



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 59 OF 2016

PENINA WAITHIRA KABURU.....APPELLANT

VERSUS

LP RESPONDENT

(An appeal from the judgment of the Hon. Mr. J.N. Onyiego (C.M., as he then was) dated 9th November, 2016 in the Nyeri Chief Magistrates' Court Civil Case No. 260 of 2015)

JUDGMENT

On the 23rd day of November, 2014, at about midday, the respondent was walking along a pavement next to a commercial building off Kamukunji road in Nyeri town when the appellant's vehicle, registered as number KBY 522 P, hit him; it would appear that the vehicle which was being driven at the time by the appellant herself drove on to the pavement and hit the appellant. He was smashed against a metallic door of a retail kiosk standing on or near the pavement. With the help of passersby, the respondent wriggled out but not before he sustained what turned out to be severe injuries. He attributed the accident to the negligence of the appellant in driving, managing or controlling her motor-vehicle and for this reason, he sued her for damages, both special and general, together with costs of the suit.

Although the appellant entered appearance and denied the respondent's claim, the two parties subsequently entered a consent judgment on liability according to which the appellant conceded that she was 90% liable for the accident. Thus, the only issue left for trial was the extent of damages payable to the respondent.

After assessing the evidence before it, the trial court awarded the respondent the sums of Kshs. 2,000,000/= as general damages and Kshs. 563,000 as special damages subject, of course, to 10% contribution. The appellant was also ordered to pay costs of the suit and interest thereof calculated from the date of the judgment.

Both the appellant and the respondent were aggrieved by the lower court's decision except that the present appeal was initiated by the appellant; she raised thirteen grounds of appeal which I can do no better than reproduce them as set out in the memorandum of appeal filed in this honourable Court on 7th December, 2016. They are follows:

- 1. The learned magistrate erred in fact by misapprehending the injuries sustained by the respondent and thereby proceeded on wrong principles in assessing general damages for pain and suffering.***
- 2. The learned magistrate erred in fact by failing to hold that from the medical evidence available, the only injuries sustained by the respondent were multiple fractures of the pelvis and rupture of the bladder.***
- 3. The learned magistrate erred in fact by failing to hold that there was no evidence on record to show that the respondent had sustained a right hip dislocation, left intertrochanteric fracture of the femur and bruises on the lower limbs as pleaded in the plaint.***
- 4. The learned magistrate erred in fact by failing to hold that there was no cogent medical evidence on record in support of the respondent's testimony that his testicles were cut or that he had lost his erectile capacity or that he had lost his fertility and was unlikely to sire children or engage in active sexual relationship.***
- 5. The learned magistrate erred in fact by failing to hold that the respondent's own doctor had confirmed that during a subsequent review on 3rd July, 2015, the respondent had no complaints and apart from the injuries he had sustained, examination of the other systems revealed normal clinical findings thereby dispelling the respondent's claims alluded to at(sic) ground 4 above.***
- 6. The learned magistrate erred in law and in fact by failing to give appropriate consideration to documentary evidence on***

record and in particular Dr. Wambugu's medical report dated 9th December, 2015 which confirmed the respondent had healed without any permanent incapacitation.

7. The learned magistrate erred in law and in fact by disregarding Dr. Wambugu's medical report dated 9th December, 2015 and failing to appreciate that Dr. Wambugu's said medical report best reflected the current status of the respondent as it was the most recent.

8. The learned magistrate erred in law by failing to appropriately consider submissions filed by the appellant's advocates and authorities cited therein and instead making a finding that the authorities cited therein involved less serious injuries which finding was wrong.

*9. The learned magistrate erred in law by placing reliance on the case of *Bint Miganiko -vs- Hakika Transporters (HCCC No. 291 of 1993 Mombasa)* which case was incomparable and well distinguishable from the case before the court as it involved much more serious injuries and complications than those in the case before the court.*

10. The learned magistrate erred in law by assessing general damages for pain and suffering at a sum that was inordinately high as to constitute an entirely erroneous estimate having regard to the nature of the injuries sustained by the respondent.

