



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 18 of 2003

CATHOLIC DIOCESE OF MERU (Registered Trustees)..... APPELLANT

V E R S U S

REGINA MUNANIE MUTINDA (minor suing thro' her father and next friend

JOHN MUTINDA MUTEMI.....RESPONDENT

Law of Succession

- *Negligence – quantum of damages,*
- *Damages quantum – principles to be observed by appellate court invited to raise or lower award of damages – Girl aged 16 years injured in traffic accident.*
- *Injuries to affect ability to give normal birth.*

Appeal from the Judgment and decree of the Hon. N. Ithiga Senior Principal Magistrate in Meru CMCCC No. 439 of 2002 delivered on 25.02.2003.

JUDGMENT

The Respondent (original Plaintiff then a minor suing through her father and next friend, John Mutinda Mutemi) sued the Appellant (original Plaintiffs) in Meru CMCCC NO. 459 of 2002). The matter was heard and concluded before the Hon N. Ithiga Senior Principal Magistrate who in a judgment delivered on 25.02.2003 found the 2nd Defendant 100% liable for the road traffic accident and gave judgment for the Respondent and awarded her the sum of Ksh.700,000/- as general damages for pain, suffering and loss of amenities, together also with proven special damages in the sum of Ksh.12,320/- making a total of Ksh.712,320/- together also with costs and interest.

The Respondent being aggrieved with the said judgment and decree has appealed to this court on four grounds namely:-

- that the learned Senior Principal Magistrate erred in law in disregarding the appellant's evidence and erroneously finding that the Respondent was a passenger in M/V No. KAM 247, V;**
- that the learned Senior Principal Magistrate erred in law and in fact in holding the 2nd Defendant 100% to blame for the accident;**

(c) that the learned Senior Principal Magistrate erred in law and in fact in awarding the Respondent excessive general damages at Ksh.700,000/- regard being had to the injuries sustained by the minor;

(d) that the earlier judgment and decree is against the weight of the evidence and the law.

And for those grounds and reasons, the Appellant prayed for the quashing /setting aside of the judgment and decree of the lower court and – the Appellant invited this court to re-assess liability and general damages downwards with costs of this appeal and the court below to the Appellant.

The Respondent (original plaintiff) being equally unhappy with the Court's judgment and decree and the consequent appeal by the Appellant also filed on 21st March 2003 a Memorandum of Cross Appeal dated the said date of 21st March 2003, on three grounds namely:-

(1) the learned Senior Principal Magistrate erred in law and fact in awarding general damages so manifestly low as to amount to a misapplication of the principles of assessment of damages despite quoting them in the judgment.

(2) the learned Senior Principal Magistrate erred in law and fact in not properly applying the decision in Nairobi H.C.C.C No. 723 of 1998 and Nairobi H.C.C.C. No. 27 of 1998 as a guide to assess general damages despite the injuries therein being less serious and after finding them directly relevant;

(3) The Learned Senior Principal Magistrate erred in law and in fact in not positively considering the current and future medical requirements, continuing pain and suffering and medical complications in assessing damages.

Again for those reasons, the Respondent/Cross Appellant prayed that:-

(a) this court do re-assess and enhance upwards the award of general damages to a mere realistic sum.

(b) costs be to the Respondent in the main appeal and Cross Appeal herein.

(c) Interest from the date of the original judgment at court rates.

As follow up to the Appeal and (Cross Appeal) learned counsel for both the Appellants and Respondent (Cross Appellant) filed written submissions together with relevant authorities and also made oral submissions to the court at the hearing of the appeal on 16.2.2009.

GROUND 1 & 2 OF THE APPEAL

In short oral submissions Mr. Mwirigi Kaburu learned counsel for the Respondents urged grounds 1 and 2 of the Appeal together. Ground 1 of the Appeal was that the learned trial Magistrate erred in finding that the Plaintiff was a passenger in the 1st Defendant's vehicle whereas the evidence showed that the Plaintiff/Respondent was a pedestrian. Ground 2 of the appeal concerned the court's finding that the 2nd Appellant was 100% liable for the accident whereas the evidence adduced support the apportionment of liability on 50:50 basis.

