



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 18 OF 2013

JERICHO FURNITURES LTD T/A GEORGE WOOD FUNERAL SOCIETY.....APPLICANT

VERSUS

NORAH CHEPNGETICH BETT.....RESPONDENT

*(Appeal from the Judgment and Decree of the Chief Magistrate delivered on the January 2013,
in Naivasha PMCC No. 664 of 2011 Norah Chepnetich Bett -vs- George Woods Funeral
Society)*

JUDGMENT

1. The Appeal before the court is against *quantum* of damages awarded to the Respondent by the trial court on the 11th January 2013, that the appellant alleges to have been inordinately excessive and unrealistic as against the injuries sustained, and an award of Kshs.634,394/= as special damages.

The injuries sustained by the Respondent in the Road Traffic Accident are not disputed, and as stated in both Doctor Wellington Kiamba's medical report dated 11th August 2011 and Dr. M.S. Malik report dated 13th April 2012 summarised as follows:

- 1. Fracture of the pelvic of the left superior ramus**
- 2. Large deep degloring injury wound on the left gluted region – over her left buttock.**
- 3. Soft tissue (sprain) injuries of the lower back.**

2. The two doctors agree that she was hospitalised and taken to theatre four times and the wound on the buttocks cleaned and debrided and skin grafting done, was transfused 3 units of whole blood. She sustained a skin grafted area of 16cm by 12 cm on the left gluted region depressed at the medial end; and several prominent scars on the region and posterior aspect of the left thigh.

The Doctors observed that at time of examination she had recovered fully but the degloring injury resulted to a prominent deformity where Dr. Kiamba assessed permanent disability at 10%. Dr. Malik however stated that she suffered total incapacity of a temporary nature for a period of two months followed by a partial incapacity of a temporary nature for a further period of one months and concluded that she suffered no permanent physical disability. He further stated that the scar on her left buttock is quite unsightly and will be permanent.

3. The respondent, a female was at date of accident on the 16th September 2010 aged 28 years and was a business lady. She was treated at the Naivasha District Hospital, was transferred to Nairobi West

Hospital and after a month's hospitalization was discharged home with drugs to continue on out patient basis at the Nakuru Provincial Hospital. At time of examination, she complained of left pelvis pain and backache though Dr. Malik observed that she had no complaints from the injuries on the 13th April 2012. For the treatment expenses in the various hospitals, she pleaded a sum of Kshs.637,8904/= . In her plaint and the trial court awarded the same as having been proved. Before the hearing of the suit commenced, parties recorded a consent on liability at the ration of 80% to 20% against the Appellant thus settling the issue of liability.

4. The appellants Submissions

The appellant faults the trial magistrate's judgment that it did not reflect the evidence and submissions tendered, and by so doing erred in awarding general damages of Kshs.1,200,000/= that was excessive and unrealistic. It is proposed for the appellant that a sum of Kshs.600,000/= would be reasonable and appropriate for the injuries sustained based on two authorities **Antony Keriga Mogesi -vs- Florence Nyomenda Tumbo (2015) KLR** and **Fatuma Abdalla -vs- Tusks Restaurants Ltd and Another (2000) KLR**.

On Special damages, the appellant submitted that the sum of Kshs.637,894/= was not proved as no payment of the statement of bills was tendered.

5. The Respondent's submissions

The Respondent submitted that the trial court carefully considered all submissions and authorities including proposals on general damages and arrived at a fair and reasonable award on general damages. The respondent had proposed a sum of Kshs.2,500,000/= in general damages based on the case of **Florence Hare Mkana -vs- Mohammed Athman** (Supra) where an ward of Kshs.2,400,000/= was granted for similar injuries.

On Special damages, it is submitted that the sum of Kshs.637,894 was pleaded and proved by production as exhibits receipts and by a consent recorded in court on the 11th March 2013, that issue was settled.

On costs, the appellant urged that costs ought not be subjected to apportionment on liability.

6. The principles that an appellate court ought to observe were laid down in the case **Kamfro Africa Ltd t/a Meru Express Services and Another -vs- Lubia & Another (1987) KLR 30** that:

“---in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court were held to be that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Further, in the earlier case of **Butt -vs- Khan (1981) KLR 349**, it was held that:

“an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

This court has considered the evidence tendered before the trial court and the judgment. As stated in the case. **Selle -vs- Associated Motor Boat Company (1968) EA 123**, I have analysed and re assessed the said evidence. In so doing I am not bound by the findings of the trial court. I must come up with my own independent findings and conclusion.

