REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 127 OF 2013

BERNARD MUTUNE MWENGEA.....APPELLANT

-VERSUS-

LOISE N. KITULU.....1ST RESPONDENT

THOMAS MUOKI.....2ND RESPONDENT

EVEREADY TRASNPORT (K) LTD.....3RDRESPONDENT

(Being an Appeal from the judgment and decree of Hon P.N. Gesora,

Senior Principal Magistrate delivered on the 18.6.2013

in Machakos CMCC 643 of 2003)

BETWEEN

LOISE N. KITULU.....PLAINTIFF

-VERSUS-

BERNARD MUTUNE MWENGEA.....1ST DEFENDANT

THOMAS MUOKI.....2ND DEFENDANT

EVEREADY TRANSPORT (K) LTD.....3RD DEFENDANT

JUDGEMENT

1. Vide a plaint in the trial court as amended on 2.4.2004 the suit arose out of a road traffic accident involving motor vehicle KAA 505N that was owned by the 1st respondent and KAA 422Q that was owned by the appellant and KAG 197B that was owned by the 3rd respondent. It was pleaded that on 18.5.2001 the appellant so recklessly drove and managed the vehicle KAA 422Q that he caused the same to obstruct the path of the 1st respondent's motor vehicle KAA 505N whereupon the 1st respondent's vehicle was hit by the 3rd respondent's motor vehicle KAG 197B and forced to smash into the rear of the appellant's motor vehicle and as a consequence the 1st respondent sustained serious injuries while her motor vehicle was extensively damaged. It was pleaded in the alternative that the 2nd respondent's driver drove the vehicle KAG 197B that the same was caused to ram into the rear of the 1st respondent's motor vehicle and as a result the 1st respondent was forced to ram into the rear of the appellant's vehicle whereas the 1st respondent sustained serious injuries and her vehicle was extensively damaged. The 1st respondent instituted Machakos CMCC 643 of 2003 where she attributed negligence to the appellant and the 2nd and 3rd respondents and she indicated that she sustained severe trauma to the lumbar sacral region, injury to the right hip joint and inability to walk. She also indicated that she suffered material damage of Kshs 538,841/. The 1st respondent sought special damages of Kshs 438, 589/-, medical care and surgery of Kshs 485,000/- and material damage of Kshs 538,841/- as well as and general damages, costs and interest. The parties recorded a consent of 15: 55:30 contributions by the 1st respondent, the appellant and the 2nd and 3rd respondents. The suit was set down for assessment of damages and vide undated judgement delivered on 18.6.2013 the trial court awarded Kshs 854,842/- general damages to the 1st respondent after deducting the contribution and Special damages of Kshs 649,476.25 thus prompting the instant appeal.

2. The appeal is solely on quantum and sets out the following five grounds:

I. ***The Learned Trial Magistrate erred in failing to take into account the evidence before him.***

II. ***The Learned Trial Magistrate erred in law and in fact in basing his decision on extraneous matters not relevant to the facts in issue.***

III. ***The Learned Trial Magistrate erred in assessing general damages that are grossly so high as to represent an erroneous estimate of the loss suffered.***

IV. ***The Learned Trial Magistrate erred in law and fact by awarding special damages which were not strictly proved as required by the law***

V. ***The Learned Trial Magistrate erred in law and fact in making an excessive award based on facts which were not pleaded and had no basis on the evidence tendered.***

3. The appellant's counsel prayed that the appeal be allowed and that the lower court's judgement on quantum be set aside and substituted with a commensurate award.

4. The parties agreed to canvass the appeal via written submissions which they filed and exchanged.

5. Learned counsel for the appellant vide submissions filed on 26.9.2019 submitted that the injuries suffered by the 1st respondent were not as severe as was painted by Dr. Susan Musyoka who was called by the respondent. Counsel invited the court to consider the case of Kiru **Tea Factory & Another v Peterson Waithaka Wanjohi (2008) eKLR,** where the court awarded Kshs 800,000/- as general damages for a plaintiff who suffered a degloving injury to the right hand with fracture of the radius and ulna bone; fracture of the right lilac bone in the pelvis and generalized pain over most of the chest.

6. According to counsel, the award of Kshs 2.2m/- was excessive and ought to be set aside and substituted with an award of not more than Kshs 500,000/- as general damages.

7. In reply, learned counsel for the 1st respondent submitted that the award of the trial court was not erroneous. Counsel cited the cases of **Ramadhan Kamora Dhadho v John Kariuki & Another (2017) eKLR and Pleasant View School Limited v Rose Mutheu Kithoi & Another (2017) eKLR** and urged the court to maintain the award of the trial court. There is no indication of any submissions filed by the 2nd and 3rd respondents.

8. This being an appeal against quantum, the role of the Appellate court in this regard was considered in the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** where the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages as laid down by the court of appeal in **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** where the grounds were that if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

9. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, *viz*;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.

d. Where awards in decided cases are to be taken into consideration then the issue if own element of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

10. The Appellant avers that the Learned Magistrate's award was ***extremely high***. He asked the court to review the evidence and facts on record and reduce the award.