GROUND 3 AND 4 OF THE APPEAL

Grounds 3 and 4 of the Appeal concerned quantum Counsel submitted that the opinion of the doctor was that no permanent incapacity was suffered by the Respondent. Counsel argued that the medical report dated 18th July 2002, and produced in court as exhibit 1 (p.29 of the Record of Appeal) showed that the Respondent suffered abdominal injuries, including a fracture of the pelvis but did not state any permanent incapacitation. Consequently the trial court erred counsel urged, in finding that the Respondent would

have problems at giving birth, because there was no medical evidence to support that conclusion. The award of ksh.700,000/- was inordinately excessive, and that it amounted to an error in law and fact.

Learned Counsel for the Respondents attacked the trial court's reliance upon the decision of the Court in **Mary Wangechi Elijah Mwangi vs Kenya Tea Development Authority (Nairobi H.C.C.C. No 2732 of 1998)** in arriving at its decision to award the quantum of Ksh.700,000/- for pain and suffering and loss of amenities. In that case Mr. Hon. Justice Shah awarded the sum of Ksh.800,000/- as general damages in respect of pain and suffering and loss of amenities and loss of capacity having found the plaintiff who was 47 years age had suffered 35% incapacity. The left hip was deformed, the left limb was shortened by 2 inches being 32 inches while the right limb was 34 inches and had suffered a fractured pelvis.

Mr. Mwirigi submitted that the court's reliance on that authority was in error and in finding that the Plaintiff had suffered the similar injuries. The injuries suffered by the Respondent, Counsel submitted, were similar to those suffered by the plaintiff in the case of **CHRISTINE KANINI MUTHOKA VS SIMON OKOTH OBOK & ANOTHER (Nairobi H.C.C.C. No. 3987 of 1993)** in which the Plaintiff suffered among other injuries a broken pelvic bone and in which the court awarded the sum of Ksh.200,000/- as general damages following an ex-parte hearing and the only evidence adduced was the doctor's report.

Finally counsel for the Appellant argued that the sum of Ksh.600,000/- offered by the Appellants, relying upon the authority of the said case of **Christine Kanini Muthaura vs Simon Okoth Obok & Another** was adequate compensation, that the sum of Ksh.700,000/- was therefore excessive, that it is public policy that the award of compensation is not economic gain but for compensation, and prayed that the appeal be allowed and the cross appeal be dismissed with costs.

For the Respondents/Cross Appellant Mr. Mwenda Mwarania argued on the various grounds of appeal as set out below.

A. GROUNDS OF 1 & 2 OF APPEAL

Ground 1 & 2 of Appeal

Learned Counsel for the Respondent submitted that there was no question of apportionment of liability because no contributory negligence was pleaded, none was alleged in evidence and none was requested for in the submissions in the lower court, that this was an afterthought.

Counsel submitted that whether or not the Respondent was either a passenger in the motor vehicle (the pickup) which hit the Respondent or merely a pedestrian was no longer an issue.

Ground 3 of the Appeal and Grounds 1, 2 & 3 of Cross Appeal (Quantum)

Quantum was at the discretion of the trial court and an appellate court would not interfere with that discretion except on certain conditions being met. These principles are either that the court took into account an irrelevant factor, or that it left out a relevant factor, or misapprehended the facts, or that due to any of the above reasons or any other reason, awarded damages that were so inordinately high or so inordinately low as to represent a wholly erroneous estimate of the damages. Learned counsel relied on the cases of **KEMRO AFRICA LTD t/a MERU EXPRESS SERVICE & ANOTHER VS A.R. LUBIA & ANOTHER (1982 – 88) I KAR. 727 AND KENYA BUS SERVICES LTD VS JANE KARAMBU GITUMA (Court of Appeal at Nyeri Court of Appeal No. 241 of 2000)** (unreported). The court should therefore not interfere with the award.

