REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 33 OF 2018

BEATRICE WACHIRA..1ST APPELLANT

DAVID WACHIRA MAINA..2ND APPELLANT

VERSUS

ATTORNEY GENERAL..1ST RESPONDENT

DR. S.K. NJUKI...2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa, Chief Magistrate, delivered on 16 March 2018 in Eldoret CMCC No. 2648 of 1995)

JUDGMENT

[1] This appeal springs from **Eldoret Chief Magistrate's Civil Case No. 2648 of 1995: Beatrice Wachira & Another vs. Attorney General & Another**. The two appellants had sued the two respondents in that suit claiming general and special damages as well as interest and costs. Their cause of action was that on or about the **24 March 1986**, the 2nd respondent so negligently performed tubal ligation procedure on the 1st appellant that she thereafter conceived and developed complications leading to the death of the foetus. It was further averred in the Plaint that the 1st appellant had to undergo a caesarean section operation to remove the dead foetus.

[2] It was therefore the assertion of the appellants that, as a result of the negligence of the 2nd respondent, they suffered injury, loss and damage, including loss of her uterus. The appellants furnished the particulars of negligence, injuries and special damage at paragraphs 6 and 7 of their Plaint, and prayed for Judgment in their favour against the respondents. The 2nd respondent was, at all material times, a medical doctor by profession, and was in the employ of the Government of Kenya. Consequently, the 1st respondent was impleaded as the legal representative of the Government of Kenya.

[3] The record of the lower court's proceedings show that whereas a Memorandum of Appearance was entered on behalf of the two respondents on **19 July 1996** no Statement of Defence was ever filed by them or on their behalf. It is also manifest from the proceedings of **15 September 2011** and **10 November 2011** that, in the course of time, the 2nd respondent passed away; and that the matter proceeded only as against the 1st respondent. The record also reveals that the issue of liability was settled by consent on **30 October 2012** at 90:10 in favour of the appellants; and that the ensuing hearing, in which the appellants testified and called one other witness, was therefore limited to settling the issue of quantum. The 1st respondent opted to adduce no evidence.

[4] Upon considering the evidence presented before it by the two appellants, the lower court assessed the damages payable to the appellants at **Kshs. 500,000/=** less 10% contribution. Thus, Judgment was entered in the appellants' favour on **16 March 2018** in the sum of **Kshs. 450,000/=** together with interest and costs of the suit. Being aggrieved by that decision, the appellants filed this appeal on **6 April 2018** on the following grounds:

> **[a]** That the learned magistrate erred in law and fact in failing to take into account the gravity of the 2nd respondent's acts of negligence which led to the 1st appellant's loss, pain and suffering.
>
> **[b]** That the learned magistrate erred in law and fact in failing to appreciate the loss suffered by the appellants due to the 2nd respondent's negligence.

[c] That the learned magistrate erred in law and fact in failing to consider the treatment notes and treatment chits produced in court as evidence from both **Pacifica Hospital** and **Provincial General Hospital, Nakuru**, in proof of the severe injuries sustained by the 1st appellant; hence an erroneous judgment and/or award on damages.

[d] That the learned magistrate erred in law and fact in failing to consider the evidence adduced as to the injuries suffered as explained by **Dr. Lelei**, the treating doctor; hence an erroneous judgment.

[e] That the learned magistrate erred in law and fact by misdirecting himself on the award of damages which were on the lower side and did not reflect the injuries suffered by the 1st appellant hence an erroneous judgment.

[f] That the learned magistrate erred in law and fact in awarding the appellants **Kshs. 450,000/=** that is not sufficient compensation for the injuries suffered by the appellants considering the decided case law attached to the appellant's submissions in which **Kshs. 4,820,000/=** was awarded for a case of similar injuries.

[g] That the learned magistrate erred in law and fact in failing to apply and consider the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules.**

[h] That the learned magistrate erred in law and fact in applying wrong principles in assessing damages.

[i] That the learned magistrate erred in law and in fact in failing to hold that and/or take into account the fact that the appellants' evidence on the loss suffered was unrebutted by the respondents.

[j] That the learned magistrate erred in law and fact in failing to consider and evaluate and/or take into account the evidence adduced in court, the appellants' submissions and the authorities cited hence an erroneous judgment.

[k] That the learned magistrate erred in law and fact in holding that the appellants were only entitled to **Kshs. 450,000/=** against the weight of evidence on record.

