appellant prayed that the judgment of the trial court delivered on 27th June 2007 and all consequential orders arising there from be set aside; That this appeal be allowed and the orders of the lower court be reversed; and the respondents do pay the costs of this appeal and the costs of the lower court.

The appeal was admitted to hearing on 12th October 2012 by Angawa J and on March 2014 by Honourable Waweru J gave directions.

When the parties advocates appeared before me on 8th October 2014, they agreed to dispose of the appeal by way of written submissions which they did by 4th December 2014 and the judgment herein slated for 26th March 2015 on which date, unfortunately the High Court was not sitting.

The appellant filed her written submissions on 17th October 2014 whereas the respondents filed theirs on 4th November 2014.

A perusal of the appellant's written submissions show that the appellant does not mention any challenge to the judgment in the lower court on liability and therefore this court shall not belabor making any reference to issues of liability, but shall focus on quantum of damages as challenged in grounds 1,2,3 and 6 which address judgment as entered on quantum of damages payable.

The respondents filed their submissions on 4th November 2014 responding to the appellant's submissions on quantum alone.

The appellant submits that according to the evidence adduced, the deceased Regina Njambi Maina sustained a cut on the forehead, cuts on both legs fracture of tibia and blunt injuries and that the trial magistrate in relying on the case of **Razi Amin Kulate vs Clau Kruger & Another HCC 61/2003** by Honourable Khaminwa J (as she then was) awarded shs 600,000/- general damages to a plaintiff who had sustained severe injuries involving

- i. Fracture of tibia/fibula.
- ii. Fracture of patella on right leg.
- iii. Potts fracture on left ankle.
- iv. Fracture of metatarsal bone.
- v. Severe strain with rapture cruciate ligaments of the knee.

In their view, the trial magistrate erred by failing to consider and or be guided by authorities where the injuries were comparable to what the deceased had suffered. Counsel cited **Thomas Karaya Kamau vs Target Guards Ltd HCC 467/2003** where the plaintiff suffered fracture of tibia and fibula, dislocation of right ankle, fracture of femur, wounds other soft tissue injuries and was awarded kshs 200,000/- for pain and suffering.

They also complained that the trial magistrate erred in failing to take into account the fact that even the medical report and P3 form which were relied on were prepared based on hearsay and documents that were allegedly giving a history of the deceased's injuries, and that the extent of her injuries was not

based on nay professional examination and urged this court to allow the appeal and award kshs 200,000/- general damages for pain and suffering plus costs.

The respondents in their response submitted through their counsel that indeed although the deceased was involved in an accident, she died from other causes unrelated to the accident and injuries sustained. That according to Doctor C.N. Kigo's report the deceased sustained injuries involving

1. Blunt injuries and cut on the forehead
2. Blunt injuries and deep cut on both legs with compound fracture of both tibia

She was admitted at Thika District Hospital for one month and 3 weeks, wore plaster paris on both legs for 3 months and 1 week.

The respondents support the award of Kshs 650,000 made by the trial court and urge this court not to interfere with the award which was made judiciously. They relied on the case of **Razi Amin Kulate vs Clau Kruger & Another(Supra)** and maintained that the deceased suffered two serious fractures to warrant that award, the trial court having noted that the authority as cited above provided a useful guide, having been decided on 30th July 2004.

Citing the case of **Stephen M. Mumbi vs Peter M. Katili CA 98/2004** Lenaola J citing with approval **Shaban vs CNN (1985) KLR 516** page 527, counsel for the respondent urged the court not to interfere with the quantum of damages awarded by the trial court unless this court is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that may be interfered with. He therefore urged this court to uphold the judgment of the lower court and dismiss this appeal with costs to the respondents.

I have carefully considered this appeal, the submissions by parties counsels on record and the lower court record and the decision. According to the plaint dated 9th August 2004, the plaintiff/respondents pleaded that the deceased Regina Njambi Maina sustained the following injuries as a result of an accident on 1st October 2001 along Sagana/Kenol Road while she was travelling as a passenger in motor vehicle registration KAL 378J which collided with motor vehicle registration AE 100-303464A:

- (a) Bilateral fractures (both legs) of the tibia and fibula.

On the other hand, the medical report by Doctor Kigo C.N. consultant surgeon on 16th August 2004 after only examining documents related to the accident, and not examining the deceased, he found that the deceased who had by that time died of other causes not related to the injuries sustained in the accident sustained injuries involving:

- a. Blunt injuries and cut on the forehead.
- b. Blunt injuries and deep cut on both legs

The doctor concluded that the multiple injuries were consistent with the accident and were potentially life threatening ie compound fractures on both legs which resulted in long layoff in hospital, long immobilization of both legs in plaster case, and wounds on the legs that had delayed healing. That at the time of her death, she had nonetheless not regained full weight bearing on both legs from the accident. The doctor conceded that he did not have the opportunity of examining the patient personally as she had died. The plaintiff produced the deceased's medical treatment notes from Thika District Hospital which showed the injuries to be clear fracture of both legs tibia(see discharge summary for 21st November 2001. The police abstract issued on 29th January 2004 classified the deceased's injuries as maim.

The law is clear that he who alleges must prove. In this case, it is clear that the deceased died before she could be examined by the doctor to confirm the injuries sustained by her in the material accident.