ON CROSS APPEAL

On Cross Appeal Mr. Mwenda Mwarania argued that the trial Court failed to be guided by two principal factors in awarding damages. **Firstly** the court failed to be guided by precedent and **secondly** it failed to have regard to inflationary trends.

As shown in the Record of Appeal at p.80 counsel argued the injuries suffered by the Respondent went beyond the posterior and groin suffered by the Plaintiff in the case of **Mary Wanjohi Elijah Mwangi vs Tea Development Authority** (supra) where she sustained among other injuries laceration wound on her right inguinal area (groin) and was awarded Ksh.800,000/- as general damages.

In contrast to the instant case, the Respondent suffered a fracture of the pelvic bone, a ruptured liver, a ruptured placenta, she had to undergo emergency surgery, suffered internal bleeding, had 4 inches of her intestines cut off. Counsel submitted that by any standards those were very severe injuries. The Respondent was hospitalized for nearly two months and treatment was continued in respect of abdominal injuries and in light of those injuries, she cannot take certain foods which cannot be digested. The Respondent would according to the doctor's evidence have problems in giving birth.

In conclusion considering both precedent (**Wangechi and Wachira** cases which had been decided earlier) and inflationary trends, the Respondent would have been awarded at least Ksh.800,000/-. The authority of **Christine Kanini Muthoka vs Simon Okoth Obok** and **Another** (supra) was not a proper guide in awarding damages in the instant case as the only serious injury in that case was a fracture of the pelvic bone, the rest were soft tissue injuries. Counsel therefore urged the court to uphold the lower court's finding on liability and re-assess the award upwards in light of the **Wangechi & Wachira** cases. Counsel also asked for costs of the cross of appeal.

ANALYSIS OF SUBMISSIONS

I have set out the respective counsel's submissions in extenso. I have also read the record of the proceedings in the lower court together with the lower court's judgment. I will therefore respond to each of the grounds of appeal and cross appeal in light of submissions of respective counsel.

The appellant's thesis is that the award made in the lower court was inordinately high, whereas that of the Respondent/Cross Appellant was that the award was contrary to both evidence and precedent cited, inordinately low, in either case so to amount to failure by the trial court to:-

- (a) take into account relevant factors, or in the reverse taking into account, irrelevant factors or
- (b) misapprehending the facts or the law,

and consequently wound up awarding damages that were inordinately so high or inordinately low so as to represent a wholly erroneous estimate of the damages. The appeal was argued on three grounds, (1) Liability, (2) quantum, and (3) ultimate award.

OF LIABILITY

It was Mr. Mwirigi's learned counsel for the Appellants argument that liability ought to have been apportioned on the basis of 50:50. In my view to apportion liability on the above basis, the (Plaintiff or Appellant), or the Defendant/Respondent must show the extent of the other party's liability for the cause of the accident. This is shown in two cumulative and not separate ways. The first way is by pleading either in the Plaintiff or Defence as the case may be and, I emphasize "**and**" by way of evidence particularly where parties are unable to agree and accept the extent of each party's causation of the accident.

So far as the pleadings are concerned the Plaintiff at pp. 5-6 inclusive (paragraph 5-8 (inclusive) of the record, shows that plaintiff was a lawful passenger in vehicle registration No. KAW 247 V Toyota Hilux Pick Up, which due to the negligence of the 2nd Defendant, overturned along Meru Cathedral Road, consequent to which the Plaintiff suffered serious bodily injuries. The particulars of negligence of the 2nd Defendant are then set out in para. 5, the particulars of injuries are set out in paragraph 6, and the particulars of damages are set out in paragraph 8. At paragraph 9 the Plaintiff pleads that she holds the 1st Defendant vicariously liable for the acts of the 2nd Defendant who was the driver, servant or agent of the 1st Defendant and in the course of her ordinary ecumenical duties.

The Plaintiff also pleaded in paragraph 10 of her Complaint that she would during the hearing of the case rely on the doctrine of **Res Ipsa Loquitur** in so far as the same was applicable to the circumstances of the case.

