



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 36 OF 2019**

**BETWEEN**

**MARY WAMBUI MUNGAI .....APPELLANT**

**AND**

**ANTONY GITHINJI KIHUGA .....RESPONDENT**

**(Being an appeal from the original judgment and decree of Hon. M Ochieng, Senior Resident Magistrate delivered on 7<sup>th</sup> February 2019 in Githunguri Civil Case No. 72 of 2017)**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**The Appeal**

1. The appellant, having been dissatisfied with the decision of the trial court aforementioned lodged this appeal on 5<sup>th</sup> March 2019 based on grounds THAT:

***a) The learned magistrate erred in law and in fact in failing to appreciate the principles available for consideration in awarding general damages which led to an erroneous assessment of the damages resulting in an award of damages so inordinately low as to represent an entirely erroneous estimate of the compensation to which the appellant was entitled.***

***b) The learned magistrate erred in law and fact in failing to give proper consideration to the appellant's submissions and cited authorities on the quantum of damages.***

***c) The learned magistrate erred in law and fact in failing to appreciate that there were essential differences in degree between the injuries in the cases she relied on and those in the instant case, the appellant's injuries being much more severe.***

***d) The learned magistrate erred in law and in fact in awarding the appellant general damages of Kshs. 500,000/- an amount that is manifestly low considering the very serious nature of the injuries sustained by the appellant.***

***e) The learned magistrate erred in law and in fact in declining to award the appellant damages for lost income/employment and or diminished earning capacity despite the appellant having sustained injuries that led to 20% permanent incapacity.***

***f) The learned magistrate erred in law and in fact in departing from case law precedent binding upon the magistrate's court as relate to the award of general damages.***

**Pleadings**

2. The appellant had filed a suit by way of a plaint dated 25<sup>th</sup> July 2017 in the lower court against the respondent where she sought general and special damages, damages for lost income/employment and/or diminished earning capacity, for future medical expenses and reconstructive surgery, together with costs and interest of the suit. The suit arose out of an accident that occurred on or about the 22<sup>nd</sup> day of September, 2016 involving the respondent's motor vehicle registration number KBP 031M and motor vehicle registration number KAL

901A in which the appellant was allegedly a lawful passenger in. The appellant claimed that on the material day along Kwa Maiko-Kiambu Road, the respondent/ his driver agent and/or servant so carelessly, recklessly and/or negligently without due care and attention to other road users more so the appellant drove, managed or otherwise controlled the said motor vehicle registration number KBP 031M causing it to ram into motor vehicle registration number KAL 901A. The appellant stated that as a result of the said accident, she sustained serious injuries and suffered pain and loss which she particularized in paragraphs 5 and 8 of the plaint therein. The appellant further blamed the respondent/ his driver, agent and/or servant for gross negligence and stated that the respondent was vicariously liable for the accident.

3. The suit was defended by the respondent who filed a statement of defence dated 10<sup>th</sup> October 2017 denying much of the contents of the plaint therein. In the alternative, the respondent blamed the appellant for being negligent and for solely causing and/or substantially contributing to the accident.

4. The suit proceeded to a full hearing during which a consent on liability was entered between the parties and adopted by the trial court in the ratio of 90:10 in favour of the appellant. At the conclusion of the trial the learned trial magistrate entered judgment for the appellant against the respondent on quantum of damages as follows:

*General damages Kshs. 500,000.00/-*

*Future Medical expenses Kshs. 550,000.00/-*

*Special damages Kshs. 683,300.00/-*

*Less 20% contributory*

*negligence Kshs. 173,330.00/-*

*Total Kshs. 1,559,970.00/-*

*Costs and interest of the suit at court rates*

5. The appellant was less than pleased with the said judgment, hence this appeal which proceeded by way of written submissions.