The medial report was prepared after her demise. However, the doctor was clear that he was provided with the medical treatment notes from Thika District hospital including the discharge summary which were clear on the injuries sustained by the deceased in the accident. The discharge summary dated 21st November 2001 is clear that the deceased sustained fractures of both tibia and even without the medical report of Doctor C.N. Kigo, those injuries are crystal clear and the period the deceased remained in hospital as an inpatient is also not disputed, being one month and 21 days.

The deceased remained in plaster casts of both legs which no doubt means that her movements were limited except on crutches and she continued with physiotherapy in the orthopedic clinic. Plaster casts were removed on 15th February 2002 and she continued with physiotherapy for a long time. The treatment notes show up to 1st October 2002.

The trial magistrate found that the treatment notes were authentic records from Thika District hospital as produced by PW5 Mr Peter Karaya Ndirangu, the health records officer from Thika District Hospital who confirmed that the said treatment notes with respect to the deceased Regina Njambi indeed emanated from the said hospital which attended to her as an inpatient No. 10169. The witness confirmed that the patient (deceased) was attended to by doctors Mulingua and doctor Waihenya and she was referred to the orthopaedic clinic reference No. 47754 which all confirmed compound fractures of both tibia.

In the lower court, the respondents' counsel submitted for a sum of Kshs 700,000 general damages for pain, suffering and loss of amenities relying on the case of **HCC 61/2003 Razi A. Kulate vs Clau Kruger & Another (Supra)** whereas the defendant/appellant submitted for nominal damages as per the injuries suffered since the plaintiffs did not prove to the court how the deceased's estate suffered loss and damage. The defendant/appellant had also submitted that the plaintiffs/respondents had not proved their case on a balance of probabilities and urged the court to dismiss the case with costs.

However, as I have stated above, despite the appellants challenging the whole of the judgment in the lower court both on liability and quantum, their submissions before this court only touched on the excessiveness of damages awarded and they urged this court to award the respondents Kshs 200,000/- general damages. This court accordingly considers that the rest of the grounds of appeal were abandoned and limits its decision to the amount of quantum of damages. It was not enough to state in the submission that there was no proof. One has to lay a foundation for saying there was no proof and not to ask the court to go on a fishing expedition to find that there was no proof.

No doubt, the cause of action subject matter of the suit in the court below and which is the subject of this appeal survived the deceased and under the Law Reform Act Cap 26 Laws of Kenya, the legal representatives of the estate of the deceased could claim for damages due to the estate of the deceased person, provided that the suit is instituted within 6 months from the date of issuance of grant of letters of administration.

In this case, the limited grant produced in evidence vide Nairobi HCC P & A 955/2004 was issued to the respondents herein on 13th April 2004 produced as P exhibit 6 and was used to institute suit on 17th August 2004 which was within 6 months. The claim was therefore valid hence the court must treat the claim as if it was filed by the deceased herself.

I must mention that the treatment notes do not mention any blunt injuries and cut on the forehead unlike doctor Kigo's medical report hence I shall ignore that injury which was also not pleaded in the plaint dated 9th August 2004.

I shall consider the pleaded injuries which are consistent with the injuries recorded on the hospital treatment notes namely bilateral fractures (both legs) of tibia. The trial magistrate awarded the estate of the deceased shs 650,000 general damages relying on *Razi Amin Kulate vs Claus Kruger & Rosemary Nyakinya CA 6/2003*. As special damages were not pleaded, he declined to award them albeit there was an attempt to produce receipts to prove them. He was correct in rejecting that claim for special

damages.

The appellants complain that the general damages awarded was too excessive and proposes Kshs 200,000.

In **Halsburys Laws of England 4th Edition VOL 12(1)** page 348-883 on pain and suffering:

“ Damages are awarded for the physical and mental distress caused to the plaintiff, both pretrial and in the future as a result of the injuries. This includes the pain caused by the injury itself, and the treatment intended to alienate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiffs condition may demonstrate.”

The general principle is that in the assessment of general damages for personal injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. **See Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd (2013) e KLR.**

Notwithstanding the above principle, the award of damages is at the discretion of the trial court, although that discretion is required to be exercised judicially. **(see Arrow Car Ltd vs Bimomo & 2 Others (2004) 2 KLR 101).**

In this case, that the deceased sustained serious injuries is not in doubt. Compound fracture of both legs (tibia) must have subjected her to a lot of pain and suffering taking into account that she remained in plaster paris for nearly 2 months and then walked on crutches and continued for physiotherapy for a long period up to 1st March 2012 according to her orthopaedic clinic card dated 1st March 2012. She however did not live very long and on 9th June 2002 she passed on due to other causes. Had she lived longer no doubt she could have continued to experience pain and limited use of her both legs. That pain was however shortened by her death barely one year after the accident though as I have stated, the death was unrelated to the injuries sustained in the accident.

In the circumstances, I am in agreement with the appellant's submissions in the lower court that the amount of damages for pain, suffering and loss of amenities awardable to her estate cannot be equivalent to damages that the deceased would have been entitled to had she lived to seek compensation on her own behalf.

I therefore find that the trial magistrate erred in law and fact in awarding the plaintiff's Kshs 650,000/- and in so doing failed to take into account the above factors.

I accordingly interfere with the discretion of the trial magistrate and set aside the award of shs 650,000/- and in its place I substitute thereto with an award of shs 320,000/- general damages for pain, suffering and loss of amenities, I also award to the appellant 1/2 (half) costs of this appeal. The respondents shall also have 1/2 costs of the suit in the lower court.

Dated, signed and delivered in open court at Nairobi this 26th day of March 2015.

R.E. ABURILI

JUDGE

26/3/2015