In contrast, the Defendant's statement of defence, dated 7th August 2002 and set out at p.10 of the Record of Appeal admits in Para 4 thereof that an accident occurred along the Meru Cathedral Road but proceeds to say the particulars of negligence of the 2nd Defendant set out in paragraph 5 of the Complaint as well as the fact that the 2nd Defendant was charged in Meru Magistrates Court **Traffic Case No. 4529 of 2001** where she pleaded guilty and was fined Ksh.400/- and that the Plaintiff would rely on the proceedings and judgment therein under Section 47 of the Evidence Act. The Defendants also denied the particulars of injuries suffered by the Plaintiff (Respondent) and the particulars of damages as set out in paragraph 7 & 8. The Defendants also denied the Plaintiff's right to rely on the doctrine of his **Ipsa Loquitur** (paragraph 10), and to hold the 1st Defendant vicariously liable for the acts of the 2nd Defendant while in the course of her ecumenical duties, and all these are issues of both fact and law.

In paragraph 5 of the statement of Defence the 2nd Defendant denies the particulars of negligence in paragraph 5 of the Complaint and in paragraph 6 of the Statement of Defence states that by virtue of the denials the Plaintiff is not entitled to any general damages. In paragraph 7 of the Statement of Defence, the Defendants state that the Complaint was fatally defective and they would at the earliest moment apply for its dismissal and striking out with costs.

The Defendants admitted that there was no other suit pending and jurisdiction of the court (paras. 11 & 13 of the Complaint) demand notice was issued (para 12 of the Complaint).

Now it is a cardinal rule of pleading (Order VI of the Civil Procedure Rules) that a party can only depart from its pleadings by amendment thereof. In other words until the pleadings are amended, a party is bound by them, and cannot be allowed to make submissions **in vacuo** from the dock or witness box. That rule is well grounded on the principle of full disclosure so that the party knows in advance the challenge he/she is likely to meet in court and need not be taken by surprise or be ambushed.

DW 1 was sister Joyce Rita Kathambi (the 2nd Defendant) in her evidence as recorded at pp 16 -17 of the Record of Appeal, denied that the Plaintiff was a passenger in the Motor Vehicle she was driving. She denies in cross-examination that she was to blame for the accident but does not say who was to blame.

Mr. Mwirigi learned Counsel for the Appellants submission from the Bar that liability should be shared on 50:50 basis has no foundation not only on fact but also in law. The law will follow the facts in evidence. There is absolutely no basis for that submission.

In the contract P.W.2, Regina Mutanie the Plaintiff who sued by her father John Mutinda Mutemi testified **“that she was a passenger in motor vehicle KAM 247 Toyota Hilux – Pick – Up which was being driven by Sister Kathambi, the 2nd Defendant. The vehicle could not climb the hill. The vehicle overturned along Meru Cathedral Road. She was with two other passengers at the back. We had been given a lift. I sustained injury on the left eye, fractured liver, fractured pelvis ruptured mesenteric colon and on the spine”.**

In cross-examination P.W.2 testified that she was a member of the youth for St Joseph Cathedral. She knew the 2nd Defendant. It is the 2nd Defendant who allowed her and her two other companions to board the vehicle. The vehicle had a body with seats at the back. The sister saw them coming from the Cathedral. The sister knew they were going to the same direction as the sister. The driver sat in front with sister Kathambi. He engaged the gear for the sister and the vehicle went downhill and overturned.

P.W.2 further testified in cross-examination that when the vehicle over-turned the driver was also inside the vehicle....The 2nd Defendant was charged and that she admitted, the charge. She was negligent. The plaintiff also confirmed her injuries.

“I sustained injuries on the head, left eye, right ear was cut, stomach, liver and hips. I go for checkups. I could not eat maize and beans. The other injuries have healed I had a fractured pelvic bone. The hip has pain upon walking. The same was also injured. I have not fully recovered”.

In re-examination by Mr. Akwalu learned counsel for the Plaintiff, P.W.2 testified **“that she could see the cabin. She saw the authorized driver and the sister exchange (seats). The vehicle was driven for a short distance, and that the sister was on the driving wheel at the time of the accident”.**

The Appellants say in ground 1 of the appeal that the learned senior principal magistrate erred in law in disregarding the Appellant’s evidence and erroneously finding that the plaintiff was a passenger in the Defendant’s vehicle.

