REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NO. 84 OF 2018

BETWEEN

JACINTA KENDI...1ST APPELLANT

MURITHI KIRINYI..2ND APPELLANT

VERSUS

ROSE KIMONDA CHEBOI..................................RESPONDENT

(Being an appeal from the original judgment and decree of Hon. B.J Bartoo, Resident Magistrate delivered on 5th July 2018 in Thika Civil Case No. 1305 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellants, being completely dissatisfied with the decision of the trial court aforementioned lodged this appeal on 3rd August 2018 seeking to have the appeal herein allowed with costs and that the trial court's decision be set aside and that this court be pleased to order that the judgment award was made against the weight of evidence. The Appeal is based on the grounds THAT:

> ***a) The learned magistrate erred in law and fact in failing to take into account the submission of the appellant in the lower court on the issue of quantum.***
>
> ***b) The learned magistrate erred in law and fact by awarding general damages that are inordinately high and manifestly excessive so as to amount to an erroneous estimate in the circumstances.***
>
> ***c) The learned magistrate erred in law and fact by making a decision on quantum that was against the weight of evidence.***
>
> ***d) The learned magistrate erred in law and fact by awarding damages for loss of amenities that were neither pleaded nor proved.***
>
> *e)* ***The learned magistrate erred in law and fact by taking into account irrelevant factors in awarding general damages.***

The Pleadings

2. The respondent filed a suit by way of a plaint in the lower court against the appellants by which she sought both general and special damages together with costs of the suit and interest on the same arising out of an accident that occurred at or about the 21st day of June, 2016 involving the respondent, who was a lawful pedestrian on the Thika superhighway; and the 1st appellant's motor vehicle registration number KCD 938V. The respondent claimed that the accident occurred on the pedestrian crossing at *Roasters* area, where the 2nd appellant, her servant and/or agent so negligently drove, managed and/or controlled the said motor vehicle that she caused it to hit the respondent resultantly inflicting severe injuries to her. The respondent stated that the accident was solely caused by the negligence of the appellants, their driver, servant and/or agent and she particularized the negligence in paragraph 6 in the plaint therein adding that she had sustained loss

and damage. The respondent stated that the 1st appellant was blamed for the accident and accordingly charged in **Milimani Law Courts, Traffic Case No. 14614 of 2016.**

3. The suit was defended by the appellants who filed a statement of defence dated 8th February 2017 denying the contents of the plaint therein and averred that if any accident at all occurred which was denied, then the blame went to the respondent for being negligent and solely causing and/or substantially contributing to the accident.

4. When the case came up for hearing, the parties consented on the issue of liability which was adopted by the trial court and entered in the ratio of 90%:10% in favour of the respondent as against the appellants. It was further consented *inter alia* that the assessment of damages be done by way of written documents and that parties be at liberty to attach supporting documents. At the conclusion of the trial, the learned trial magistrate entered judgment for the respondent against the appellants as follows:

General damages Kshs.1,200,000/-

Loss of earning capacity NIL

Loss of amenities Kshs. 300,000/-

Special damages Kshs. 55,959/-

Less 10% contribution Kshs. 155,595/-

Total Kshs.1,400,364/-

Costs of the suit and interest at court rates from the judgment date until payment in full.

5. It is the said judgment that gave rise to the instant appeal. Parties agreed that the appeal be canvassed by way of written submissions. The rival submissions are on record.

Duty to this Court

6. It is long established that, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis, only bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to: ***'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions**.'* This provision was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

> ***"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 *(unreported)."***

The appellants' submissions

7. The appellants submitted that having taken cognizance of the injuries suffered by the respondent, the amount awarded by the lower court was inordinately high and excessive. The appellants submitted that comparatively, there were many past authorities in which courts that awarded less sums for far more serious injuries than those suffered by the respondent. The appellants proposed a sum of Kshs. 450,000/- as being adequate under the head of general damages.

8. The appellants submitted that the trial court only took into account the medical report by Dr. A O Wandugu produced by the respondent and not that of Dr. P.M Wambugu produced by appellants, thereby leading to an erroneous award of damages. The appellants urged this honourable court to consider both medical reports in its decision.

9. The appellants further submitted that damages under the head of loss of amenities was unwarranted as that award was already made under the head of general damages for pain and suffering and therefore such separate awards amounts to double compensation.

10. In conclusion, the appellants contended that the damages awarded by the trial court were not fair and they invited this honourable court to re-evaluate the evidence tendered in the lower court and award fair compensation to both parties as the court may deem fit, fair and just.

The respondent's submissions

11. The respondent submitted that from her pleadings, she had sustained the following injuries as a result of the accident:

a) Fracture compound of the (L) left tibia/fibula – distal end

b) Multiple soft tissue injuries

c) Blood loss

12. The respondent further submitted that these findings of the injuries were by two doctors as shown by their medical reports which were produced and are on record adding that she sustained maiming injuries with resultant lifetime total permanent disability.

