REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 81 of 2005

STEPHEN WANDERI KAMAU……...……………1ST APPELLANT

SOFITRA LTD…………………...……...…………..2ND APPELLANT

VERSUS

GLADYS WANJIKU KUNGÚ……...……..……….RESPONDENT

JUDGMENT

The respondent, Gladys Wanjiku Kung'u filed suit against the appellants seeking to be paid damages on account of injuries that she alleged to have sustained when she was crushed by motor vehicle registration number KN 4269X-KN12614 (*hereinafter referred to as the said motor vehicle*) when it veered off the road and hit her as she was walking by the side of the road. In her amended plaint, the respondent averred that the said accident was caused due to the negligence of the driver of the said motor vehicle. The appellants filed a defence denying that they were negligent or were responsible for the injuries that the respondent sustained. They averred that the respondent solely or substantially contributed to the said accident by driving her two donkeys across the road when it was not safe to do so. They further averred that the respondent confused the driver of the said motor vehicle by retreating from the middle of the road at a blind section of a busy road.

The respondent's suit was heard by the subordinate court, after which the said court found the appellants to be solely liable in damages to the respondent as a result of the injuries sustained in the said accident. The respondent was awarded Kshs 600,000/= as general damages for pain and suffering, Kshs 129,970/= as the costs of future medical expenses and Kshs 380,000/= as loss of future earnings. The trial court further awarded the respondent the sum of Kshs 156,180/= as lost earnings from the time of the accident to the time the respondent filed the suit. In total, the respondent was awarded the sum of Kshs 1,450,032/= and costs of the suit. The appellants were aggrieved by the said judgment and have filed an appeal against the same to this court.

In their memorandum of appeal, the appellants raised five grounds of appeal challenging the decision of the trial magistrate when he arrived at the said decision. They were aggrieved that the trial magistrate had awarded general damages that was excessive and grossly erroneous in light of the medical evidence that was adduced. They were aggrieved that their submissions had not been considered before the trial magistrate reached at the said decision. They were aggrieved that the respondent had been awarded the sum of Kshs 380,000/= as loss of future earning in the absence of any evidence on record. They faulted the trial magistrate for awarding the respondent the sum of Kshs 156,180/= as loss of earning when the same had not been pleaded. The appellants were aggrieved that the trial magistrate had not considered the applicable principles of the law before arriving at the said decision assessing the awards in favour of

the respondent.

At the hearing of the appeal, Mr. Amingá learned counsel for the appellant reiterated the contents of the memorandum of appeal. He submitted that the trial magistrate had ignored the written submissions which were filed by the appellants before arriving at the said decision in favour of the respondent. He submitted that the award of Kshs 600,000/= was inordinately high as to constitute an erroneous assessment of the damages payable to the respondent on account of the injuries she had sustained. In his view, the respondent ought to have been awarded between Kshs 300,000/= and Kshs 400,000/= taking into account comparable awards made by other courts. He submitted that the respondent had not established that she was earning a monthly income of Kshs 5,800/= prior to the date of the accident. No documentary evidence, like for instance bank statements, were produced to support the respondent's contention that he earned such sum of money.

He further submitted that the evidence on record showed that the appellant could not have earned more than Kshs 3,900/= per month. In any event, he submitted that the contract which the respondent produced in evidence had expired by the time she was involved in the accident. It was therefore his submission that it was erroneous for the trial magistrate to rely on the said figure to assess the loss of future earnings. He submitted that there was no justification in the court adapting multiplier of five years in assessing the damages to the paid as loss of future earnings. He argued that all the evidence on record pointed to the fact that the respondent was a house wife and was not working at the time of the accident. As regard the issue of future medical expenses, learned counsel for the appellants submitted that the issue was not pleaded and therefore the trial magistrate erred in awarding the respondent the sum of Kshs 129,970/=. He further submitted that the respondent had not established the connection between herself and a company called Mt. Kenya Fashions which was actually contracted to manufacture uniforms for Nanyuki Municipal Council and other individuals. He submitted that, if the court was inclined to give any award to the respondent on loss of future earnings then the figure that should be applied in Kshs 3,000/= per month. He submitted that the trial magistrate ignored relevant factors and took into account irrelevant factors in arriving at the said decision in favour of the respondent. He urged this court to allow the appeal.