11. The learned magistrate erred in law by awarding special damages of Kshs. 560,000 whereas the same were never proved as no supporting documents were admitted in evidence as exhibits.

12. The learned magistrate erred in law by holding that the respondent had proven medical expenses amounting to Kshs. 560,000 and thereby awarding the same whereas receipts filed on record only supported a sum of Kshs. 476,016.

13. The learned magistrate erred in law by failing to hold that the medical expenses amounting to Kshs. 83,984 remained unproven and could not be awarded.

14. The learned magistrate's judgment was rendered/delivered per incuriam.

On his part, the respondent cross-appealed and faulted the learned magistrates' decision on, amongst other grounds, that the learned magistrate failed to adequately appreciate the injuries sustained by the plaintiff, their severity and the fact that some of the injuries were irreversible and permanent and therefore occasioned a miscarriage of justice. In particular, the learned magistrate erred in fact and in law in failing to give adequate consideration of the medical report by Dr. Kanina, the supporting medical documents, and the testimony by the plaintiff while making the award of general damages. He was also faulted for failing to give due regard to the submissions by the plaintiff and the substance of the authorities he relied upon in making the award for general damages. Last but not least, the learned magistrate's decision was impugned because the award is said to have been so low as to occasion miscarriage of justice in the light of circumstances and the nature of the injuries sustained by the plaintiff.

As noted, the issue of liability was not in contention and therefore the only question that concerns this honourable court as much as it concerned the trial court is the extent of the award of damages. It therefore follows that in resolving this issue, my attention will necessarily be drawn to the evidence adduced with respect to this aspect of the respondent's case.

I find the proceedings of the court on 3rd June, 2016 to be the appropriate starting point in this regard; on the material date, both parties informed the court that they had a consent to record on various heads of the respondent's claim; to quote, Mr Ombongi, the learned counsel for the respondent, he informed the court as follows:

We wish to record a consent on various heads:

1) By consent plaintiff to be allowed to amend the plaint on the issue of special damages to read Kshs. 560,000/= (medical expense).

2) By consent judgment be entered on liability rates(sic) of 90:10 % in favour of the plaintiff.

3) The medical reports by Dr. Kanina B.K. for the plaintiff dated 7.7.15 be admitted at (sic) 2nd report by Dr. Wambugu dated 9.12.15 be admitted as PExhibit 1 and DExhibit 2 respectively.

By consent plaintiff be allowed to file further receipts and invoices as proof of special damages within the next 3 days and serve.

4) Plaintiff to file the original documents in support of special damages within 3 days and serve.

By consent matter be mentioned within 3 weeks. By consent treatment notes made by the plaintiff to be admitted as plaintiff Exhibit No. 2. Matter be mentioned in 3 weeks to the (sic) further directions on the issue of quantum.

Mr. Ngugi, the learned counsel for the appellant agreed with counsel for the respondent on the terms of the consent; with such confirmation, the court adopted the consent as its order and judgment, as the case may be.

Perhaps by reason of this consent, only the respondent testified; it was his evidence that at the time he was injured he was a student at

Kenya University, Nyeri campus. According to him, he suffered bruises on his legs. He also sustained fractures on the pelvic and injuries on the urethra.

He testified further that he was admitted at Consolata hospital for one month; he underwent surgeries the first of which involved insertion of a catheter to the bladder to help him pass urine. The catheter remained inserted in his bladder for six months. He was admitted in two different hospitals for a total of 48 days. At the time of his testimony, he could not hold urine in his bladder for long; he testified that he could not control his urine yet he had to take four litres of water every day in order to prevent a recurrence of the urethral stricture. He also testified that he could not sit for a long time because of a backpain. It was also his evidence that he suffered from erectile dysfunction and pain in the urethral area. He visited hospital occasionally for follow up treatment and the last such visit before he testified was in January, 2016.

Besides the respondent's own testimony, the medical reports by the two doctors were of particular relevance to the question at issue since it is only in those reports that the court could satisfy itself of the experts' opinion concerning the nature and extent of the injuries sustained by the respondent. It is therefore apt at this point to consider these reports in detail.