#### **Duty of this Court**

6. 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 save to remember that it did not have an opportunity to 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.*’ The importance of 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 reevaluate 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 appellant’s submissions**

7. The appellant submitted that the trial court fell into error on the issue of the general damages awarded and the trial court’s refusal to award the appellant damages for lost income/employment and or diminished earning capacity despite the appellant having sustained injuries that led to 20% permanent incapacity. The appellant submitted that by the learned trial magistrate stating in her judgment that the authorities relied on by the respondent were more comparable to this case than those the appellant had referred the trial court to, she failed to take into consideration the fact that the cases cited by the respondent related to rather old cases dating back to the year 2004. The appellant added that the prevailing economic conditions could not be compared to what they were in the year 2004 and in directing herself to such cases so as to determine the quantum of damages, the learned trial magistrate indeed acted on wrong principles which led to an award of Kshs. 500,000/- that was so inordinately low thus resulting to a wrong assessment of the damages payable.

8. The appellant further submitted that damages are awarded for physical as well as mental distress caused to an accident victim both pre-trial and in the future as a result of the injuries sustained. The appellant submitted that the learned trial magistrate failed to take into consideration the fact that she still suffers pain to date and that when she sleeps on one side she is unable to get up in good condition. The appellant added that after the accident, she was hospitalized for 12 days and had to undergo a medical procedure of fitting metal implants which confined her to a wheel chair for three months and that even after removal of the plaster cast, she had to use crutches in addition to suffering great discomfort during that period.

9. The appellant submitted that nowhere in the trial court’s assessment of damages did the magistrate refer to the fact that she would have to undergo future surgery to remove the metal implants which would result in further suffering to the appellant because of the accident.

10. The appellant added that the trial court ought not to have considered the authorities cited by the respondent. She urged this court to interfere with the award of damages made by the trial court as the same was inordinately low and represented an entirely erroneous estimate of compensation to the appellant and proceed to award what the appellant had submitted before the trial court.

11. The appellant further submitted that the learned trial magistrate erred in principle by stating that the claim for lost income/employment and or diminished earning capacity must fail as the appellant did not adduce evidence of any real assessable loss of income and that this error occasioned an injustice to her as it denied her an award on damages that she was entitled to. The appellant stated that she adduced viva voce evidence to show loss of income and or diminished earning capacity and thus the proper principle which the learned trial magistrate should have directed herself to was to take the relevant factors of the case into account in order to ascertain the real or approximate financial loss that the plaintiff suffered because prior to the accident she was employed as an accountant and as a result of the injuries she could not go to work for some time and lost income for the period she was recovering as it exceeded her sick leave days and that indeed she did testify to that fact.

12. The appellant also submitted that the learned trial magistrate erred in principle by stating in her judgment that she was still employed as an accountant during the hearing as a basis for dismissing the appellant's claim for damages for diminished earning capacity. The appellant stated that though she was still employed as an accountant however the justification for the award of diminished earning capacity was to compensate her for the risk that the injuries she sustained exposed her to either losing her job in future or in case she loses her job due to the injuries sustained, her diminution of chances of getting an alternative job in the labour market. The appellant submitted that she was at risk of losing her job as an accountant because her job required her to sit down most of the time, but her injuries, forced her to stand up and do exercises and that she is only still employed because of her employer's empathy. She said she was apprehensive that her employer might be fed up and terminate her employment contract altogether. The appellant added that if she was to lose her job, chances of getting an alternative job in the labour market would also be greatly diminished as a result of her injuries and the assessed 20% permanent disability which was not disputed.

### **The respondent's submissions**

13. The respondent submitted that the trial court was right in pointing out that the cases that the appellant relied on were irrelevant because they involved severer injuries as compared to the present case and that they did not conform to the established principle that similar injuries attract similar damages. The respondent stated that the injuries he had cited, though not so similar were comparable to the present case. The respondent urged the court not to interfere with the judgment of the trial court as the learned trial magistrate guided herself properly in awarding the damages.

14. The respondent further submitted that the appellant should not be awarded interest because through her advocate, she returned the cheques that he had drawn and sent to her advocate.

