



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.90 OF 2018**

**MONICAH WANGUI MUNDIA.....APPELLANT**

**VERSUS**

**SIMON NJUGUNA A.K.A**

**SIMON WANYOIKE NJUGUNA.....RESPONDENT**

*(Being an appeal from the judgment/decree of Hon. Yator (Senior Resident Magistrate, Molo Law Courts, delivered on 5<sup>th</sup> July, 2018.)*

**JUDGMENT**

**BACKGROUND**

1. This appeal arose from suit filed by the appellant in the lower court seeking the following prayers: -

- a. General damages for pain, suffering and/or loss of amenities.
- b. Damages for loss of income at kshs.15,000 per month (or any other sum) for six (6) months or such other period that this honorable court might deem fit.
- c. Damages for cost of future medication and or treatment.
- d. Damages for loss/diminution of future earning capacity.
- e. Special damages of kshs.16,600.
- f. Costs of the suit.
- g. Interest on above at court's rate.

2. Parties recorded consent on liability at the ratio of 10:90 in favor of the plaintiff. The trial magistrate assessed general damages at kshs.400,000 and special damages at kshs.16,600 plus cost and interest at costs rate. She declined to award damages for future medication and damages for loss/diminution of future earning capacity on ground that evidence was not tendered to prove future medical treatment and loss or diminished earning capacity is awarded as part of general damages. The appellant claimed loss of earnings for 6 months she alleged she was placed on bed rest and reduced earning capacity thereafter.

3. The appellant/plaintiff being aggrieved by the trial magistrate's determination filed this appeal on the following grounds: -

- i. That the learned trial magistrate erred in law and in fact by awarding general damages that were manifestly, obviously and so inordinately low and not in tandem/commensurate with the injuries that the Appellant suffered and materials on record.
- ii. That the learned trial magistrate erred in law and in fact by not awarding the Appellant herein damages for loss of income whereas the same were deserving in the circumstances of this case.

4. Parties agreed to proceed by way of written submissions.

**APPELLANT'S SUBMISSIONS**

5. The appellant submitted that this being the first appellate court and appeal being on quantum only, the court is bound to re-evaluate evidence adduced before the trial court and draw its own conclusion as was held in the case of **Coast Bus (Msa) Ltd v Harrison Kenga Hare [2017] eKLR**.

6. Appellant submitted that the trial magistrate did not give a careful, proper, and or exhaustive evaluation, analysis, comparison and or consideration of parties' submissions, authorities cited vis-a-vis injuries suffered by the appellant herein while reaching her said award of kshs.400,000 and failure to do so amounts to error in principle which entitles this court to interfere with the award as held in **Tononoka Rolling Mills Limited V Jackson Wambua Nzioki [2019] eKLR**.

7. That from the foregoing, the trial magistrate did not make comparison of authorities before reaching its award. Further that no sufficient reasons were given for award of kshs.400,000; that the award of kshs.400,000 is insufficient and inordinately low taking into account injuries suffered by the appellant which are pleaded in the plaint and proved in oral and documentary evidence; appellant urged court to note that the injuries suffered are not in dispute.

8. Appellant summarized the injuries as follows: -

- a. Fracture of pelvis.
- b. Commuted fracture of the clavicle.
- c. Soft tissue injuries of the left shoulder joint.
- d. Deep cut wound on the left hand.

9. And resulting complaints as hereunder

- a. Inability to wash clothes, do heavy duty and bend thereby making her unable to continue with her tailoring work.
- b. Permanent disability assessed by consent of parties at 5%.

10. Appellant submitted that the injuries that would attract an award of kshs.400,000 are in the region of soft tissue injuries and dislocation without any fracture. Appellant cited the case of **Carolyne Indasi Mwononyo Vs Kenya Bus Service Ltd [2012]** where the respondent suffered soft tissue injuries and dislocation of knee joint without any fracture or disability and the High Court in the year 2012 awarded kshs.350,000 in general damages and it goes without saying that an award in 2018 which is 6 years after the said decision the court would have probably awarded more than kshs.400,000. The appellant gave further examples where higher awards were granted in the years 2015 and 2017.