Mr. Oraro, Learned Counsel for the respondent opposed the appeal. He submitted that the appellants had not raised any issue that would make this court interfere with the decision of the trial magistrate. He submitted that the injuries which the respondent had sustained were established by the doctors who also made comments on the residual disabilities that the respondent had sustained. He submitted that the trial magistrate had not ignored the submissions of the appellant in arriving at the said assessment in favour of the respondent because the appellants had not relied on any authorities in support of their case. He therefore submitted that the award of Kshs 600,000/= was fair taking into account the injuries that the respondent had sustained and also the incidences of inflation. He submitted that the respondent had proved that she earned more than Kshs 5,000/=, which evidence had not been challenged. She urged this court not to interfere with the said award.

He further submitted that the respondent had proved that Mt. Kenya Fashions was a trade name that she used and therefore the documents that were produced and referred to the said business referred to the respondent. He submitted that the multiplier of five years adopted by the court was fair in the circumstances. He however conceded that the loss of future earning should have been calculated at Kshs 348,000/= instead of Kshs 380,000/=. He submitted that the respondent had proved that she had not worked for a period of 27 months while she was recuperating from her injuries as she was totally immobile. He submitted that the sum of Kshs 5,800/= that was assessed to be the monthly income of the respondent was therefore supported by evidence which the respondent had adduced. Learned Counsel for the respondent therefore urged this court to disallow the appeal.

This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court so as to reach its own determination bearing in mind that it neither saw nor heard the witnesses as they testified and therefore make an allowance in that respect. The High Court is not bound to follow the trial court's finding of fact if it appears either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence

generally. (*See* **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Anor [1968]E.A. 123**). In the instant appeal, the issues for determination by this court are two fold; firstly whether the respondent proved her case on a balance of probabilities that it was the appellants who injured her by their negligence and secondly that the award made to the respondent by the trial magistrate was in accordance with the law.

On the issue of liability, the respondent testified that as she was walking along Nairobi-Mai Mahiu road on the 29th of June 1998, the said motor vehicle, owned by the appellants lost control and veered off the road towards the path that she was walking on. She testified that she tried to run away from the path of the said motor vehicle but unfortunately was unable to climb an embankment by the side of the road, upon which the said lorry overturned and crushed her leg. She testified that she was rescued by the people who were there and taken to the P.C.E.A. Kikuyu hospital where she was admitted and discharged after two months of treatment.

Although the appellants indicated that they would call evidence to challenge the respondent's version of events, they were unable to do so and thereafter closed their case without calling any evidence. The evidence as to the circumstances of the accident that led to the injuries that the respondent sustained was therefore uncontroverted. The respondent established that she was injured as she was walking by the side of the road when she was knocked down by the said motor vehicle owned by the appellants which lost control because it was being driven at a high speed. Upon re-evaluating the evidence therefore, I do not find any fault with the decision of the trial court who found the appellants solely liable in damages to the respondent. On liability, the appellants are therefore held to be 100% liable.

The Court of Appeal in the case of **Ali –vs- Nyambu t/a Sisera store [1990]KLR 534** at page 538 approved the decision made by its predecessor in the case of **Lukenya Ranching and Farming Co-operative Society Limited –vs- Kavoloto [1970]E.A. 414** where it was held that:

"***The principles which apply under this head are not in doubt whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of the first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935]1 KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collievers Ltd [1941] AC 601).***"

