



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 141 OF 2015

GRACE WAMUE.....APPELLANT

-VERSUS-

WICKS MWETHI NJENGA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. D.K. Mochache (Principal Magistrate) delivered on 1st December, 2014 in KIAMBU CMCC NO. 125 OF 2014)

JUDGMENT

1. Wicks Mwethi Njenga, the respondent in this instance, lodged a suit against the appellant by way of the plaint dated 15th May, 2014 in which he sought for reliefs in the nature of general and special damages together with costs of the suit and interest thereon.
2. The respondent pleaded that sometime on or about the 24th day of December, 2011 while he was travelling as a lawful passenger aboard motor vehicle registration number KBB 801D along the Northern By-pass near Windsor Hotel, the appellant whether by herself or through her agent/driver negligently drove motor vehicle registration KAU 229J, causing the said motor vehicle to lose control and collide with the motor vehicle in which the respondent was, resulting in serious injuries to the respondent. The particulars of negligence were set out under paragraph 4 of the plaint.
3. Upon entering appearance, the appellant filed her statement of defence dated 10th June, 2014 to deny the claim.
4. When the suit came up for hearing before the trial court, the parties entered into and recorded a consent on liability in the ratio of 80:20 in favour of the respondent. On assessment of damages, the respondent testified and summoned a second witness to support his case. The appellant closed her case without calling any witness. Thereafter, the parties put in written submissions.
5. Ultimately, the trial court entered judgment in favour of the respondent as follows:

<i>a) Liability</i>	<i>80:20</i>
<i>b) General damages</i>	<i>Kshs.700,000/(less 20%)</i>
<i>Total</i>	<i>Kshs.500,000/</i>
<i>c) Special damages</i>	<i>Kshs.8,000/</i>
<i>Final Total</i>	<i>Kshs.508,000/</i>

6. The appellant has now challenged the aforesaid judgment on appeal and has brought forth the following three (3) grounds of appeal in her memorandum of appeal dated 2nd April, 2015:

(i) THAT the learned trial magistrate erred in law and in fact by making an award on general damages which was inordinately high considering the respondent's injuries.

(ii) THAT the learned trial magistrate erred in law by failing to consider and/or appreciate the appellant's submissions as well as the authorities annexed thereto and in rushing to write a judgment.

(iii) THAT the learned trial magistrate erred in law and in fact in awarding special damages in excess of the amount pleaded.

7. The appeal was canvassed by way of written submissions which both parties filed. On her part, the appellant contended that not only did the trial court award general damages which were excessive, but the trial court did not cite any authorities which guided its award, neither did it award general damages commensurate to the injuries suffered by the respondent.

8. The appellant also contended that the trial court ought to have taken regard to the authorities of **James Cartwright v John Namjaa Lekipiri [2012] eKLR** where general damages were assessed at Kshs.100,000/ for fracture and tissue injuries, and **Rivatex Limited v Philip Mochache Nyabayo [1999] eKLR** in which an award of Kshs.300,000/ made on general damages was reduced to Kshs.240,000/ for fracture of the first toe metatarsal and bruises on the right leg, both of which were cited by the appellant and which proved relevant.

9. On a similar note, the appellant submitted that the authorities quoted by the respondent could not have applied for the reason that they either entailed injuries of a graver nature compared to those sustained by the respondent or constituted injuries distinct from those associated with the respondent.

10. In that respect, it was the appellant's submission that an award of Kshs.250,000/ would be better suited as adequate general damages.

11. On special damages, the appellant argued that the respondent only pleaded the sum of Kshs.3,000/ yet the trial court entered an award of Kshs.8,000/, going further to argue that in any event, the doctor's attendance charges amounting to Kshs.5,000/ which the trial court granted as part of special damages could only be awarded under costs of the suit. The appellant therefore urged that the award of Kshs.8,000/ be substituted with an award of Kshs.3,000/ on specials.

12. The respondent on his part began his submissions by challenging the jurisdiction of this court to entertain the appeal on the premise that at the time of filing the appeal, the appellant had not extracted the decree. In support of his argument, the respondent referred this court to the case of **Nancy Wamunyu Gichobi v Jane Wawira Gichobi [2018] eKLR** where the High Court found the appeal in that instance to be incompetent for the reason that the record of appeal did not comprise of the decree being appealed against.