11. The evidence in the trial court was as follows; **Pw1 was Loise Nzisa Kitulu** who testified that on the material day she was hit while in her motor vehicle and as a result she suffered injury where she was taken to Mater Hospital and treated by Prof Mbindyo but did not improve so she was treated at Nairobi Hospital by Dr. Musoke but did not get better and then went to America for further treatment in 2002 where she was treated and given a letter to go for treatment at Kikuyu Hospital. She testified that she was admitted at Nairobi Hospital in 2004 and her leg was cut and a metal inserted by Dr. Mutiso. She tendered in court the P3 form, the abstract, the treatment notes and records. She testified that the bill at Nairobi Hospital was Kshs 267,714 and other bills totaling to Kshs 491,616.25 as well as travelling expenses receipts that totaled Kshs 36,000/-; the same were objected to by counsel for the 2nd and 3rd respondents as they bore no revenue stamp. Pw1 tendered in court the medical report by Dr Musyoka and told the court that she cannot drive or work in her shamba. She also produced receipts of Kshs

96,060/- bearing a revenue stamp for expenses she incurred. On cross examination, she testified that she was hit from the back and that she was examined by Dr. Hicks. On re-examination, she told the court that at the time of the accident she was 70 years old.

12. **Pw2 was Jackson Mutua Kitulu**, Pw1's son and who testified that Pw1's vehicle was assessed at Integrated Motor Vehicle assessors where it was declared a write off and pre Road Traffic Accident Value was Kshs 400,000/-. He testified that the salvage was bought at Kshs 200,000/-. He testified that repairs were carried out at a cost of Kshs 238,000/- however he claimed Kshs 38,000/- only as he received Kshs 200,000/- from the insurer. On cross examination, he testified that he bought the salvage at Kshs 140,000/- not Kshs 200,000/-.

13. **Pw3 was Dr. Susan Musyoka** who testified that she examined Pw1 on 2.8.2007 with a history of a road accident and had been treated at Machakos General Hospital, Mater Hospital, Kikuyu Hospital, Nairobi Hospital and the USA. She testified that Pw1 was seen by Orthopedic Specialists like Prof Mbindyo and Dr Mutiso and the documentation noted that she could not walk without support. She testified that the diagnosis on the patient was post traumatic osteoarthritis involving the left hip and lower back. She testified that the Pw1 underwent total hip replacement surgery at Nairobi Hospital in 2004 and she was put on crutches and still was in pain. It was her testimony that when she saw Pw1, she was in pain and not able to walk or stand for a long time and movement of the hip was limited due to pain. It was her testimony that incapacity was assessed at 70% because she had lost use of her left lower hip. She told the court that she compiled her report dated 2.8.2007 and that she made the report seven years after the date of injury and further that more treatment was required. On cross examination, she testified that Pw1 had had an operation in the back in 1978 but she had not been complaining of back problems after the 1978 surgery. On reexamination, she testified that she relied on the reports from other hospitals and her examination of Pw1. That was the close of the 1st respondent's case and the appellant presented his case.

14. **Dw1 was Andrew Charles Hicks** who testified that he examined Pw1 on 8.2.2006 and he formed an opinion that she had sustained pain and suffering as a result of the accident. He testified that Pw1 sustained 15% permanent medical impairment as a result of the accident and tendered his report (Exh 1). On cross examination, he testified that the accident could have contributed to the hip replacement and that the 15% permanent medical impairment was based on the evidence presented to him. He was the only witness for the appellant.

15. I have analyzed the evidence that was adduced by the 1st respondent and the appellant as well as the submissions by their Advocates. The issues for determination as elicited from the appeal are:

1) Whether a case for disturbing the award by the trial court has been made

2) If yes, how much is the 1st respondent entitled to

16. The 1st respondent testified that she was involved in a road traffic accident and was injured. The trial court made a finding on liability at 15:55:30% that was after a consent was entered into by the parties.

17. On quantum, the 1st respondent pleaded that she suffered severe trauma to the lumbar sacral region, injury to the right hip joint and inability to walk.

18. According to the medical report from Machakos General Hospital dated 12.12.2001 by Dr. Kilonzo the medical superintendent, the 1st respondent was noted as having suffered grievous harm, severe back pain. Prof Mbindyo's findings are not on record. The 1st respondent is noted as having been seen by Dr. Vincent Mutiso, an orthopedic surgeon on 1.7.2004 and 30.7.2004 as well as by Dr. Musoke and it was noted vide report dated 13.7.2004 that the 1st respondent had pain and physiotherapy was recommended. The diagnosis of Dr. Susan Musyoka vide report dated 2.8.2007 was that the 1st respondent suffered 70% disability.

19. According to a medical report dated 8.2.2006 by Dr. Andrew Hicks, a consultant surgeon it was noted that the 1st respondent suffered 15% permanent medical impairment.

20. I had the benefit of going through the written submissions that were filed by the counsels of either parties as well as the authorities that were supplied therein.