15. The respondent prayed that the appeal be dismissed for want of merit.

### **Issues for Determination**

16. After perusing the record, the grounds of appeal, the judgment of the trial court as well as the law, the issues for determination are as follows:-

**a) Whether the trial court erred in awarding the appellant Kshs. 500,000/- for general damages.**

**b) Whether the trial court erred in refusing to award the appellant under the heads of loss of income and loss of future earning capacity.**

### **Analysis and Determination**

17. 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 that 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 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.”*

18. The Court of Appeal in the case of *Gicheru V Morton and Another (2005) 2 KLR 333(supra)* 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 miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award.”*

.....

*“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.”*

**Whether the trial court erred in awarding the appellant Kshs. 500,000/- for general damages**

19. The appellant, who testified as PW1 stated that she suffered injuries as a result of the accident and still had implants on both her legs which were to be removed after a year but by the time of giving her testimony, it had been two years and the same had not been removed. The appellant stated that the injuries affected her as she no longer sat down for long so she had to stand up and do some exercises. The appellant further stated she was still in pain and that if she slept on one side, she was unable to get up in good condition

20. **Dr. George Kungu Mwaura** testified as PW2 and produced a medical report (*Pexhibit 59b*) stating that the appellant had sustained the following injuries as a result of the accident:

**i. Cut wound – above right eye**

**ii. Cut wound – right elbow**

**iii. Segmental fracture – left femur**

**iv. Fracture – right femur**

21. Dr Mwaura stated that his findings indicated that the appellant’s healing was incomplete, had a limping gait, was on crutches, could not stand or walk for a long time, sustained grievous harm injuries and that there were scars above right eye and right elbow and both thighs. Dr Mwaura assessed the appellant’s degree of permanent incapacity at 20%: 5% on the right leg and 15% on the left leg. Dr Mwaura added that his assessment on the permanent incapacity was done over a year since the accident occurred and he considered the pain and inability to walk and stand which he said could persist to a certain extent. Dr. Mwaura stated that the fracture would unite but would still leave some discomfort and added that by undergoing the procedure for removal of the metal implants, the appellant would experience pain.

22. The appellant’s evidence on the injuries sustained remained largely uncontroverted and I take it that these were the injuries sustained by her as a result of the accident.

23. 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 nature and extent of injuries and comparable awards made in the past.”*

24. In *SBI International Holdings (AG) Kenya v William Ambuga Ongeru [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. Due to a mis-diagnosis at the Kericho District Hospital which led to his seeking proper treatment too late, the open reduction at the Tenwek Hospital failed. His leg was therefore significantly shortened due to bone loss, and he had permanent disability assessed at 40% -45%. The court held that the amount of **Kshs. 800,000/-** awarded by the trial court was proper

25. In *Mwavita Jonathan v Silvia Onunga [2017] eKLR* the respondent sustained a fracture at the hip joint which corrective surgery involved insertion of surgical plantings and screws. The other injuries she sustained were in the nature of soft tissue injuries. The latest examination revealed malunion of the joint at the fracture point leaving her to walk with crutches and pain. Permanent incapacity was assessed at 85%. The court substituted the trial court’s award of Kshs. 1,000,000/- with **Kshs. 400,000/-**.

26. In *James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & another [2015] eKLR* the injuries sustained by the plaintiff were fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula and treatment by immobilization of the left upper limb and right lower limb and operating and plating of tibia bone fracture of right leg and immobilized with an external fixator and recommended the removal of dead bit bones from right tibia as infection had occurred. the plaintiff's incapacity was 10% and that his temporary incapacity would be for about 3 years 3 months. The court awarded general damages of **Kshs. 1,500,000/-**

27. In *P W v Peter Muriithi Ngari [2017] eKLR* the plaintiff (a minor) sustained multiple fractures (A fractured left femur which was operated on and fixed with a metallic plate, Fractures of the left fibula and tibia malleoli which were operated on and fixed with K-wires and plates), Blunt injuries to the pelvis causing fractures of the pelvis, 20% permanent disability, urine incontinence and required future operations to remove metals. The court held that the award of Kshs.600,000/- was far below comparable awards for comparable injuries and substituted the same with an award of **Kshs. 1,600,000/-**

28. In *Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok [2019] eKLR* the respondent suffered a Fracture of the left femur, Cut wound on left forearm, was walking with limping gait, shortening of leg, Permanent incapacity ascertained at 7%. The Court set aside the award of Kshs. 600,000/- and substituted it with an award of **Kshs. 480,000/-**.