13. On the merits of the appeal, it was the respondent's contention that the trial court's award on general damages was fair, adding that the sum proposed by the appellant was on the lower side and the authorities which the appellant chose to rely on were quite old.

14. Further to the authorities cited by the respondent before the trial court, this court was urged to consider the cases of **Njora Samuel v Richard Nyang'au Orechi [2018] eKLR** in which the High Court on appeal upheld an award of Kshs.500,000/ made to a plaintiff who had sustained closed fracture 5th metatarsal, and **Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR** where an award of Kshs.800,000/ was made in the instance of a plaintiff who had sustained fracture injuries to the left tibia and fibula.

15. In view of the foregoing, the respondent submitted that the award on general damages is comparable to the above-cited awards, hence the appeal is deserving of dismissal.

16. I have considered the contending submissions on appeal and the authorities which the parties have cited before me. I have also re-examined the evidence which the trial court had the privilege of considering. I have established that the appeal essentially lies against the awards made on both general and special damages. Before delving into the merits of the appeal; however; I deem it necessary to first discuss the question on competency of the appeal as raised by the respondent.

17. As already mentioned, the respondent brought to question this court's jurisdiction to entertain the appeal due to absence of the decree in the record of appeal which was filed. The appellant did not offer any response thereto.

18. Upon examining the record of appeal filed by the appellant on 26th April, 2018, I noted that a copy of the extracted decree was attached therein which is in total contrast to the position taken by the respondent.

19. In the circumstances, I find no validation in the position taken by the respondent on the above issue and I do not hesitate to conclude that the appeal is competently before me.

20. I will now address the merits of the appeal in line with the two (2) heads mentioned hereinabove, keeping in mind that interference by the courts on appeal against an award of damages is purely restricted to either of the following instances:

(i) Where an irrelevant factor was taken into account.

(ii) Where a relevant factor was disregarded.

(iii) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

a) General damages

21. In his testimony as PW1, the respondent stated that immediately following the accident, he received treatment at Kiambu Hospital and later on, at Kikuyu and Aga Khan Hospitals respectively.

22. The respondent further stated that upon examining him, Dr. Mwaura prepared a medical report confirming that the injuries sustained were as pleaded.

23. During cross examination, it was the respondent's evidence that he suffered a fracture to his foot and he is still taking medication.

24. Dr. Kungu Mwaura who was PW2 testified that he examined the respondent and produced a medical report detailing his findings as P. Exh 6a.

25. On being cross examined, it was the good doctor's evidence that deformity to the respondent's foot was visible from the examination undertaken.

26. In his submissions, the respondent suggested that the learned trial magistrate awards a sum of Kshs.1,500,000/ on general damages, placing reliance on two (2) cases: the first is the case of **Kimilili Hauliers v Samuel Kingogo [2011] eKLR** where the court awarded a sum of Kshs.600,000/ to a plaintiff who had suffered *inter alia*, fracture injuries of the distal end of the left femur and blunt trauma to the pelvis and hips; while in the second case of **Hussein Abdi Hashi v Hassan Noor [2004] eKLR** the plaintiff received an award of Kshs.800,000/ for fracture injuries of the left malleolus and metatarsal, with permanent incapacity being assessed at 20%.

27. In response, the appellant urged the trial court to award a sum of Kshs.250,000/ while citing the authorities of **James Cartwright v John Namjaa Lekipiri [2012] eKLR** and **Rivatex Limited V Philip Mochache Nyabayo [1999] eKLR** whose awards were laid out earlier on in this judgment.

28. In the end, the learned trial magistrate reasoned that an award of Kshs.700,000/ would constitute adequate general damages for pain and suffering and loss of amenities.

29. Having re-considered the medical evidence on record, more particularly the discharge summary from PCEA Kikuyu Hospital produced as P. Exh 4 and the medical report by Dr. G.K. Mwaura produced as P. Exh 6a, I noted that the injuries listed therein are consistent with the following particulars of injuries pleaded in the plaint:

- (i) Blunt chest injury (tender)
- (ii) Blunt injury-left lower limb (tender)
- (iii) Swollen and tender left foot
- (iv) Fractures-left 3rd and 4th metatarsals

30. In his medical report, Dr. G.K. Mwaura termed the respondent's injuries as grievous harm and soft tissue in nature, going further to assess permanent incapacity of the left foot at 2%.