[5] The appeal was urged by way of written submissions, which were filed herein on **2 September 2019** and **30 October 2019**, respectively, by learned counsel for the parties. Counsel for the appellant proposed two issues for determination, namely:

[a] whether the award by the lower court of **Kshs. 450,000/=** was proper and/or justified, taking into account the injuries and loss suffered by the appellants; and,

[b] whether there is any justification for this Court to alter the trial court's finding.

[6] Counsel for the appellants faulted the lower court's award basically on the ground that, in arriving at the sum of **Kshs. 450,000/=,** the learned trial magistrate failed to take into account the evidence of **Dr. Kibor Lelei** as to the nature of the injuries suffered by the 1st appellant; and thereby arrived at an extremely low sum. Counsel proposed that **Kshs. 5,000,000/=** would be reasonable in the circumstances and urged the Court to set aside the lower court's award and replace it with a reasonable sum, granted that the 1st appellant lost both her baby and her uterus.

[7] Counsel relied on **Butt vs. Khan** [1978] eKLR and **Migori HCCA No. 7 of 2015: Harun Muyoma Boge vs. Daniel Otieno Agulo** for a discussion of the applicable principles in matters of assessment of damages. He also cited **Hellen Karimana vs. PCEA Kikuyu Hospital** [2016] eKLR and **AAA vs. Registered Trustees, Aga Khan University Hospital, Nairobi** [2015] eKLR wherein an amount of **Kshs. 4,820,000/=** was awarded for pain, suffering and loss of amenities in similar circumstances of medical negligence and failed family planning method.

[8] On his part, counsel for the respondents proposed only one issue for determination, namely, whether the general damages awarded by the lower court was inordinately low in the circumstances. He urged the Court to note that in the case of **AAA vs. Registered Trustees, Aga Khan University Hospital** (supra) only **Kshs. 500,000/=** was awarded for pain, suffering and loss of amenities; the rest being the cost of maintaining the unwanted child. Accordingly, counsel defended the lower court's award and urged for the dismissal of this appeal.

[9] This is a first appeal, and therefore it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon. As was well explicated in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123:**

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[10] With the foregoing in mind, I have given careful consideration to the evidence placed before the lower court in the light of the appellant's pleadings. The 1st appellant testified on **6 December 2017** and adopted her witness statement dated **18 July 2014**. Her evidence was that between **24 March 1986** and **2 April 1986**, she was admitted at **Nakuru Provincial General Hospital** for the purpose of undergoing tubal ligation procedure. She explained that she decided to undergo the procedure because she had had three children through caesarian section. It was therefore the evidence of the 1st appellant that the operation was conducted by **Dr. S.K. Njuki**, a gynecologist then based at **Nakuru Provincial General Hospital.**

[11] It was further the testimony of the 1st appellant that, 8 years later, in **1994**, she developed bleeding complications and had to go to **Pacifica Hospital** in Eldoret for treatment; and that it was then that she was found to be pregnant. She was admitted at **Pacifica Hospital** for treatment between **17 July 1994** and **27 July 1994**, having been found to have developed complications that necessitated the removal of her uterus. She added that she got to learn that the tubal ligation had been negligently performed; and that one of her fallopian tubes was left intact, hence the pregnancy. She therefore blamed **Dr. Njuki** for her predicament. She produced her medical records as exhibits before the lower court.

[12] The 2nd appellant testified as **PW2** before the lower court. He likewise adopted his witness statement dated **18 July 2014**. He confirmed that the 1st appellant is his wife and that they had four children. He further confirmed that since all their children with the 1st appellant had been delivered through caesarian section, she took her to hospital for tubal ligation, which was done. He added that all was well until **1994** when the 1st appellant was found to be pregnant when she went to **Pacifica Hospital** for treatment. **PW2** confirmed that the foetus had to be removed along with the 1st appellant's uterus because of the ensuing complications. He also blamed **Dr. Njuki** for the expenses they had to incur on treatment as well as for the loss of the 1st appellant's uterus.

[13] **Dr. Kibor Lelei** testified before the lower court as **PW3**. He confirmed that he attended to the 1st appellant at **Pacifica Hospital;** and that he prepared a medical report in respect of her medical condition. He produced the report before the lower court as the **Plaintiff's Exhibit 3** and confirmed that the 1st appellant conceived 8 years after undergoing tubal ligation. **PW3** stated that the failure rate for such a procedure is minimal; and that the right fallopian tube was scanned and found to be patent.

