



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 183 OF 2017

BETWEEN

DEDAN NJOROGE MWANGI.....1ST APPELLANT

NDUTA GRACE2ND APPELLANT

AND

JANE WANJIRURESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. N. Musyoka, PM

dated 31st October 2017 at the Kikuyu Magistrates Court

in Civil Case No.139 of 2010)

JUDGMENT

1. As is stated in the memorandum of appeal dated 29th November 2017, the appellants are dissatisfied with the judgment of the subordinate court awarding the respondent **Kshs. 2,000,000.00** as general damages, **Kshs. 864,000.00** for loss of earning capacity, **Kshs. 1,090,000.00** for future medical expenses, **Kshs. 25,000.00** as witness expenses and **Kshs. 244,202.00** as special damages.
2. The judgment was as a result of a claim for damages by the respondent who was hit by motor vehicle registration number KBA 247S owned by the 2nd appellant and driven by the 1st appellant on 17th March 2014 while walking along the Thogoto – Gikambura Road. The issue of liability was agreed in the ration 90:10 in favour of the respondent.
3. Both parties filed written submissions in which they set out their respective arguments. The appellants are dissatisfied with the award of damages on the ground that the trial magistrate failed to consider their submissions on quantum. That the trial magistrate erred in law and in fact in awarding damages that were inordinately high in view of the circumstances of the case and that the trial magistrate erred in failing to consider conventional awards for similar cases.
4. The respondent supported the judgment of the trial court and urged that the trial court cannot be faulted for reaching the conclusions it did. Her counsel submitted that the appellants had not shown that the trial court had exercised its discretion to award damages wrongly and that it had failed to discharge its burden of doing so. The respondent urged the court to take into account that the appellants did not call any evidence on the issue of quantum.
5. According to the plaint, the respondent sustained a degloving injury (open wound) on the right arm, fracture of the right radius and ulna, bruises on the right side of the head, the right thigh and right upper arm. The respondent pleaded that prior to the accident she was an energetic and hardworking small scale farmer earning an average of Kshs. 9,000/- per month but due to the accident she could no longer engage in such gainful activity including domestic chores and was forced to engage a domestic helper for Kshs. 4,500/- per month. She therefore claimed loss of earning and loss of earning capacity.
6. At the hearing the respondent (PW 2) testified and called Dr Nasir Bhanji (PW 1). PW 1 testified and produced his report dated 18th November 2018. He told the court that he examined the respondent on 17th April 2014. The evidence set out in his report was that the respondent was initially treated at St. Teresa's Maternity and Nursing Home in Kikuyu after the accident where X-rays were done and fracture diagnosed. She was taken to the theatre where the fractures were cleaned and dressed and she was referred to Kenyatta National Hospital (KNH) on 19th March 2014. While at KNH, the fractures were stabilized by an external fixator and she was discharged on 1st April

2014 with instructions to attend outpatient reviews. The respondent was admitted to KNH again on 5th May 2014 where the compound fracture skin defects were covered by skin grafts from the thigh. She was discharged on 16th May 2014. Thereafter, she attended several outpatient clinics and physiotherapy.

7. At the time of review, Dr Bhanji recorded that the respondent was complaining of her inability to hold objects with the right hand, pain at the fracture site on the right forearm, pain over the suprascapular area, feeling coldness over the donor site area of the skin graft and deformity of the right forearm. After reviewing her status, he observed that the respondent had lost usage of her right arm and that it was unlikely that any surgical intervention would bring about improvement. In his testimony, Dr Bhanji recommended surgery to straighten the bones and estimated the costs to be Kshs. 1 million.

8. The respondent testified and gave an account of her treatment from the time she was injured. She produced medical reports, treatment notes and receipts for payments made during her period of treatment. She recalled that before the accident she was taking care of her cattle. She would cut grass for them and do farming which she could not do as her hand was injured. As a result of the injuries she had to employ someone to assist in her household chores and another to assist in taking care of the cows. She told the court that she was paying each of them Kshs. 4,500.00 per month. She also stated that she required Kshs. 1,000,000.00 for further operation.