This assertion is not borne out by the learned Senior Principal Magistrate’s judgment where at p.19 of the record, he says;-

“The second Defendant testified she works as the Bishop’s Secretary in the Diocese of Meru Headquarters. She was therefore an authorized agent of the 1st Defendant when she drove the Motor Vehicle Registration No. KAM 247 and caused the accident in which the Plaintiff sustained serious bodily injuries. I find the plaintiff did not contribute at all to the accident which fact of the accident is conceded. I find the 2nd Defendant was negligent and she is liable to compensate the Plaintiff for the injuries she sustained. The first Defendant is vicariously liable for negligent acts of the authorized employee or agent. Consequently I find the Defendants 100% liable jointly and should compensate the plaintiff.”

Quite clearly, both from the statement of Defence where there is no pleading of contributory negligence against the plaintiff and from the evidence of P.W.2. and indeed the evidence of D.W.1 (the 2nd Defendant) who was the only witness for the Defendant) there is no basis for the proposition that liability be shared on 50:50 basis. The evidence of P.W.2 is quite graphic as to the antecedents to the accident. The usual driver of Pick Up changed seats with the Sister, the 2nd defendant the authorized driver engaged the gear for the Sister, the vehicle perhaps stalling on the wrong gear or reverse gear, and therefore moving backwards down the hill and overturning violently and causing the severe injuries to the Plaintiff.

The sister according to the evidence of P.W.2 knew her and her companions as members of youth of St Joseph Cathedral. She saw them and knew they were going to the same direction as she was going. They asked for a lift, and she authorized them to board the pick-up and take up the back seats of the covered vehicle.

The Appellants cannot therefore be heard to say either that the learned Senior Principal Magistrate did not take into account the evidence of the Defendants, or that the Plaintiff contributed to the accident. The Plaintiff was tucked away at the back of the covered pick-up. If anyone else were said to contribute to the accident, it can only be the 2nd Defendant and her companion the driver in the passenger seat of the Cabin and not the Plaintiff.

I am also satisfied that the learned trial magistrate considered the evidence of the Defendants before arriving at his decision on liability. I therefore reject grounds 1 and 2 of the Memorandum of Appeal and uphold the findings of the learned Senior Principal Magistrate on liability.

ON THE WEIGHT OF EVIDENCE AND QUANTUM AND CROSS APPEAL.

Grounds 3 and 4 of the Appeal were that the learned Senior Principal Magistrate erred in law and in fact in awarding the respondent excessive general damages at Ksh.700,000/- regard being hard to the injuries sustained by the minor (ground 3) and that the entire judgment and decree is against the weight of evidence and the law.

On the other hand, the Respondent in the Cross Appeal contended that the learned Senior Principal Magistrate erred in law and fact in:-

- (a) awarding general damages so manifestly low as to amount to a misapplication of the principles of assessment of damages despite quoting them in the judgment,
- (b) not properly applying the decisions in **Nairobi HCCC No. 723 of 1998 and Nairobi HCCC No. 2732 of 1998** as a guide to assess general damages despite the injuries therein being less serious and after finding them directly relevant, and
- (c) not positively considering the current and future medical requirements, concerning pain and suffering and medical complications in assessing damages.

To determine these issues both in the Appeal and Cross-Appeal, we need to examine the evidence for the Plaintiff in this matter.

P.W.1 was Dr. John Macharia. He was part of the team which received and treated the Plaintiff following the accident on 12.10.2001. He testified that he examined the plaintiff who had sustained injuries in a road traffic accident on that date, 12.10.2001. She was about 17 years of age. He again examined her on 16.07.2002 and from the treatment notes he testified that the plaintiff had sustained a fracture of the pelvis, the liver was fractured torn, the abdomen had ruptured, she had a cut on her face. The plaintiff underwent surgery to repair the liver, she had four inch gut cut out, and blood in the abdomen drained. She had been nursed from 12.10.2001 to 7.12.2001 when she was discharged to continue with outside treatment.

