



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 136 OF 2009

JESSE MBURU.....1ST APPELLANT

GRACE WANJA WAINAINA.....2ND APPELLANT

VERSUS

ANN KAREMI MUGAMBI.....RESPONDENT

JUDGMENT

In a Memorandum of Appeal dated 26th September 2011 and filed on 28th September 2011, the Appellant raised the following grounds against the quantum of damages -

- (1) the learned Magistrate erred in fact and in law in finding that the plaintiff was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.***
- (2) the learned Magistrate erred in fact and in law in failing to consider the Defendants' Submissions on quantum.***
- (3) the learned Magistrate erred in fact and in law in taking into account injuries that were not proved when making the award for general damages.***
- (4) the learned Magistrate erred in fact and in law in failing to consider conventional awards for general damages in cases of similar injuries.***

And prayed that -

- (a) this appeal be allowed with costs,***
- (b) the judgment of the Honourable Principal Magistrate as far as the quantum of general damages is concerned dated 9th June, 2009 be discharged and set aside with costs to the Appellants,***
- (c) the Honourable Court be pleased to award the Plaintiff quantum of general damages commensurate with her injuries.***

Respective counsel also filed written submissions upon which both Mr. Ndubi (*counsel for the Respondent*) and Miss Ouko (*counsel for the Appellant*) relied.

The facts before the lower court were not in dispute, and a consent on liability was entered at 85% for Appellant and 15% for the Respondent. The trial court assessed the damages @ shs 200,000/= and reduced it by 15% contributory negligence on the part of the Respondent to Ksh 170,000/=. There was no contest as to the sum of Ksh 2,500/= special damages. The Appellant's case is against the quantum of damages.

It is a very common feature in these accident claims for the plaintiff's. Counsel to cite cases with high figures, and the Defendant's counsel to cite cases with the lowest possible awards.

In this case, the Defence cited decisions of 1991 in which the courts awarded general damages in the sum of Kshs 60,000-70,000/= for pain and suffering and loss of amenities and soft tissue injuries, bruises and injuries to shoulder joints. The cases cited were all decided in 1991.

On their part counsel for the Respondent (*plaintiff*) cited cases of five years later between 1996-1999, or more recent cases in which awards for such injuries were much higher at shs 200,000-250,000/= in addition to proved special or actual outlays, called special damages. The question is what are damages, and what is the basis upon which general damages are awarded by courts?

Damages, according to Black's Law Dictionary, 8th Edn. is "**money claimed by, or ordered to be paid to, a person as compensation for loss or injury occasioned by the wrong done.**" And by the same source, "**general damages**" are the loss that the law presumes to follow from the type of wrong complained of."

To the question what is the basis upon which courts award damages, the answer or reply is, the extent or severity of the loss, injury, pain and suffering experienced or suffered by the injured person. According to Lord Blackburn in LIVINGSTONE VS. RAWYARDS COAL CO. (1880) 5 App. Cas. 25 -

"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which, he is now getting his compensation."

In the case of Kigaragari vs. Aya [1985] KLR 273, the High Court awarded general damages of Ksh 250,000/= for personal injuries and shs 41,000/= special damages. The Appellant's appeal against the quantum of damages was dismissed. The court held inter alia:

"(1) In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be both within the limits of decided cases and avoid the effect of making insurance cover fees unaffordable for the public."

The court also held that in order for the appellate court to interfere with the High Court's award on general damages, it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was manifestly excessive or inadequate that a wrong principle may be inferred, and that the assessment of damages is a matter of judicial discretion.

In the submissions on appeal, counsel for the appellant have upped the ante and cited cases where general damages were generally double the figures from the cases they cited to the trial court. The sum of Ksh 150,000/= was awarded in WILSON K. KAVIUYA VS. REGISTERED TRUSTEES CATHOLIC DIOCESE OF MACHAKOS & MICHAEL M. MULEI [2008] eKLR, a similar sum of Ksh 150,000/= was reduced to Ksh 85,000/= in KAHUGU & ANOTHER VS. ONGARO [2004]eKLR and similarly reduced to Ksh 75,000/= in JOSEPH KABERA & ANOTHER VS. GEORGE KIHUMBA KANGWARA & 2 OTHERS [2006] eKLR, from Ksh 150,000/=.