9. It is on the basis of the evidence and parties written submissions that the trial magistrate made the award I have set out at the opening paragraph of this judgment. Since the decision challenged is only on the award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reasons, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Butt v Khan [1982-88]1KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**). With this principle in mind, I will now consider each head of claim.

10. I will start with the award of Kshs. 2,000,000.00 as general damages. Before the trial court, the respondent suggested Kshs. 2,700,000.00 as general damages. She cited the case of **Cosmas Kipkoech Sigei v Madrugada Limited and Another NKU HCC No. 176B of 2005 [2010] eKLR** where the plaintiff sustained a crush injury of the left hand. The hand was later amputated at the wrist joint. The court awarded Kshs. 2,000,000.00 as general damages.

11. On the other hand, counsel for the appellants suggested that Kshs. 250,000.00 was sufficient recompense for pain and suffering based on several decisions. In **Jackson Wanyoike v Kenya Bus Services Ltd and Another NRB HCCC No. 297 of 2002 [2003] eKLR**, the plaintiff sustained a degloving injury of the left leg and other soft tissue injuries. Disability was assessed at 15 – 20% with no prospect of improvement. He was awarded Kshs. 300,000.00. In **H. Young Construction Company Limited v Richard Kyule Ndolo MKS HCCC No. 173 of 2009 [2014] eKLR**, the plaintiff was awarded Kshs. 250,000.00 for sustaining injury involving degloving of the left leg with loss of skin over the calf muscles and blunt injury on the left ankle joint. In **Moraa Maangi v Kerumbe Tea Estate and Another KSI HCCA No. 41 of 2008 [2011] eKLR** the plaintiff who suffered compound fractures of the right elbow and other soft tissue injuries would have been awarded Kshs. 200,000.00 had the appeal not been dismissed.

12. I have set out the nature and extent of the respondent's injuries. The issue to be decided is whether in light of the cases cited, the trial magistrate can be said to have erred in light of the principle in **Butt v Khan (Supra)**. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. The general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR** thus:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

13. In **Jabane v Olenja [1986] KLR 661**, the Court of Appeal elucidated the principles that guide the court in assessing general damages as follows;

The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

1. *Each case depends on its own facts;*
2. *awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);*
3. *comparable injuries should attract comparable awards.*
4. *inflation should be taken into account; and*
5. *unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.*

14. The trial magistrate relied on the case cited by the respondent that is, **Cosmas Kipkoech Sigei v Madrugada Ltd and Another (Supra)** to award Kshs. 2,000,000.00. It is not apparent from the judgment that the trial magistrate engaged with or reviewed the cases cited by the appellants hence counsel for the appellant was correct in contending that its submissions were disregarded. At this juncture, I wish to reiterate that just like it is the duty of the court to ensure comparable injuries attract comparative awards in order to promote uniformity and certainty, it is the duty of the advocates who appear before the court to ensure that they cite relevant and current cases that meet the objective

I have stated. Citing one case does not assist the court to ensure that “*comparative injuries attract comparable awards*”. Neither does citing irrelevant and outdated cases assist the court in that regard.

15. I have studied the cases cited by both parties to guide the trial magistrate. The respondent cited only one case while the cases cited by the appellants did not reflect the more serious nature of the respondent’s injuries. In fact, both parties cited cases that were rather out dated. It is also noticeable that the gulf between the cases and figures cited by the parties was almost ten-fold. It is for this reason that I must call in aid the principle in **Butt v Khan (Supra)** in interfering with the discretion of the trial magistrate.

16. Unlike in the past where the parties had to rely on case abstracts to determine the trend of damages, recent and relevant judgments are now available on www.kenyalaw.org and advocates must endeavor to assist the trial court by doing appropriate research. I have looked at more recent and relevant cases as follows.

