



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 353 OF 2018**

**CYNTHIA NELIMA KHAMUANU.....APPELLANT**

**VERSUS**

**PATRICK KABIRO GITAHI .....RESPONDENT**

**(Being an appeal from the judgment delivered on 12/6/2019 at the Chief Magistrate's Court in Milimani Commercial Court Nairobi by Hon. A.N. Makau (Ms) Principal Magistrate)**

**JUDGMENT**

This appeal arises from the judgment of the lower court delivered on 12<sup>th</sup> June, 2019. The appellant was injured in a road traffic accident that took place on 28<sup>th</sup> November, 2017 along Thika Road. In her plaint she pleaded that she was a pedestrian crossing the road at a Zebra crossing, when she was knocked down by motor vehicle registration No. KBH 255T registered in the name of the respondent, who was also driving the same at the time of the accident.

The appellant blamed the respondent for being negligent, careless and reckless in the way he drove the motor vehicle leading to the accident and subsequent injuries she suffered.

The respondent denied the appellant's claim in the statement of defence and attributed the accident to the negligence of the appellant. The respondent also pleaded that if the accident ever took place, it was entirely contributed to by the actions and/or omissions of the appellant.

After compliance with procedural steps before the commencement of the hearing, the parties agreed on liability whereupon the respondent would bear 80% and the appellant 20% contributory negligence. The parties then elected to file submissions on quantum.

After considering the submissions, the lower court made an award of Kshs. 600,000/= general damages which was then subjected to 20% contributory negligence on the part of the appellant leaving a balance of Kshs. 480,000/=. The trial court also made an award of Kshs. 3,600/= special damages which was also reduced by 20% leaving a balance of Kshs. 2,880/=. The appellant was aggrieved by the said judgment and filed this appeal.

In the Memorandum of Appeal dated 24<sup>th</sup> and filed on 26<sup>th</sup> June, 2019 the appellant faulted the lower court for failing to consider the injuries sustained as contained in the medical report and also the submissions on quantum. Further, the lower court was faulted for failing to consider conventional awards in similar cases.

As the first appellate court, it is my duty to consider and evaluate the evidence presented before the lower court in order to arrive at independent conclusions. Both parties have filed submissions and cited some authorities.

I observe from the outset that no oral evidence was presented before the trial court. However, the consent dated 12<sup>th</sup> and filed on 18<sup>th</sup> April, 2019 which apportioned liability, also included the fact that the appellant's witness statement and documents would be admitted as filed without calling the makers.

The appellant sustained injuries as contained in records from Kenyatta National Hospital and the medical report authored by Dr. W.M. Wokabi. Dr. Wokabi relied on the P3 form, X-ray request form and the discharge summary from Kenyatta National Hospital. It is his report therefore that should be the best guide in assisting the court.

The medical report dated 1<sup>st</sup> August, 2018 gave a history (by the appellant) of major chest injuries – fractured rib on the left side and left haemothorax (blood collection the chest cavity) – major pelvic injuries – fractures of the pelvis.

Upon examining the appellant, the doctor noted a scar on the outer aspect of the left chest wall where the chest tube had been inserted. There were no abnormalities on the pelvic region or both thighs. No x-rays had been availed.

The doctor questioned the appellant “directly” whether she had sustained a fracture of the femur who answered she had not sustained such a fracture. Dr. Wokabi’s opinion in his report is instructive. It reads in part as follows;

**“At her young age I expect her to make full recovery. Similarly the fractured pelvis healed after being treated conservatively. In the long term no permanent disability is to be anticipated.**

**I have noted that the P3 Form and the discharge summary speak of fracture of femur. There is no medical or clinical evidence that this fracture happened.”**

In her Judgment, the learned trial magistrate stated she had **“given due consideration to the rival submissions by the parties and the injuries the plaintiff sustained as reflected on the medical report”**. The court then went ahead to address the contents of the medical report and the cases cited by the parties before making the award on general damages. It is clear from the record that the trial court considered the medical report, submissions made and the authorities cited.

This court may not interfere with the awards made by the trial court unless the said awards are so inordinately high or low or based on wrong appreciation of applicable principles.

See **Kemfro Africa Limited & Another – V- A.M. Lubia & Another (1987) KLR 30, Butt –V- Khan (1982 – 1988)1 KAR 727**

Going by the submissions filed by the parties herein, I am not persuaded that the learned trial magistrate applied wrong principles or that the award of general damages was so low as to attract any intervention. Comparable injuries attract comparable awards and this, the trial court duly followed.

The learned trial magistrate also correctly declined the prayer for loss of earning capacity because, though pleaded, medical evidence discounted any permanent disability. Additionally, even though the appellant pleaded she was employed as a casual worker, and that she earned Kshs. 12,000/= per month, her list of documents fell short of evidence required to prove the same. There was no letter or payment voucher from any employer among the documents admitted by consent.

Upon reconsideration of the record and submissions filed, I find the appeal lacking in merit and therefore the same is dismissed.

Each party shall bear their own costs in this appeal.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of May, 2020.***

**A. MBOGHOLI MSAGHA**

**JUDGE**