31. I also observed from the evidence on record that the respondent also received medical treatment at Aga Khan University Hospital and a medical report dated 8th May, 2014 was prepared by Dr. Bahaty R. indicating that the respondent had sustained injuries to the left foot resulting in deformity. Nonetheless, that particular medical report made no mention of the other injuries referenced above.

32. Turning to the authorities cited by the respondent before the trial court, I observed on the one hand that though the injuries suffered by the plaintiff in **Hussein Abdi Hashi v Hassan Noor [2004] eKLR** could be termed as comparable to those suffered by the respondent herein, not only was that case decided years ago but the permanent incapacity in that instance was notably higher than what was assessed in respect to the respondent's injuries. On the other hand, I am not convinced that the case of **Kimilili Hauliers v Samuel Kingogo [2011] eKLR** is comparable to the present circumstances.

33. As concerns the authorities of **James Cartwright v John Namjaa Lekipiri [2012] eKLR** and **Rivatex Limited V Philip Mochache Nyabayo [1999] eKLR** which the appellant opted to rely on, I am of the view that the injuries sustained in both injuries are less severe in comparison to those suffered by the respondent. Moreover, the latter authority was decided over 10 years prior to the date on which the respondent instituted the suit.

34. I have considered a few comparable awards made. In the case of **Njora Samuel v Richard Nyang'au Orechi [2018] eKLR** which the respondent cited before me, the court upheld an award of Kshs.500,000/ in the instance of a plaintiff who had suffered a closed fracture right 5th metatarsal. Likewise, in the case of **Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR** the High Court on appeal saw it fit to uphold an award of Kshs.500,000/ made to a plaintiff who had a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

35. In view of the foregoing and from my reading of the impugned judgment, I am satisfied that while there is nothing to indicate that the learned trial magistrate overlooked the appellant's submissions and authorities, it is apparent that the learned trial magistrate did not elaborate on the authorities which guided the award made. Suffice it to say that having considered the comparable awards I have just cited alongside inflation rates, I am satisfied that the award of Kshs.700,000/ was on the higher side; in my view, Kshs.500,000/ would constitute a more suitable award on general damages for pain and suffering and loss of amenities.

b) Special damages

36. Under this particular head, the respondent pleaded the sum of Kshs.3,000/ as costs incurred in preparation of the medical report and a receipt to that effect was later on produced by PW2 as P. Exh 6a. PW2 also produced as P. Exh 6b a receipt in the sum of Kshs.5,000/ for court attendance.

37. The respondent through his submissions sought a total sum of Kshs.8,000/ from the trial court while the appellant was of the view that the respondent was only entitled to the sum of Kshs.3,000/.

38. Upon considering the evidence, the learned trial magistrate awarded the sum of Kshs.8,000/ on special damages.

39. The law is well settled that for an award of special damages to be made, the same ought to have been specifically pleaded and strictly proved. This legal position was reaffirmed by the Court of Appeal in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR** when it determined thus:

“...it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”

40. From my review of the respondent’s pleadings, I established that only the sum of Kshs.3,000/ was specifically pleaded and subsequently proved at the trial by way of evidence. The sum of Kshs.5,000/ constituting medical expenses incurred was not specifically pleaded, hence the learned trial magistrate had no basis on which to grant the same. In the premises, I am persuaded to interfere with the award of Kshs.8,000/ and substitute it with the award of Kshs.3,000/ on special damages.

41. The upshot is that the appeal succeeds on merit. Consequently, the awards of Kshs.700,000/ on general damages for pain and suffering and loss of amenities, and special damages in the sum of Kshs.8,000/ are hereby set aside and are substituted with the respective awards of Kshs.500,000/ and Kshs. 3,000/.

42. The judgment on appeal shall now read as follows:

<i>a) General damages</i>	<i>Kshs.500,000/</i>
<i>b) Special damages</i>	<i>Kshs.3,000/</i>
<i>Gross total</i>	<i>Kshs.503,000/</i>
<i>Less 20%</i>	<i>Kshs.100,600/</i>
<i>Net total</i>	<i>Kshs.402,400/</i>

The respondent shall have costs of the suit before the trial court together with interest on general damages at court rates from the date of judgment and interest on special damages at court rates from the date of filing suit until payment in full.

Parties shall cater for their own costs of the appeal.

Dated, signed and delivered at NAIROBI this 13th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent