



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO 27 OF 2017**

**GRACE WAMUE ..... APPELLANT**

**VERUSUS**

**FLORENCE WANJIRU KIRUBI..... RESPONDENT**

**JUDGMENT**

1. This appeal emanates from the judgment delivered in **Kiambu Civil Case No.126 of 2014**. The suit had been brought by **Florence Wanjiru Kirubi** (the Respondent herein) against **Grace Wamue** (the Appellant herein), to recover damages in respect of injuries sustained by the former on 24<sup>th</sup> December 2011, following a road traffic accident along the Northern by-pass road. The accident involved the Respondent's vehicle **KBB 801 D** which she was driving at the time and the Appellant's vehicle **KAU 229 J**.

2. In her plaint, the Respondent had alleged that the latter vehicle was being driven negligently and at a high speed hence veered off its rightful lane and rammed into the Respondent's vehicle. The Appellant had denied negligence and liability in her defence. However, subsequently, the parties subsequently recorded a consent on liability in the ratio of 80:20 and the matter proceeded to assessment of damages.

3. In her judgment delivered on 12<sup>th</sup> March 2015 the trial magistrate awarded damages as follows:

General damages for pain and suffering KShs.1600,000/=

Damages for loss of earnings and earning capacity KShs.308,880

Future medical expenses KShs.800,000/=

Total KSh.3,786,455/=

Less 20% contributions = KShs.3,029,164/=

4. The Appellant, aggrieved with the outcome filed this appeal. In her grounds the Appellant attacks the award of damages in respect of pain and suffering and for loss of earnings and earning capacity, and complains that the former awards were inordinately high, while the latter were not proved, and that the trial court failed to consider the Appellant's submissions and authorities.

5. This court directed that the appeal proceeds by way of written submissions. Only the Appellant filed submissions. Referring to the evidence and submissions at the trial, the Appellant, reiterating authorities cited at the trial and citing other authorities, asserted that the trial court failed to apply relevant case law and principles and as a result arrived at wrong assessment of general damages. It was submitted that a sum of KShs.600,000/= would suffice as damages for pain and suffering. Regarding lost earnings and lost earning capacity the Appellant argued that the claim was not proved and ought to have been dismissed.

6. The court has considered the evidence adduced at the trial and submissions made by the respective parties then and by the Appellant on this appeal. That duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424**; **Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123**, **Williams Diamonds Limited v Brown (1970) EAI I**.

The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88 IKAR 278** stated that:

**“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”**

7. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by the Appellant. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30**.

8. It was held in that case that:

**“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”** see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) e KLR**.

9. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *“an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”*.

10. The sentiments of the English Court in **Lim Poh Choo v Health Authority (1978)1 ALL ER 332** were echoed by Potter JA in **Tayab v Kinany (1983) KLR14**, quoting dicta by Lord Morris Borth-y-Gest in **West (H) v Sheperd (1964) AC 326**, at page 345 as follows:

**“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”** (emphasis added).

11. There is no dispute that consequent to the accident, the Respondent sustained fractures to the right proximal tibia and the left distal femur. According to the Respondent’s uncontroverted evidence at the trial, she was admitted in hospital for 2 months while undergoing treatment. Implants were fixed in the fracture sites but twice removed due to recurrent bone infection and non-union of the fractured bones.

12. Three years after the accident, she was examined by Dr. Mwaura (PW2) who observed in his report that healing was incomplete. That her right leg had been shortened by 1.5 inches while there were prominent disfiguring scars on both legs. She was still walking with the aid of crutches and was in pain. The affected limbs were weak and incurred a permanent incapacity of 15%. The bone infection was recurrent. Dr. Mwaura’s report [Exh.7a) is consistent with an earlier medical report dated 30<sup>th</sup> October 2013 prepared by Dr. Bodo, a consultant orthopedic surgeon at the Aga Khan Hospital. The report describes the bone infection to the tibia, surgical scars on both legs from previous treatment, the stiffness in the left knee and the interventions made between 15<sup>th</sup> March 2012 and 31<sup>st</sup> January 2013, which included restorative surgery and repairs to the right knee and right tibia.