Counsel for the appellant also referred to 1985 and 1988 cases where awards of Ksh 60,000/= were awarded. With respect those awards are no longer of any help to the courts deciding these cases, and considering the rate of inflation, the fluctuation of currencies in which most drugs are imported or bought and are clearly irrelevant.

Indeed as Lord Morris of Borth stated in WEST (H) & SON LTD. VS. SHEPHERD [1964] A.C. at 347

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as injuries should be comparable by comparable awards. When all is said it still must be the amounts which are awarded are to a considerable extent conventional."

Counsel also referred to the case of Ibrahim Dennis Musa & Another vs. Joseph Maina Michune [2007]eKLR which cited with approval the decision of the Court of Appeal for Eastern Africa in PETER VS. SANDY [1958] E.A. 424, that an appellate court should exercise caution in determining questions of fact as it neither saw nor heard witnesses. I entirely agree. There is no dispute on facts in this appeal. The question is purely upon quantum. So we go to the wise words of Lord Denning in LIM POH CHOO VS. CAMDEN & ISLINGTON AR EA HEALTH AUTHORITY [1979] 1 ALL E.R. 332 at p. 339 -

"In considering damages in personal injury cases, it is often said, the Defendants are wrongdoers, so make them pay in full. They do not deserve any consideration. This 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 he suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and the Defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as lawyers say, only vicariously liable."

Let us take the wise words of Lord Denning -

"the Defendants are not wrongdoers. They are people who have to foot the bill. They are, as lawyers say, only vicariously liable."

With respect to counsel, that statement is only true of the 2nd Defendant the registered owner of the vehicle driven by the 1st Defendant - who was actually, according to the plaint the wrongdoer. The 2nd Defendant was perhaps to a lesser extent equally a wrongdoer for allowing his driver to drive a defective vehicle. That probably explains the background on the agreement on liability at 85% to the Defendants, and 15% for the Plaintiff (*Respondent*).

The ultimate question is, was the award by the trial magistrate so manifestly excessive or low to presume that a wrong principle was applied or some extraneous consideration came into play? I do not think so.

The learned trial magistrate considered both the plaintiff's (*Respondent*'s) as well as the Defendant's (*Applicant*'s) submissions. As already stated there is a tendency, which in my view should be discouraged, of counsel citing old cases some as old as one decade, on quantum. That in my humble view is clearly unhelpful to the courts. A clerk employed in any office today, does not start with a salary or allowances of yesterday or yester years. His salary and allowances are pegged to today's cost of living, index. To put it differently, as Lord Fraser said in COOKSON VS. KNOWLES [1979] AC 566

"Inflation and the high rates of interest to which it gives rise is automatically taken into account in the use of multipliers based on rates of interest related to a stable currency, but not a future inflation which would be wrong."

The instant case was filed in October 2008. It was determined about 9 months later on 7th July 2009. To ignore the passage of time from 1991 to July 2009 and apply awards made between 1985 - 1991 would not be applying like with like, even if the injuries were similar. The cost of treatment would not be

similar. Their cost would be influenced by the rate of inflation and therefore the indices of the cost of living.

The learned trial magistrate was therefore within his discretion to award the general damages of Ksh 200,000/= subject to reduction of 15% contributory negligence, and leaving a nett sum of Ksh 170,000/= plus the special damages of Ksh 2,500/=. It was a conventional sum for the time and injuries suffered by the Respondent.

No principle for the award of damages was breached, and I see no good ground for arriving at a contrary opinion. I see no merit in the appeal. I confirm the judgment and decree of the lower court, and dismiss with costs the appeal herein.

Dated, signed and delivered at Nakuru this 27th day of April, 2012

M. J. ANYARA EMUKULE
JUDGE