13. The respondent also submitted that the general method or approach for assessment of damages was that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. The respondent stated that the authorities relied upon in their submissions in the lower court were evidently best matched and comparable to her injuries and damages adding that her injuries were even more severe than those in some of those cases. It was the respondent's submission that the award of Kshs.1,200,000/- as general damages was proper and may be said to be modest compared to the severity of the respondent's injuries and age of the case law cited by parties. The respondent urged the court not only to uphold the same but find it fit to enhance the award.

14. On the head of loss of amenities, the respondent stated that the same was specifically pleaded as a separate head and that it is now trite that damages for loss of amenities can and may be awarded separately and independently from the award of general damages for pain and suffering and the same ought not necessarily be specifically pleaded. The respondent contended that she proved her claim for loss of amenities by the evidence of the medical reports which were not contested or controverted and which concluded that she suffered 50% permanent disability and permanent weakness on the left leg. The respondent added that the award of Kshs. 300,000/- was proper in that as a result of her disability, she has not enjoyed certain aspects of her life like walking without effort and the beauty of being healthy.

15. The respondent further submitted that the trial court rightly considered all the evidence on record in arriving at the decision and that this evidence was uncontested, uncontroverted and mutually adduced by parties.

16. The respondent urged this honourable court to uphold the finding of the trial court on quantum and dismiss the appeal with costs.

Issues for Determination

17. I have gone through the entire record and written submissions together with the authorities cited therein by both parties. From all the above, the only issue for determination is whether the learned trial magistrate applied the correct principles of law in awarding the quantum of damages to the respondent.

18. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, cited the case of ***Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** **at p. 730** where Kneller J.A. said:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be 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 damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."***
>
> ***The Court further makes reference to the case of Gicheru V Morton and Another (2005) 2 KLR 333 where the Court stated:***
>
> ***"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***
>
> See also ***Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.***
>
> ***The Court further references the venerable Madan, JA (as he then was), on the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims as follows in UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page 579:***
>
> ***"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."***

19. The Court of Appeal in ***Gicheru V Morton Case (above)*** goes on to hold that:

> ***"In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See JABANE*** **V OLENJA, (1986) KLR 1.**
>
> **In MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986** ***(unreported) Madan, JA again, aptly observed that***

"an award of general damages should not be <u>miserly</u>, it should not be <u>extravagant</u>, it should be realistic and satisfactory and therefore it must be a reasonable <u>award</u>."

…………………………

"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."

20. The respondent produced a medical report by one Dr. A.O Wandugu indicating that she sustained the following injuries:

a) Fracture compound of the (L) left tibia/fibula – distal end

b) Multiple soft tissue injuries

c) Blood loss

21. The appellants submitted that there is another medical report by one Dr. P.M Wambugu but after an exhaustive scrutiny of the record of appeal and original record of the trial court, I cannot find the said report. From the record of the trial court, the appellants only mention the purported medical report in their written submissions but then there is no evidence that the said report was ever produced or annexed to the submissions. The Court of Appeal, in the case of ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR*** held that submissions can never take the place of evidence and do not constitute evidence. The appellate court added that submissions are generally parties' *"marketing language"* with each side endeavouring to convince the court that its case is the better one. This position has been adopted by this court and restated severally that submissions do not form part of pleadings. A party cannot produce documents or introduce evidence through submissions because written submissions is not a mode of receiving evidence as set out under ***Order 18 rule 2 of the Civil Procedure Rules, 2010.***

22. It is therefore my finding that the respondent was able to plead and prove the injuries sustained as indicated in the medical report by Dr. A.O Wandugu and the discharge summary from Kenyatta National Hospital. This evidence was never rebutted or challenged and as such, it can only be said that the respondent sustained the injuries indicated therein.

23. Apart from the injuries aforementioned, Dr. A.O Wandugu, in his medical report stated *inter alia* that the respondent's injuries resulted in permanent weakness of the left leg which was going to be progressive due to the limp and that functional disability was estimated at about 50%. Dr. Wandugu added that the respondent had surgical devices still in place and removal will lead to more pain and scar formation with the estimated cost of removal with supportive medical attention being a minimum of Kshs. 250,000/-. In ***Simon Taveta v Mercy Mutitu Njeru civil Appeal 26 of 2013 [2014] eKLR*** the Court of Appeal observed thus:

"The context in which the compensation for the respondent must be evaluated is determined by the <u>nature and extent of injuries</u> and <u>comparable awards made in the past."</u>

24. It follows from the above that I go through the heads of general damages-pain and suffering and; loss of amenities that were disputed by the appellants and determine whether the trial court awarded the said damages based on the nature and extent of injuries suffered by the respondent and comparable awards made in the past and whether the same were reasonable in the circumstances.