29. In *NBI HCCA No.193/2012 Kenyatta University –vs- Isaac Kamma Nyuthe(2014)eKLR* for fracture of the 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.

30. In the instant case, considering the injuries suffered by the appellant and the awards cited above, it is my opinion that the trial court's award of Kshs.500,000/- was on the lower side. I note that the injuries sustained in *NBI HCCA No.193/2012 Kenyatta University –vs- Isaac Kamma Nyuthe (supra, Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok (supra) and Mwavita Jonathan v Silivia Onunga [2017] eKLR(supra)* involved fractures on one side of the leg/hip. These are distinguishable from the instant case as the appellant sustained fractures on both legs. Additionally, the evidence revealed that she continued to be in lots of pain and discomfort two years after the accident and was to continue until the metal plates were removed.

31. In the foregoing, I find it necessary to interfere with the trial courts award of Kshs.500,000/- by setting it aside and substituting it with an award of Kshs.700,000/- under the head of general damages.

**Whether the trial court erred in refusing to award the appellant under the heads of loss of income and loss of future earning capacity**

32. In *Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR*, the Court of Appeal held that:

***“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”***

33. Similarly, in the case of *Douglas Kalafa Ombeva v David Ngama [2013] eKLR*, the Court of Appeal held that:

***“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”***

34. The Court of Appeal in *S J v FrancESCO Di Nello & another [2015] eKLR* held that:

***“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.***

***This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40 at pg 14 wherein Lord Denning M. R. said in part as follows:***

***“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.***

***Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”***

35. From the above cited authorities, loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages whereas loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. That being the case, I note from the record and more specifically the pleadings, that the respondent prayed for “damages for lost income/employment and/or diminished earning capacity. “In her evidence and submissions, the appellant conceded that she never lost employment after the accident meaning she continued to earn a salary from her employer. The appellant also stated that she was in hospital for 12 days and her discharge summary from Nairobi South Hospital(*PExhibit8*) indicated that she was given a sick-off for six weeks. The appellant submitted that this period was beyond her sick leave days and testified that she lost income during this period but there

is no evidence on record to that effect and note that the appellant testified to no such thing either. In the absence of evidence that the appellant lost income during this period or any period after the accident occurred, I am in agreement with the learned trial magistrate's finding that the appellant never lost any income or employment as a result of the accident and this claim by the appellant must fail for want of proof.

36. On loss of earning capacity, the appellant was apprehensive that her injuries exposed her to either losing her job in future or in case she loses her job, her diminution of chances of getting an alternative job in the labour market. From the evidence, the appellant is an accountant and in my understanding of professions, accountancy just like most professional occupations require mental/intellectual skill rather than physical skill and heavy lifting. The evidence of Dr. Mwaura and that of the appellant herself did not suggest that she had suffered mental injuries that negatively affected her intellectual skillset and mental capacity as an accountant. If the appellant is a smart and skilled accountant, I do not think that her physical appearance will really matter or lower her chances of employment in the future if she was to lose her current job. I find her apprehension to be misguided and overstated. This claim must also fail as it lacks merit.

### **Conclusion and Disposition**

37. In conclusion, it is my finding that the trial court's award of Kshs. 500,000/- for general damages was inordinately low compared to the injuries sustained by the appellant and comparable awards made in the past. The same is set aside and substituted with an award of Kshs. 700,000/-.

38. Apart from the above, I confirm the other awards made by the learned trial court.

39. On costs and interest, since the appeal partly succeeds, the appellant shall have half the costs of this appeal and the interest on the award of Kshs.700,000/-awarded by this court shall be computed from the date of judgment of the trial court until payment in full.

40. Orders accordingly.

Judgment written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

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

**HON.LADY JUSTICE.CHRISTINE W. MEOLI**

**JUDGE**