13. It seems that subsequent to these interventions, the bone infection recurred necessitating the second removal of the right tibia plate in January 2014. In her own evidence the Respondent also gave a detailed account of the injuries and subsequent complications leading to surgical interventions and long periods of physiotherapy. In her judgment, the trial magistrate noted that at the time of the hearing in September 2014, the Respondent walked with difficulty with the aid of crutches in addition to bearing large unsightly scars on the fracture sites.

14. The trial court further observed that;

**“The Plaintiff sustained very serious injuries. She is permanently incapacitated. I had... to look at her legs and what I saw was (not) very pleasant... Besides the Plaintiff is still walking with the aid of crutches 3 years after the accident... I also notice that after giving evidence she could not stand on her own. Her husband had to assist her to rise. Clearly her life had completely changed”**.

15. The court adverted to the submissions made and asserted to have also considered the authorities although no specific discussion is contained in the judgment, before settling on the award of general damages for pain and suffering.

16. For my part, I have looked at the Respondent’s authorities at the trial. Whereas it is impossible to find authorities with exact injuries and sequela with this or any other case, it is my view that the case of **Mary Nzomo v H.M Machakos Girls School and Others [2003] e KLR** and **Robson Ngowa Masha v Summit Cove Line Ltd and Another [2013] e KLR** reflected injuries comparable to those of the present Respondent. In that, they involved serious fractures to the femur and tibia. Indeed, in terms of the sequela and prognosis the Respondent in this case appears to have fared much worse than the plaintiffs in the said two cases. Ditto for the Appellant’s authorities. Though relevant, the case of **John Nyarangi Rasugu v Car and General (Automotive) Ltd and Another Nairobi HCC. No. 2531/1996** is fairly old. Moreover the plaintiff therein did not endure the same lengthy period of treatments and morbidity suffered by the present Respondent. Nor did the plaintiff in **David Kiplangat Sang v Richard Kipkoech Langat and Another KERICHO HCC 91 of 2004**, despite sustaining similar injuries and a permanent disability of 30%.

17. Thus, this court is not persuaded that an award of KSh.700,000 as urged by the Appellant would be adequate in this case. Reviewing all the relevant evidence on the injuries, suffering and permanent incapacity of the Respondent in this case, I am unable to accept that the sum of KShs.1,600,000/= awarded as damages was excessive. The court upholds the award.

18. Similarly, the award in respect of lost earnings and future earning capacity must be upheld. The Respondent had testified that she primarily was involved in running a business of selling second-hand clothes prior to the accident and was unable to carry on with the business during her morbidity. At the time of the trial she had not been able resume her business activities. Although she had claimed to have been earning KShs.100,000/= per month, she tendered no records or other evidence. The trial court in its judgment, noting the absence of business records, nevertheless proceeded to base its award on the minimum wage applicable i.e. KShs.8,580.00 per month for 3 years to arrive at an award for loss of earning capacity. However, the trial court appears in the final awards to have conflated the claim for lost earnings and lost earning capacity, which are different.

19. In **Butler v Butler (1984) KLR 225** the Court of Appeal stated:

**“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”**

20. From the statement made by the court in the body of the judgment, it seems that the court was considering loss of earning capacity rather than lost earnings. The trial court stated.

**“... No records were produced to prove how much the Plaintiff was making per month term of profit. In this regard I shall adopt the minimum wage which currently stands at 8,580.00. Though the Plaintiff is only 44 years I would assess the loss of earning capacity at 3 years.”**

21. In the circumstances of the case, the court was entitled to apply the minimum wage applicable in arriving at the award for loss of earning capacity, but only erred by including lost earnings which are a type of special damage, in its final award in the judgment. The award itself was quite moderate and this court finds no justification to interfere with it. In the result, the court finds no merit in the appeal, save to state that the award of KShs.308,880/= in the final award of the judgment ought to be properly an award for loss of earning capacity and not, both lost earnings and lost earning capacity as stated in the said judgment. The appeal is dismissed with costs, capped at half as the Respondent neither filed submissions nor attend court for directions.

**DELIVERED AND SIGNED AT KIAMBU THIS 6<sup>th</sup> DAY OF FEBRUARY 2020**

.....

**C. MEOLI**

**JUDGE**

**In the Presence of:**

Ms Wamaitha holding brief for Mr. Wambua for the Appellant

No appearance for the Respondent

Court Assistant - Ndege