11. Appellant further submitted that in the submissions filed in the lower court, he relied on the case of **Julius Kiprotich Vs Eliud Mwangi Kihohia [200] eKLR** where the respondent had suffered fracture of the pelvis injury to the abdomen and a deep cut wound on the right parietal region and the High Court in its judgment delivered in the year 2006 awarded kshs.450,000 in damages under this limb. That the injuries suffered in this case are more serious than those suffered by the respondent in that case since she suffered fracture of clavicle in addition to fracture of the pelvis which occasioned permanent disability of 5%. Another authority relied on by the appellant is **Anthony Keriga Mogesi Vs Florence Nyomenda Tumbo [2015] eKLR** where the High Court awarded kshs.600,000 in the year 2015. The appellant also relied on the case of **Hussein Dairy Limited Vs Samuel Mokaya [2016] eKLR** where the High Court awarded kshs.800,000 where respondent suffered permanent disability of 5%.

12. On failure to award damages on loss of income, the appellant submitted that the same was pleaded at paragraph 6 and prayer B of the plaint and submissions thereto are found on page 44 of the record of appeal and appellant's evidence on the claim are found on page 38 line 23 of the record. Appellant quoted the said evidence in support of the claim by the respondent.

13. The appellant submitted that the trial magistrate in disregarding oral evidence of temporary incapacitation for 6 months and income of kshs.15,000 for tailoring as adduced by the appellant in court and cited the casebook on **Measure of Damages for Bodily Harm Injuries by Richard Kuloba** who stated that the primary source of information about injuries sustained by a person is by the victim himself; and urged court to note that the appellant's evidence on period of bedrest and income was not controverted during cross examination hence the same was credible.

14. Further in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko [2006] eKLR** the court held that a victim does not lose his remedy in damages merely because its quantification is difficult and production of certificates is not the only way to prove profession nor the production of documents the only way to prove accounts as that kind of view will do a lot of injustice to many Kenyans who are illiterate and do not keep records yet earn a living in various ways. Further, even in circumstances where court finds no documents but occupation of claimant is known, the court may result to minimum wage regulation.

15. The respondent submitted that it is not disputed that the appellant suffered fracture of the pelvis and left clavicle and award of kshs.400,000 is fair and justified and not manifestly low as alleged by the appellant; that it is in line with principle for assessing damages set out in the case of **Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd [2013]** where the court held that method approach for assessing general damages is that, comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar case.

16. The appellant submitted that the medical report by **Dr. Kiamba** which the appellant relied on contained exaggerated soft tissue injuries

that were not indicated in the initial treatment notes from Molo Sub District Hospital and urged this court to consider the treatment notes as the actual and true reflection of the injuries sustained in the accident.

17. Respondent further submitted that the trial magistrate considered evidence adduced together with rival submissions and competing awards of kshs.1,000,000 and kshs.300,000 by the appellant and respondent respectively and arrived at the impugned award of kshs.400,000; that the award of damages is discretionary exercise of the court and the appellant has not demonstrated any error/misdirection on part of the trial court in awarding kshs.400,000 save for submitting that it has a legal duty to give careful, proper, exhaustive evaluation analysis, comparison and or consideration of the materials before court.

18. Respondent submitted that the appellant has not met the threshold established by the court of appeal to warrant interference of an award for damages in the case of **Catholic Diocese of Kisumu Vs Sophia Achieng Tete Civil Appeal No.284 of 2001[2004] 2KLR 55** where the court stated as follows: -

**“It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at the first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some irrelevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

19. And in **Millicent Atieno Ochunyo Vs Katcla Richard [2012] eKLR** where the court held as follows: -

**“It is eminently desirable that so far as possible injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the plaintiff a just amount, so far as money can ever compensate, and entering a realms of very high awards, which can only in the end have a deleterious effect.”**

20. Respondent cited several authorities stating that injuries suffered are comparable and similar to this case where awards ranged from kshs.200,000 to kshs.950,000.

21. On failure to award damages for loss of earnings/income, the respondent submitted that the appellant failed to prove that she was a tailor earning kshs.15,000 monthly as the medical reports were clear that the fractures had united and healed and in her cross examination, the appellant was categorical that she was still working.