In the instant case the respondent was examined by three doctors who prepared medical reports. The respondent was twice examined by Dr. Wokabi, a consultant surgeon who prepared a report on the 15th of February 1999 and on the 14th of July 1999. Dr. Yusuf Kodwavwala, a consultant surgeon saw the respondent on the 1st of September 1999 and prepared his medical report. Similarly the respondent was seen by Dr. A. P. Landra a plastic surgeon who wrote a report on the 17th of February 2000. The first two doctors both agree on the injuries that the respondent sustained. They both state that the respondent sustained serious and extensive compound fractures of the left leg. The respondent sustained both the fracture of the left fibula and tibia. She also suffered extensive skin loss from the knee downwards. The skin loss led to the skin being removed from her left thigh to graft the part of the leg which had no skin. The injury sustained by the respondent has resulted into the plaintiff's left leg being disfigured and ugly. The fractures were reduced through conservative methods by the application of plaster of paris and the application of external fixators. At the time of examination, the respondent was still walking on with the aid clutches but the doctors were of the opinion that the respondent would be able to use her leg without the assistance of clutches if she underwent intensive physiotherapy. They both agreed that the respondent would not be able to have restored the full functions of the said leg because the fracture had united but led to the said leg being 2cm shorter than the right leg. Dr. Wokabi assessed the degree of permanent disability to be 20% while Dr. Kodwavwala stated that "… *Mrs Kungu will be left with a grossly*

disfigured left leg, some pain, some shortening, weak quadriceps, some limitation of the left knee movements and possibility of early degenerative changes in the left knee." Dr. Landra, the plastic surgeon whom the respondent saw opined that he could have restored the area above the knee by skin grafting. He at the time estimated the cost of the operation would be Kshs 106,760/=.

In her amended plaint, the respondent pleaded to be awarded special damages as follows:

(i) Medical reports …………………………..Kshs. 4,000/=

(ii) Police Abstract …………………………...Kshs. 100/=

(iii) Medical expenses…………………………Kshs.179,782/=

(iv) Future medical expenses …………………Kshs.129,970/=

(v) Loss of earnings from the date

of the accident to the date of filing suit … Kshs 156,180/=

(vi) Loss of future earnings

The special damages awarded by the trial court under the heading (i), (ii) and (iii) have not been challenged by the appellants on this appeal. I will therefore confirm them.

As regard the issue of future medical expenses, the respondent pleaded that she would require the sum of Kshs 129,970/= as future costs. She testified that she had seen Dr. Landra, a plastic surgeon who had told her that he would require the said sum of money to operate on her to improve the appearance of her left leg above the knee. I have however seen the report by Dr. Landra. He admits that he may not do much to correct the general appearance of the respondent's left leg. In fact the surgery that he proposed was limited in scope.

By the time the respondent testified in court, she had not undergone the operation. This was five years after the accident. She admitted in cross examination that she had had the said report prepared so that she could get more money from the court. The other two doctors, who examined the respondent, and who are eminently qualified consultant surgeons, never said anything as regard the necessity of the respondent undergoing future surgery to treat her left leg. In the circumstances of this case, it is clear that the future expenses that the respondent anticipated to be awarded by this court, is to say the least, of a speculative nature. It is not a necessary medical procedure. I therefore agree with the appellants that the said special damages ought not to have been awarded. I will therefore disallow it.

As regard the claim under the head loss of earnings from the date of the accident to the date of filing suit, the respondent pleaded to be awarded the sum of Kshs 156,180/=. This sum she claimed was calculated from the average sum that she earned per month of Kshs 5,800/=. The respondent was involved in the accident on the 29th of June 1998. She filed suit in the subordinate court on the 21st of May 2001. Although the respondent pleaded to be awarded the said special damages, she offered no evidence to support her claim apart from stating that she had lost the sum of Kshs 470,000/= since she was involved in the accident. It is trite law that special damages must be specifically pleaded and specifically proved (*See* **Ali –vs- Nyambu t/a Sisera Store** (*supra*) at page 537 para 40). The respondent's claim under this head is therefore disallowed. The award of Kshs 156,180/= made by the subordinate court is therefore set aside.