[14] There is therefore no dispute that the appellants are husband and wife; or that they agreed as a couple that tubal ligation procedure be performed on the 1st appellant as a birth control measure. There is no dispute that the that procedure was undertaken at **Nakuru Provincial General Hospital** by **Dr. Njuki**, named as the 2nd respondent herein. Credible and uncontroverted evidence was adduced by the appellants before the lower court to demonstrate that, eight years after the procedure was performed, the 1st appellant developed complications, including excessive bleeding; and that when she was admitted at **Pacifica Hospital** in Eldoret, it was found out that she was pregnant.

[15] **Dr. Lelei's** report **(the Plaintiff's Exhibit 3)** shows that the appellant was at 36 weeks' gestation stage; and that ultra sound scan revealed that she had placenta *previa.* The report also shows that, given that the bleeding could not be arrested, the baby was delivered by caesarian section on **19 July 1994** but died shortly thereafter on the same day after developing respiratory distress. The report also mentions that the 1st appellant continued to bleed and had to undergo a second operation; and that it was then ascertained that the bleeding was due to fibrin clot formation in the uterus. It was then decided that the solution was sub-total hysterectomy (partial removal of the uterus); which was done. It is also manifest from the report that the 1st appellant responded well to the treatment after the operation and was discharged on **27 July 1994**.

[16] Given the foregoing uncontroverted evidence, the single issue for determination herein is whether the sum of **Kshs. 450,000/=** awarded by the lower court as general damages for the appellants' pain, suffering and loss of amenities was so low as to amount to an erroneous estimate of the appellant's loss. In approaching this issue, it is not lost on me that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. Hence, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages."** (Also see **Butt vs. Khan [1981] KLR 349)**

[17] Likewise, in **H. West & Son Ltd vs. Shepherd [1964] AC 326**, the viewpoint taken, which I find both instructive and persuasive, was that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[18] And in **Stanley Maore vs. Geoffrey Mwenda** [2004] eKLR, the Court of Appeal held that:

> **"…It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

[19] With the foregoing in mind, I have given careful consideration to the authorities cited herein by learned counsel. I note that, although **Hellen Kiramana vs. PCEA Kikuyu Hospital** (supra) was in respect of medical negligence, the plaintiff's grievance had nothing to do with negligence in connection with a birth control procedure. In that case, the plaintiff had a bilateral hip replacement which got loosened with time. It was later to be found that a wrong implant had been used by the defendant's doctors and that it had clear instructions reading "DO NOT IMPLANT". In the premises, the award of **Kshs. 4,473,851.18** made therein can hardly be a useful guide in this matter.

[20] As was aptly observed by **Hon. Waweru, J.** in **<u>AAA vs. Registered Trustees, Aga Khan University Hospital, Nairobi</u>** [2015] eKLR, there appears to be a dearth of precedents in this branch of the law, particularly on quantum. Here is what the learned Judge had to say:

> **"I started this judgment by saying that this is a unique case. Indeed Kenyan jurisprudence in this area is dearth. The closest case this court is aware of is a case I dealt with, ERO –vs- Board of Trustees Family Planning Association of Kenya, Nairobi HCC No 788 of 2000. It was a claim in negligence for a failed sterilization, just as the present one. I found for the Defendant on evidence; that evidence was that at the time of sterilization, conception appeared to have already taken place but could not be detected that early by the pre-sterilization tests then available. I never delved into the nitty-gritties of considering what damages were available and the quantum thereof…"**

[21] In appears, therefore, that the case of **<u>AAA vs. Registered Trustees, Aga Khan University Hospital, Nairobi</u>** (supra), is the most relevant of the two authorities on quantum that were cited by learned counsel. Briefly, its facts were that the plaintiff visited the defendant's family planning clinic for consultation on appropriate contraceptive method as she did not want to have any more children than the two they already had with her husband. She was advised that the insertion of an implant known as *implanon* would be the most suitable for her; and that it would protect her from conception for three years from the date of the implant. The plaintiff took the advice and the defendant's employees undertook the preferred procedure. She nevertheless conceived after about one year; and on investigation it was found out that no *implanon* was inserted in her arm at all; contrary to what she had been made to believe. The court held the defendant liable in negligence and awarded the plaintiff **Kshs. 500,000/=** for pain suffering and loss of amenities; and **Kshs. 4,320,000/=,** being the cost of raising and educating the child.