22. Respondent submitted that he fully associates himself with the trial court’s holding and cited the case of **Daniel Kosgei Ngelechei Vs Catholic Trustee Registered Diocese of Eldoret & another [2013] eKLR** where the court held that this award is in the nature of special damages and must be specifically proved; that the appellant did not produce any evidence to support her allegation of dealing in tailoring business and was earning kshs.15,000 as monthly income.

23. In respect to submission by appellant that minimum wage be applied where income is not proved, the respondent submitted that there was no prove that the appellant was dealing in tailoring business and urged court to uphold the decision of the trial magistrate.

24. On costs of appeal the respondent submitted that costs follow the event and added that the award of costs is a discretion of the court and urged this court to exercise its discretion in favour of the respondent by awarding costs of the appeal to the respondent and cited the case of **Joseph Oduor Anode Vs Kenya Red Cross Society, Nairobi High Court Civil Suit No.66 of 2009[2019] eKLR** where **Odunga J** held that court has discretion when awarding costs, but the discretion must be exercised judiciously.

25. The appellant filed submissions in response to the respondent’s submissions. On injuries suffered, the appellant submitted that the injuries contained in **Dr. Kiamba’s** medical report were captured in the initial treatment notes hence this court ought to consider injuries on the treatment notes only; further that the argument is not anchored in the appeal neither was a cross appeal filed by the respondent and the issue was not also raised in the trial court and cannot be raised at appellate stage. Appellant submitted that the respondent did not tender any evidence to controvert **Dr. Kiamba’s** medical report and **Dr. Kiamba’s** medical opinion cannot be impeached from the bar or through submissions.

26. Among authorities cited in support of the above is the case of **PMM (minor suing through the mother and next friend MNM v Family Bank Limited & another [2018]** where the court held that submissions cannot take the place of evidence and what appeared in submissions could not come to aid the 1<sup>st</sup> respondent who had failed to prove his case.

27. Appellant further submitted that the said injuries are contained in **Section B of the P3 form** and P3 form is relevant when it comes to determining injuries suffered by a victim of road accident as held in the case of **BB(a minor suing through his next friend and father GON) v Ragaie Kamau Kanja[2019] eKLR** where the court of appeal held that as follows: -

**“The trial court in evaluating the injuries sustained for purposes of ascertaining the general damages relied upon the P3 filled after the accident. The learned judge in his evaluation of the injuries sustained by the appellant focused on the medical report prepared by Dr. Kinuthia. The judge correctly discounted this report. However, the judge did not address his mind, as the trial magistrate did, to the injuries sustained by the appellant as disclosed in the P3 form. For these reason, we are satisfied that the judge erred in setting aside and reducing the general damages awarded because he, inter alia, did not take into account the P3 form which was a relevant document in assessing damages.”**

28. The appellant further submitted that the respondent has relied on authorities which were not relied on in the lower court and submitted

that a challenge to decision of a magistrate should be within the context it was dealt with by the trial magistrate and further the said authorities are distinguishable since they relate to injuries which are less severe, different and not comparable to those suffered by the appellant; and the respondent has not discredited and or faulted any authorities that the appellant relied on in the lower court.

29. On prove of occupation, the appellant submitted that it is now well settled that documents are not the only way to prove income or engagement as shown in the case of **John Kipkemoi & another v Morris Kedolo [2019] eKLR** among others where the court rejected contention that only documentary evidence can prove occupation or income. Further that the principle of law has now crystalized into law as provided in **Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013** which defines income and earnings as follows: -

**“Revenue gained from labour or services and includes the income or money received from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007 or the determination of income whichever is higher.”**

30. The appellant submitted that when it comes to calculating income, the court is mandated to first of all use documentary evidence if any and if none is available, the court to look at other forms of evidence including minimum wage regulation and or its own discretion to arrive at the same.

31. In conclusion, the appellant reiterated that the respondent did not tender any evidence in support of their defense or to controvert/challenge the appellant’s case and the appellant’s in this matter remain uncontroverted.

### **ANALYSIS AND DETERMINATION**

32. This being the first appellate court, I am guided by the decision in **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

**“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

33. This being appeal on quantum only I will reevaluate evidence adduced in the trial court in respect to injuries suffered by the appellant/plaintiff and authorities cited to establish whether the trial magistrate misapprehend evidence adduced and relied on the wrong principles.