P.W.1 testified that the Plaintiff complained of abdominal and low belt pains, although the scar on the abdomen and around the left eye had healed.

His prognosis was that as she had sustained abdominal injury and had to undergo emergency surgery to save her life, although the pelvic fracture was managed, she lost four inches of her gut, and had residual pains she may develop problems while giving birth.

In cross-examination P.W.1 testified that he participated in the treatment of the plaintiff, and confirmed that the fracture was limited to the pelvis, and that it had united at the time of examination; and further stated that the patient may have problems in giving birth, that the liver had ruptured but that it had healed, and that there was both draining of the blood and transfusion done, and that the back pains have a bearing on the injuries.

There was no other evidence adduced by the Appellants to contradict or raise doubt on the evidence of P.W.1 which was essentially confirmed by P.W.2 the Plaintiff in respect of the injuries she sustained in the accident. The issue therefore becomes whether in light of the evidence of P.W.1 (the Doctor) and P.W.2, (the Plaintiff), the learned Senior Principal Magistrate erred in law and in fact in awarding the respondent the allegedly excessive damages of Ksh.700,000/- having regard to the injuries sustained by the Plaintiff and whether the judgment and decree is against the weight of the evidence.

The answer to this issue must be in the negative, the learned Senior Principal Magistrate took into account in particular the evidence of P.W.1 (the Doctor) of the injuries the plaintiff had sustained. She had undergone emergency surgery to save her from life threatening injuries. Whereas most of these injuries had been well managed and healed, like the liver, the fractured pelvic bone which had united, the scar on the abdomen and on the face were to the left eye had healed, the plaintiff still suffered abdominal and low back pains, she still had residual pain, she may develop problems while giving birth. Although this latter part of his evidence was not contained in the pleaded report dated 18.07.2002, it cannot be ignored, it is important evidence of the Plaintiff's need for future or continued medication a matter which the Respondent raised in cross-appeal ground 3 that the learned Senior Principal Magistrate erred in law and in fact in not positively considering the current and future medical requirements, continuing pain and suffering and medical complications in assessing damages.

In the case of **Mutinda Mathera vs Gulam Yusuf**, (supra) the plaintiff suffered the following injuries:-

- (i) severe pelvic injury with fracture of pubic isochial rachi on the left side,
- (ii) rapture of the urethra,
- (iii) comminuted fracture of the tibia, fracture of the right leg,
- (iv) contused wound of 3” by 3” in the pelvic area,
- (v) large wound on 8” on the left leg.

The court awarded general damages for:-

Pain suffering and loss of amenities - sh.1,000,000/-

Loss of capacity to be employed - sh. 150,000/-

Agreed special damages - sh. 3,000/-

Total sh.1,153,600/-

Less 10% of contribution sh. 115,360/-

Balance Net sh.1,038,240/-

In the case of **SIMON GITHAIGA WACHIRA VS TIMOTHY NDIRANGU MWANGI (Nairobi HCCC. No. 723 of 1998)** the Plaintiff suffered the following injuries:-

- (i) Blunt injury to the chest which caused a fracture of the rib – left side.
- (ii) Blunt injury to the abdomen;
- (iii) A fracture of the pelvic bone which caused urethral injury.

Medical evidence was given that several operations were carried out on the plaintiff to correct urethral structure and incontinence of urine. The doctor’s opinion was that the Plaintiff had suffered erectile dysfunction of the pelvis which would persist until the fistula closes either spontaneously or by operation; the court awarded damages as follows:-

(i) Pain and suffering and loss of amenities - Ksh.800,000/-

(ii) Loss of earning capacity - Ksh.100,000/-

(iii) Cost of future operation - Ksh.150,000/-

(iv) Special damages - Ksh. 45,139/-

Total Ksh. 1,095,139/-

And in **Mary Wangechi Elijah Mwangi vs Kanja Tea Development Authority** (supra) the Plaintiff suffered the following injuries-

- (i) Posterior dislocation of left hip joint,
- (ii) Laceration wound on right inguinal area (groin),

The court awarded her damages of ksh.800,000/- for pain and suffering and loss of amenities, and loss of capacity to earn.