21. The trial court had not noted that there were several medical reports on record. However, I note that there are several reports and some of them are prepared by specialists and others are prepared by persons not specialized in the area of injury that affected the 1st respondent. The trial court ought to have gone ahead to give an opinion that it formed in the light of the different reports and what report it believed and why it opted to believe one report over the other. However, the court seemed not to have indicated whether or not the appellant suffered permanent disability or indicated that the same was taken into account when giving an award of damages. The court however awarded general damages.

22. In this regard I make the following observations:-

a) All the reports on record agree that the 1st respondent suffered severe back pain.

b) The reports prepared in 2001 and 2004 give no assessment of permanent disability but the ones prepared in 2006 and 2007 did mention disability but one of them had no indication that the author was specialized in study of bones.

c) The reports were made based on observation on the 1st respondent immediately after the accident then after three years then 5 years then 6 years after the accident occurred.

d) The 1st respondent was able to attend court, testify and complained of pain. She complained that she could not sit properly or drive. There is no indication on the record of the trial court that the 1st respondent was wheeled into court. However, there is indication from the record that she was using crutches. Therefore, there is something to make this court to believe that the 1st respondent had difficulty in walking.

23. I am not satisfied that the 1st respondent had permanent disability to the degree assessed by Pw3. In **Kenyatta University v Isaac Kamma Nyuthe(2014) eKLR** for fracture of right femur, soft tissue injuries to head and bruises of right knee, and with a permanent incapacitation of 20%, the court on appeal reduced an award of Kshs.700,000/= to Kshs.350,000/= in 2014. In **Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok [2019] eKLR**, for occasional pains on the left thigh during the cold season, shortening of limb deformity, likelihood of developing early osteoarthritis of the left hip joint and knee joints, the court assessed permanent disability at 40% and set aside an award of 900,000/- to 600,000/- on appeal. In this regard bearing the fact that the medical reports were unchallenged, it is probably true that the 1st respondent had permanent disability but not to the degree assessed by Pw3. It emerged from the evidence of Pw3 that she was a daughter in law to the 1st respondent and hence the possibility of exaggerating the degree of injury was high. Further it is noted that Pw3 was a general practitioner and not an orthopedic surgeon. The 1st respondent did plead for what amounts to future medical expenses. However, her evidence did not lay any factual basis for grant of the same. The evidence that was led in court indicated that the 1 st respondent was a business woman and she told the court that she could not farm or drive; she did not plead loss of amenities. In loss of amenities, courts regard loss of the enjoyments of life: one that made several rounds to the market to pick vegetables for sale cannot do so anymore through loss of limb or health. It would be difficult to ascribe meaningful monetary value. However once loss is recognized, there is a duty and courts must compensate the victim. Nevertheless, as is with all such compensation, that, as Lord Devlin observed in **West v Shephard (1964) A.C. 326, 357**, the wrongdoer must be able to "hold up his head among his neighbours and say with their approval that he has done the fair thing." It is necessary that there be fairness on both sides and not a venture of unjust enrichment. With the available evidence on record, I am satisfied on a balance of probabilities that the 1st respondent has proved that she is entitled to loss of amenities. In totality, I find that an award of Kshs 2,200,000/- for pain and suffering and loss of amenities was rather high in the circumstances. As regards the issue of incapacitation I find the assessment by the appellant's doctor Andrew Hicks of 15% sounds reasonable. Suffice to add that the 1st respondent had already undergone surgery on her back way back in 1978 and this could have contributed to the degree of injuries. Again the 1st respondent admitted that she was aged 70 years at the time of the accident which then implied that she was advanced in age and hence the degree of injuries. Being guided by the above authorities I find an award of Kshs 700,000/ would be adequate as general damages to the 1st respondent herein for pain, suffering and loss of amenities.

24. As to the future medical expenses, it is trite law that the same ought to have been specifically pleaded as the same was in the nature of special damages. I find that the same was pleaded as Kshs 485,000/-. In **Simon Taveta v Mercy Mutitu Njeru [2014]** eKLR that placed reliance on the case of Kenya bus Services Ltd v Gituma, (2004) EA 91, the court stated:

"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".

25. I opine also that the future medical expenses also must be based on a foundation of solid facts. It is therefore important that evidence should be given to the court in form of solid facts as possible. One of the solid facts that must be proved to enable the court to assess the cost of the same was that the 1st respondent incurred the cost of physiotherapy as recommended by Dr Mutiso and Dr. Musoke and from the evidence on record the same is lacking. This would mean that the same could not be awarded.

26. The plaint claimed for special damages of Kshs 438,589/- and the court awarded a sum of Kshs 649,476.25 that is unexplained. However, as the amount is not disputed, I see no reason to disturb the same.

27. In the result the appellant's appeal succeeds to the extent that the trial court's judgement on the award of general damages is set aside and substituted with a sum of Kshs 700,000/. The special damages as well as the agreed ratios on liability shall remain undisturbed. Each party shall bear their costs of the appeal while the 1st respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 7th day of May, 2020.

D. K. Kemei

Judge