17. In the **Agnes Wakaria Njoka v Josphat Wambugu Gakungi [2015] eKLR**, the plaintiff therein sustained 2 deep cut wounds on her hand, fracture of the skull, deep compound fracture on the right forearm and loss of left hand at wrist which was cut off. She was awarded Kshs 650,000.00 as general damages in 2015. The claimant in **Gogni Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR** was awarded Kshs. 350,000.00 as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks. In **Philip Musyoka Mutua v Leonard Kyalo Mutisya MKS HCCA No. 149 of 2009 [2018] eKLR** the plaintiff suffered a cut wound on the face near the right eye, blunt injury on the forehead and both shoulders, bruises on the chest and left hand and fracture of the distal left radius. He was awarded Kshs. 300,000.00 as general damages. In **Rose Mukombo Masanju v Night Flora alias Nightie Flora and Another VOI HCCA No. 2 of 2015 [2016] eKLR** the plaintiff sustained a fracture of the left wrist, comminuted fracture of the frontal bone with hemoinus, concussion and deep cut wound on the right eye. She was awarded Kshs. 500,000.00. In **Jitan Nagra v Abidenego Nyandusi Oigo KSI HCCA No. 74 of 2018 [2018] eKLR** the plaintiff sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and was awarded Kshs. 450,000.00.

18. Although the cases I have cited deal with fractures of the ulna and radius and associated injuries, in this case the respondent sustained more serious injuries that affected her range and ability of movement. Taking into account the rate of inflation and having regard to the circumstances of the case, I would award the respondent **Kshs. 600,000/-** as general damages.

19. Under the head of future medical expenses, the trial magistrate awarded Kshs 1,090,000.00 under this head based respondent’s need to correct deformity at the fracture site identified by Dr Bhanji in his testimony. The appellants complained that this claim was not justified and was neither pleaded nor proved as required by law.

20. The governing principle for awarding damages for the future medical expenses was explained by the Court of Appeal in **Kenya Bus Services Ltd v Gituma [2004] EA 91** as follows;

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded.

21. I have looked at the amended plaint dated 13th January 2015 setting out the claims and it does not include or plead the claim for future medical expenses. In this respect the trial magistrate fell into error by awarding a claim that was not pleaded. I therefore set aside the award of Kshs. 1,090,000.00 as future medical expenses.

22. The next head of damages is the award of loss of earnings and loss of earning capacity which was assessed at Kshs. 864,000.00. According to the judgment, the trial magistrate awarded that sum for loss of earning and loss of earning capacity yet, as the appellants correctly submit, the two claims are distinct (see **Mumias Sugar Company Limited v Francis Wanalo KSM CA Civil Appeal No. 91 of 2003 [2007] eKLR**). Since the respondent did not cross-appeal against this error, I will deal with the matter as an award of loss of earning capacity since this is the approach that is apparent from the judgment by the trial magistrate.

23. The trial magistrate also cited the case of **Butler v Butler [1984] KLR 225** where the Court of Appeal identified the following principles in assessing the claim for loss of earning capacity;

- 1. A Person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.*
- 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.*
- 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.*
- 4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.*

5. *Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.*

6. *The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.*

24. From the evidence of the respondent and PW 2 it is clear that she had lost the use of the right arm and could not work in the manner she used to. The learned trial magistrate used a multiplier approach and took the age of 70 years based on Book of Psalms 90:10, *“the length of our days is seventy years or eighty if we have strength”* to determine the multiplier. The respondent stated that she was earning about Kshs. 9,000/- per month on farming which was not controverted. The trial magistrate observed that he was entitled to take judicial notice of the fact that people of the respondent’s social status do not keep books of accounts or records hence the income was proved.

25. The evidence on record is that the respondent was severely injured in her arm. Despite pleading the nature of her work and therefore giving the appellants the opportunity to verify the information, the respondent’s testimony was not controverted hence I affirm this award.

26. Although the appellants contested the special and general damages in their memorandum of appeal, they did not press the issue in the written submissions or address the court on the same. I will therefore not touch on those aspects of the claim.

27. I allow the appeal only to the extent that I set aside the following award; Kshs. 2,000,000 as general damages and Kshs. 1,090,000/- as future medical expenses. I substitute the award of general damages with an award of **Kshs. 600,000/-** while the claim for future medical expenses is dismissed. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

28. The appellants shall have half the costs of this appeal.

DATED and DELIVERED at KIAMBU this 10th day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Mr Muthee instructed by Kairu and McCourt Advocates for the appellants.

Mr Khamala instructed by B. W. Kamunge and Company Advocates for the respondent.