7. It is my finding that the Respondent sustained quite serious injuries and the two medical reports agree on the material injuries save on the degree of permanent incapacitation of the Respondent as a result

of the injuries. While Dr. Kiamba assessed a 10% Permanent incapacitation, Dr. Malik found no permanent incapacitation save the observation that the scars on the respondents buttocks were unsightly and permanent. I am minded that the Respondent was a young woman 28 years old and would be traumatised and psychologically affected by the unsightly scars on her buttocks. In her testimony on cross examination, she stated that she had healed but had lost $\frac{1}{4}$ of her buttocks $\frac{3}{4}$ of her left buttocks having been severed as her body protruded outside the bus through the window. She must have suffered a lot of pain and trauma.

The appellant has urged the court to set aside the trial courts award on general damages of Ksh.1,200,000/= and substitute it with Kshs.600,000/= and relied on the case of **Antony Kenga Mogesi -vs- Florence Nyamenda Tumbo** (supra).

The injuries in this case were:

- Open book pelvic fracture
- cut wound on left upper eyelid
- facial cut wound
- contusion on lower limbs
- Cut wound on sacroiliac joint.

While in the case **Fatma Abdulla (Supra)**, the injuries were:

- Compound fracture of left leg bones,
- Fracture of right superior pubic ramus
- cuts and bruises on forearm, back left thigh and left leg.

In both cases a sum of Kshs.600,000/= was awarded in January 2000 and March 2015 respectively.

My view is that the above injuries are not as serious as those sustained by the Respondent.

The Respondent on the other hand has urged the court to enhance the award to Ksh.2,500,000/= as had been submitted in the trial court. I have noted that the Respondent had not cross-appealed, so, that submission remains as such.

8. The issue for determination is therefore whether the award by the trial court was inordinately high so as to warrant this court's disturbance. The trial court considered authorities submitted by the parties and particularly **Florence Hare Mkaha Case (supra)** Submitted by the respondent and **Philip Gichiki Weru -vs- KTDA HCCC 2865 of 1992**, submitted by the appellant where a sum of Ksh.120,000/= was awarded as general damages to the plaintiff who had sustained a fracture of the left ramus.

With respect to the appellant, the proposed award of Kshs.120,000/= was way below a reasonable and fair compensation. Though the trial court did not support its award of Kshs.1,200,000/= with authorities it represents a moderate, reasonable and fair compensation to the Respondent.

The appellant has not shown this court in what way the trial court erred or took into account irrelevant factor or left out any relevant one. It has also failed to satisfy this court that the trial court made an erroneous estimate of the damage.

9. Having failed to discharge its burden to prove the above, and being guided by the court holding in **Mwanasokoni -vs- KBS (1982-88) I KAR 278**, that a court will not readily differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and only interfere with them if they are based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

Consequently and having considered comparable awards and injuries, particularly in the case **Florence Hare Mkaha -vs- Pwani Tawakal Mui & Another (2012) KLR** where Mwongo J Awarded

Kshs.2,400,000/= damages for pain and suffering, and **HCCC NO. 209 of 2013 Peace Kemuma Nyangera -vs- Michael Thuo & Another (2014) KR** where Aburili J on the 3rd December 2014 awarded Kshs.2,500,000/= for comparable injuries, I find the trial courts award to have been within reasonable limits and find no reason to upset it.

Here I must state that had there been a cross appeal by the Respondent seeking to enhance the award of the trial court, this court, in view of the recent court pronouncements on comparable injuries in the above cases, I would have not hesitated to enhance the same.

In the result, the trial courts award is confirmed.

10. On special damages, I note that on the 11th March 2013 by consent of counsel of both parties, a sum of Kshs.586,862/= was recorded as payable to the respondent. This amount included accrued interest of Kshs.76,547 as at the date it was recorded.

The consent order was duly adopted by the trial court on the 12th March 2013. That settles the matter of special damages.

For the reasons stated above, the appeal is disallowed with costs to the respondent.

It is so ordered.

Dated, signed and delivered in open court this 12th day of November 2015

JANET MULWA

JUDGE