[22] On appeal, in **<u>A K H S T/A A K U H vs. A A A</u>** [2019] eKLR, which appeal was centered on the **Kshs. 4,320,000/=** component of the award, the Court of Appeal overturned the decision of the High Court in terms of costs of raising the child, taking the following view of the matter:

> **"…What the above decision shows is that the issue in this appeal is so multidimensional that the learned trial judge could not have possibly been right to dispose of the case before him only on the basis of the decisions in *Emeh v. Kensington AHA* (supra) and *Sherlock v. Stillwater Clinic* (supra), which he quoted at length before stating that there was no reason why the situation in Kenya should be different…We find considerable merit in the argument adopted in the majority of the decisions we have quoted above that deny costs of raising a normal and healthy child on the basis that it is at odds with the society's expectation as regards the duties of a parent, which are underpinned by Article 53(1)(e) of the Constitution and the additional challenge of assessing and putting a value or worth on the life of the child to the parents, relative to any loss or hardship that they may suffer in bringing up the child…"**

[23] It is instructive then, that the Court of Appeal upheld the **Kshs. 500,000/=** that the High Court awarded the plaintiff for pain, suffering and loss of amenities. Indeed, it held that:

> **"…we are persuaded that the award of Kshs 4,300,000.00 as costs of raising the respondent's baby was not justified. The award of pain and suffering, which is not subject of this appeal was properly awarded, and we would add, not the least due to the deplorable conduct of the appellant of misleading the respondent that it had implanted her with an *implanon* rod, which it had not. <u>Had the respondent cross-appealed for enhancement of the award for pain and suffering, we would not have hesitated to grant the same</u>. Due to the circumstances of this case, we direct each party to bear its own costs…"** (emphasis supplied)

[24] I also took into consideration the case of **<u>Clara Nzula Muli vs. Marie Stopes Kenya Limited & Another</u>** [2019] eKLR, which appears to be a lot more similar to the instant case. The claim arose from alleged medical negligence by the defendants in undertaking bilateral tubal ligation surgical procedure. It was the contention of the plaintiff that the procedure was so negligently and unprofessionally performed that the plaintiff's intestines were perforated in the process, causing her life threatening injuries as well as pain and suffering. She had to undergo corrective surgery to avert further harm. An award of **Kshs. 3,000,000/=** was made on **17 October 2019** as general damages for pain and suffering. It was held that:

> **"From the facts of this case, there is no doubt that the plaintiff suffered intense pain and inconvenience as a result of the complications that arose from the 2nd defendant's negligence. I find that the Hellen Kiramana case relied on by the plaintiff in support of her proposal on quantum cannot be a useful guide in the assessment of damages in this case as the plaintiff in that case as demonstrated by the summary of the case I have discussed earlier sustained completely different injuries from those sustained by the plaintiff in this case. Having taken all relevant factors into account and doing the best I can, I award the plaintiff general damages in the sum of Kshs. 3,000,000 to compensate her for the pain and suffering she must have endured following her post surgery complications."**

[25] In the instant matter, there can be no doubt that the 1st appellant suffered immense pain, suffering and loss. She had to undergo two surgeries, as a direct consequence of the negligent contraceptive procedure undertaken by the 2nd defendant. However, there were no post-operation complications experienced after the second surgery. More importantly, there was no question of child rearing costs, for the baby died at birth. Thus, while I would agree that the award of **Kshs. 500,000/=** as general damages for pain, suffering and loss of amenities was on the lower side, and therefore an erroneous estimate of the appellant's loss, the proposed sum of **Kshs. 5,000,000/=** by counsel for the appellant is plainly unreasonable. It is to be recalled that in **<u>Clara Nzula Muli vs. Marie Stopes Kenya Limited & Another (supra),</u>** for instance, in which **Kshs. 3,000,000/=** was awarded, there was negligent perforation of the plaintiff's intestines which presented unique complications after the procedure was performed.

[26] Guided by the aforementioned authorities, I would enhance the award for general damages for pain, suffering and loss of amenities to **Kshs. 1,500,000/= less 10% contribution.** I note that, although the appellants testified that they were put to expense in seeking corrective medical intervention at **Pacifica Hospital**, no special damages were claimed or proved before the lower court.

[27] In the result, the appeal succeeds and is hereby allowed with costs. The Judgment and Decree of the lower court are hereby set aside and substituted with Judgment in the appellant's favour against the 1st Respondent for **Kshs. 1,350,000/=** together with interest and costs; with interest being payable thereon from the date of the lower court's Judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE, 2020

OLGA SEWE

JUDGE