The essence of the Respondent's argument in the cross appeal is that the learned Senior Principal Magistrate erred in law and fact in not properly applying the decisions in the above captioned cases as a guide to assess general damages despite the injuries therein being less serious and after finding them directly relevant.

I entirely agree with the contention by the Respondent/Cross Appellant. The injuries suffered by the Respondent in this case were much more severe than those suffered by the Plaintiffs in the above captioned cases, yet the learned Senior Principal Magistrate failed to apply the same principle in assessing the damages in this case. I further agree with the Respondent/Cross Appellant that the learned Senior Principal Magistrate failed to positively consider the current and future medical requirements, continuing pain and suffering and medical complications in assessing damages. P.W.1 clearly testified that the Plaintiff complained of abdominal and low back pains that she still has residual pains, and she may develop problems in giving birth. These are all relevant considerations in assessing damages for future medical expenses.

Once again to reiterate the principles upon which this court will interfere with the exercise of discretion of a lower court only where the latter court has failed to take into account a relevant factor, or taken into account an irrelevant factor or the amount awarded is inordinately so low or so high so that it must amount to wholly erroneous estimate to the damages. See the case of **Kemfro Africa Limited t/a Meru Express Service and another vs A.M. Lubia and another (1982 -88) 1KAR 727.**

In **B.G. Saint vs Kevin Hogan [1953] E.A.C.A 85**, the predecessor of the East Africa Court held:-

“1) Although as a general rule an appeal court will not disturb assessment of damages made by the trial court, where there are no reasons are stated by the trial court, the Appeal Court can make its own assessment of damages.

2) In assessing damages for personal injuries, whilst the special facts of the case under consideration must be borne in mind the assessment should accord with the general run of assessments made over a substantial time in comparative cases”.

Similar sentiments were expressed by our own Court of Appeal in **Kenya Bus services Ltd vs Jane Karambu Gituma (Court of Appeal at Nyeri Civil Appeal No. 241 of 2000).**

In this case Counsel for the Appellants cited a host of cases over a relatively short span of time, from the same court which in my respectful opinion were so inordinately low as to amount to wholly extraneous estimate of damages. On the other hand the trial court in this case having cited the correct principles for assessment of damages in comparative (no case is an exact copy) cases, failed to positively consider the current medical requirements, continuing pain and suffering and medical complications in assessing damages.

In re-assessing damages in this case therefore, I will ignore medical complication because a court is unable to tell at this stage whether the plaintiff will one day have complications in giving birth notwithstanding the maternal instinct of every woman to have a child, except of course those who have dedicated themselves to the service of God by living celibate lives in convents as nuns and similar religious persons. Damages for future complications giving birth would be too remote to contemplate at this stage.

However deciding similar cases in a similar manner and comparing this case to the cases of **MUTINDA MATHEKA vs GULAF YUSUF** (supra) deceased on 17.08.1994 and **SIMON GITHAIGA WACHIRA VS. TIMOTHY NDIRANGU MWANGI** (supra) (decided on 29.02.2000), I would re assess general damages for pain and suffering and loss of amenities at Shs.800,000/-. I would also award the Plaintiff shs.150,000/- for future medical expenses and proven damages of Shs. 12,320/- thus making

a total award of Ksh.962,320/-

In consequence therefore the Appellant's Appeal dated and filed on 14th March 2003 is dismissed with costs to the Respondent and the Respondent's Cross Appeal dated and filed on 21st March 2003 succeeds in terms of re-assessment of general and special damage in the total sum of Ksh.912,320/-. The Cross Appellant will also have the costs in the lower court as well as in the Cross Appeal.

There shall be orders accordingly.

Dated, Delivered and Signed at Meru this 19TH Day of June 2009

M. J. ANYARA EMUKULE

JUDGE.