As regard loss of future earnings, the respondent testified that because of the accident she was prevented from undertaking her contract to provide clothing to Nanyuki Municipal Council and other customers. The respondent testified that she was a tailor by trade and had been given a contract to supply staff uniforms for a period of three years by the Nanyuki Municipal Council. She produced a letter dated the 27th of April 2000 whereby the town clerk of the said Nanyuki Municipal Council confirmed that the

respondent had been given a contract to supply staff uniforms between the years 1995 and 1997 under the business name Mt. Kenya Fashions.

The respondent was involved in the accident on the 29th of June 1998. Therefore, by the time she was involved in the accident the contract with the Nanyuki Municipal Council had already expired. The respondent adduced no evidence to support her submission that the said contract could have been renewed if she had not been involved in the accident. She further offered no evidence as to the value of the contract between herself and the Nanyuki Municipal Council. She did not give any statements which could have given this court an indication of the income that she earned while she was conducting her tailoring business in the name and style of Mt. Kenya Fashions. What the respondent produced were bank statements of Mt. Kenya Fashions between the 27th of March 1997 and the 18th of November 1997. The state of that account at the time of the accident was not adduced in evidence.

This court has re-evaluated the evidence as regard the said bank statements which were produced by the respondent. It is clear that the respondent on an average month, did not earn any amount near the sum of Kshs 5,800/=. If the average sum is calculated, then the monthly income of the respondent would be Kshs 3,900/=. I will adopt this figure to calculate the loss of future earnings. In calculating the loss of future earnings, this court shall consider the applicable legal principles that guide this court in awarding such damages. The loss of future earnings should be awarded to compensate a claimant for incapacitation that result from the injuries that he or she has sustained and which has impacted on his or her capacity to earn a living. In this regard, the loss of future earnings would only be paid as compensatory and not as punitive damages. The loss of future earning would only be paid for the period that the claimant would not be in a position to earn a living due to his or her injuries.

In the present case, the respondent adduced evidence that she was incapacitated for a period of about three years. In the circumstances therefore, she can only be paid loss of future earnings for a period of three years. I therefore set aside the award made to her under the heading of loss of future earning and substitute it with an award of this court. The respondent is therefore awarded;

Kshs 3,900 x 12 x 3 = Kshs 140,400/=

As regard the general damages awarded of Kshs 600,000/=, I have considered the submissions that were made by the respondent and the appellants. I have also considered the authorities that were relied on by the respondent in support of her claim. Generally, the award of general damages for the nature of injuries sustained by the respondent would be between Kshs 350,000/= and 450,000/=. I have taken into account the severe nature of the injuries sustained by the respondent. I have also taken into consideration that the said decisions which were referred to the trial court by the respondent were more than ten years old. In that respect, I will take into account the incidence of inflation. However I note that the trial magistrate gave an award that was higher than the generally acceptable range of damages payable for the sort of injuries similar to the one sustained by the respondent. However, I do not think that the said award was inordinately high as to attract this court's sanction in terms of reassessing it. I will therefore disallow the appeal against the assessment of general damages for pain, suffering and loss of amenities.

The upshot of the aforegoing, is that the appeal herein partially succeeds. The judgment and decree of the lower court is hereby set aside and substituted by a judgment of this court as follows:

(i) On Liability

The appellants are held to be 100% liable.

(ii) On Quantum

(a) Special damages – the respondent is awarded special damages of Kshs 324,282/= comprised as

- Medical reports …………. Kshs 4,000/=

- Police Abstract …………Kshs 100/=

- Medical expenses ………Kshs.179,782/=

  - Loss of future earnings ... Kshs 140,400/=

(b) General damages …….. Kshs 600,000/=

Total ………………. Kshs 924,282/=

(iii) Interest at usual court rates on the special damages shall be applied from the date of filing suit whilst interest on the general damages shall be paid from the date of the delivery of the judgment by the subordinate court i.e. 26th of September 2003.

(iv) Since the appellants have been partially successful on this appeal, they shall be paid half of the costs on appeal.

(v) The respondents however shall have the costs of the suit in the subordinate court.

DATED at NAKURU this 26th **day of** May**, 2006**

L. KIMARU

<u>JUDGE</u>