34. I do agree with counsel for the appellant that in so doing I should deal with the matter in the context it was dealt with in the lower court. I will therefore look at evidence adduced in respect to injuries suffered and authorities cited to find whether the figure awarded is comparable to awards in cases with similar injuries.

35. Record show that **Dr. Kiamba** opined that the degree of injury suffered by plaintiff/appellant was grievous harm, had 3 months’ temporary disability and assessed permanent disability at 10% and minor deformity of the left clavicle. In his medical report he listed injuries sustained as follows: -

- a. Commuted fracture of the clavicle,
- b. Soft tissue injury of the left shoulder,
- c. Fracture of the pelvis, deep cut wound on the left hand.

36. At the time of examination, the appellant was in pain in the left collar bone and left shoulder joint and pain in the pelvis. I however note from the record that permanent disability was agreed at 5%.

37. On perusal of treatment record from Molo Sub District Hospital, I note that on 25<sup>th</sup> October, 2015, what was captured was pain on the left shoulder around the clavicle and inability to raise the arm, pain of the right leg around the thighs around the hip joint. X-ray showed fracture of the pelvis and clavicle. Diagnosis was fracture of pelvis and clavicle. These were injuries captured on the day of the injury.

38. The P3 form signed on 25<sup>th</sup> November, 2016, indicate deep cut wound, superior and inferior tenderness on pelvic region generalized. Part of treatment indicated include bedrest.

39. There is no doubt that the injuries captured by **Dr. Kiamba** were captured in the initial treatment notes and the P3 availed to the court by the appellant. I will therefore proceed to compare the injuries suffered by the appellant/plaintiff with injuries suffered by the victims in the cited cases to establish whether the award by the trial magistrate is comparable to wards granted in the said authorities.

40. I note that the appellant’s/plaintiff’s counsel proposed kshs.1,000,000 while the respondent’s/defendant’s counsel proposed kshs.300,000. I also note that awards in authorities cited by the respondent ranged between kshs.450,000 to kshs.1,000,000. I note that in the case of **Hussein Dairy Limited V Samwel Mokya [2016] eKLR** kshs.800,000 was awarded for chest contusion, deep cut wound on the right leg and fracture of pelvic bone; the injuries healed with no permanent disability. Apart from chest contusion the other injuries are similar to injuries suffered by appellant in this case. I also note that unlike the cited authority the appellant herein sustained permanent disability which

was assessed by the doctor at 10% but parties agreed to permanent disability at 5%.

41. In my view an award of kshs.400,000 was on the lower side and I find that an award of kshs.750,000 would be reasonable for the injuries suffered by the appellant.

42. In respect to earning for temporary disability for 6 months and loss of earning capacity, there is no doubt that the appellant failed to produce any document that she was a tailor and that she earned kshs.15,000 per month. I note from record that the appellant said she was a self-trained tailor. In cross examination she testified that she still did tailoring work with help. From record it is difficult to know whether the appellant engaged in tailoring work or not. She failed to prove her profession or earnings but even if she was not a tailor, she must have engaged in some activity to earn a living and in a case where there is no proof of profession like this one, minimum wage should be applied or a global award be granted especially in a case where a percentage for permanent disability has been agreed.

43. From the foregoing, I find that the trial magistrate erred in failing to award damages for loss of earning capacity to the appellant/plaintiff. In my view a global figure of kshs.250,000 is reasonable to compensate the plaintiff.

**FINAL ORDERS**

- 1. Appeal on quantum is allowed.**
- 2. The appellant is awarded kshs.750,000 as general damages for pain and suffering.**
- 3. Kshs.250,000 is awarded under loss of earning capacity.**
- 4. Special damages to remain at kshs.16,600.**
- 5. Total award to be subjected to 10% contribution as per consent recorded.**
- 6. Each party to bear own costs of appeal.**

**Judgment dated, signed and delivered via zoom at Nakuru this 7<sup>th</sup> day of May, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Mr. J. Ndungu Counsel for Appellant

No appearance for Counsel for Respondent