<u>General Damages – Pain and Suffering</u>

25. In ***Ntulele Estate Transporters Ltd & another v Patrick Omutanyi Mukolwe [2014] eKLR*** the respondent suffered a crush injury to the left leg which had led to the amputation together with a cut on the forehead, face and blunt injury to the left eye. There were other injuries to the right fore arm, right knee and foot and left shoulder. Permanent incapacity was assessed at 50% and 60% respectively. The court upheld the award of Kshs. 1,800,000/-

26. In ***James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR*** the plaintiff sustained a fracture of the left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula and incapacity was assessed at 10% which would be for about 3 years 3 months. The Court awarded Kshs. 1,500,000/-

27. In ***Cold Car Hire and Tours Limited & 2 others v Elizabeth Wambui Matheri [2015] eKLR*** the respondent suffered comminuted fracture of the right acetabulum and dislocation of the right hip joint resulting in total hip replacement. Permanent disability was assessed at 35%. The court upheld the award of Kshs. 1,400,000/-.

28. In ***Humphrey Okumu Odondi v Imperial Driving School [2018] eKLR*** the appellant suffered serious injury to his right leg leading to amputation between the knee. The effect of the injury was that the appellant lost part of his leg and could no longer walk without the help of crutches or an artificial leg. He was fitted with an artificial leg to assist him in walking. Permanent disability was assessed between 50% to 60%. The court upheld the award of Kshs. 1,200,000/-.

29. In ***SBI International Holdings (AG) Kenya v William Ambuga Ongeri [2018] eKLR*** the respondent suffered chronic dislocation of the left hip and a fracture of the femoral head, as well as bruises on the right thigh. His leg was, as a result significantly shortened due to bone loss, and he had permanent disability assessed at 40% -45%. The court upheld the award of Kshs. 800,000/-.

30. In the instant case, considering the injuries suffered by the respondent, the opinion in the medical report of Dr. Wandugu that the respondent was pained in the affected leg and her mobility was negatively affected and taking into account the authorities cited above, it is my considered view that the award of Kshs. 1,200,000/- by the trial court was sound and judicious in the circumstances. The same was neither inordinately too high nor too low as to warrant this court's interference. The said award is hereby upheld.

Loss of amenities

31. In ***Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR*** D.S Majanja J held that:

> ***"14. Before I conclude my finding on general damages, I need to consider the complaint by the appellant that the trial magistrate erred in law in making a separate award for loss of amenities. In Mwaura Muiruri v Suera Flowers and Another (Supra), the learned Judge expressed the view that:***
>
> ***[12] Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of his life as a result of the accident are diminished. Essentially the quality of life of the Plaintiff is reduced due to the inability to do the things he would otherwise have done had it not been for the injuries.***
>
> ***He relied on a passage in Halsbury's Laws of England (4th Ed, Vol. 12(1)) at Page 348-***
>
> ***884. Loss of amenities -***
>
> ***In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it.***
>
> ***15. The decision by Emukule J., in making of a separate award for loss of amenities runs against the grain of precedent and practice in this country where a single award of general damages is made to compensate the injured party for pain, suffering and loss of amenities. I would adopt the sentiments given by Kamau J., in Peninah Mboje Mwabili v Kenya Power and Lighting Co., Ltd VOI HCCC No. 2 of 2015 [2016] eKLR where she explained that:***
>
> ***[25] General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages.***
>
> ***[26] A claim for loss of amenities is thus encompassed and/or is included in a claim general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.***
>
> ***16. Having reached the conclusion that the award for loss of amenities is not tenable…"***

32. I am in agreement with the aforementioned persuasive decisions that our jurisprudence has always held '**loss of amenities'** as being part of the **"General Damages"** head together with **'pain and suffering'**. (Also see the Court of Appeal in ***Mariga v Musila [1984] eKLR,*** Hancox JA, Chesoni & Nyarangi Ag JJA).

33. I must therefore find and hold that making an award under a separate head of '**loss of amenities'** when one has been made under '**pain and suffering'** amounts to double compensation and goes against the widely accepted principle of awarding of general damages. I am thus in agreement with the appellants that the learned trial magistrate erred in awarding Kshs. 300,000/- under the head of '**loss of amenities'** when an award had already been made under general damages for '**pain and suffering'**.

Conclusion and Disposition

34. In conclusion, it is my finding that the trial court applied the correct principles and took into account relevant factors in awarding the sum of Kshs. 1,200,000/- as general damages for pain and suffering. The said sum was reasonable, sound and judicious in the circumstances and was commensurate with the injuries sustained by the respondent and comparable awards made in the past.

35. However, I find that the trial court's award of Kshs. 300,000/- under the head of '**loss of amenities'** was based on the wrong principle and went against jurisprudence, practice and precedent. This award amounted to double compensation and ought not to have been awarded when an award under the head of '**general damages for pain and suffering'** had been awarded.

36. In the result, this appeal partly succeeds with regard to ground 4 of Appeal. The lower court judgment is hereby set aside and substituted with the following:

General damages Kshs.1,200,000/-

Special damages Kshs. 55,959/-

Future Medical Expenses Kshs.   250,000/-

Less 10% contribution   Kshs.   150,596/-

Total   Kshs.1,355,363/-

Costs of the suit and interest at court rates from the judgment date until payment in full.

37. The respondent shall get 1/5 of the costs of this appeal.

38. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this **11th** day of **June, 2020**

CHRISTINE W.MEOLI

JUDGE