Dr Kanina's report is dated 7th July, 2013. According to that report, the respondent had a history of having been involved in road traffic accident in which he sustained multiple fractures of the pelvis including bilateral superior and inferior pubic rami and rupture of the urethra.

He did not suffer any loss of consciousness. Soon after the accident he was taken to Nyeri provincial general hospital where the initial x-ray was undertaken; he stayed there for six hours before he was transferred to Mathari mission hospital where he was admitted for four weeks.

The x-rays taken revealed multiple fractures of the pelvis. The fractured pelvis was managed conservatively on bedrest and painkillers for four weeks. Due to the ruptured urethra, he was unable to pass urine. He was therefore taken to theatre and under general anaesthesia, this urine was diverted via a suprapubic catheter. A urethrogram (x-ray of the urethra) done on 4th January, 2015 revealed a membranous urethral stricture. The respondent was subsequently admitted to Outspan hospital from the 28th January, 2015 up to 30th January, 2015; during his admission, he was taken to the theatre for an operation to open the stricture; the operation was, however, unsuccessful and therefore he was discharged with the urinary diversion via the suprapubic catheter. In the course of time, while being managed as an outpatient, he developed urinary tract infection due to the indwelling catheter and had to be admitted to Consolata hospital-Mathari for treatment for five days from 2nd February, 2015 to 7th February, 2015. Upon discharge, he was followed up as an outpatient until 1st June, 2015 when he was admitted at Mathari hospital; he remained so admitted until, the 18th June, 2015. In the course of his admission, he underwent an operation to correct his urethral stricture (urethroplasty); this time round the operation was successful.

According to the medical report, he was reviewed on 3rd July, 2015. He had no complaints and on physical examination, he was established to be walking with a normal gait. He, however, had a perineal scar (site of the urethroplasty) and suprapubic scar (site of the suprapubic diversion). The fractures of the pelvis were clinically healed. Examination of the systems revealed normal clinical findings.

According to Dr. Kanina, though the patency of the respondent's urethra had been regained, the urethral stricture tends to recur over time causing obstruction to the urine flow; accordingly, the respondent needed to be followed up as an outpatient throughout his life. In the event that the urethra stricture recurs, the respondent will need to repeat surgeries at an approximate cost of Kshs. 400,000/=; he was also exposed to the dangers of difficulties in sexual activity and inability to sire children.

In his report dated 9th December, 2015, Dr Wambugu established that the respondent had a history of fracture of the pelvis with the bilateral involvement of the superior and inferior pubic rami; he also sustained a urethral injury.

A CT scan taken and reviewed by the doctor himself confirmed the injuries but that there was no hip dislocation or inter trochanteric fractures noted. The doctor also confirmed that the respondent had been treated as an inpatient and that the fractures were managed conservatively. A suprapubic catheter was inserted. Upon follow-up, he was noted to have developed a urethral stricture. He had undergone urethroplasty on two occasions. As at the date of examination of the respondent, the latter complained of stress urinary bladder incontinence especially when the bladder was full and occasional urethral pains. The general condition of the respondent was found to be good and that he walked with a normal gait without a pelvic tilt. The stress tests elicited subjective tenderness.

He had a healed perineal surgical scar. The external genital was normal and pelvic joints were found to be intact. The rest of the systems were established to be normal.

In his opinion and prognosis, the doctor concluded the respondent's injuries were consistent with those arising from blunt trauma secondary to the traffic accident. He sustained skeletal and electoral tissue injuries and developed a urethral stricture as a direct result of this accident. The stricture had been adequately repaired except that he was predisposed to possible recurrence of the same and a provision should be made for this eventuality. He estimated the cost of an operation in the event of a recurrence to be around Kshs.120,000/= if a surgery was to be undertaken at Kenya National Hospital. In his assessment the respondent had not sustained any permanent incapacitation.

Based on the respondent's evidence and the doctors' reports, counsel for the respondent submitted that an award of Kshs. 7,000,000/= would be an adequate compensation in general damages, for pain, suffering and loss of amenities. In support for this award, counsel relied on this Court's decision sitting at Embu in **High Court Civil Case No. 15 of 2004, Dorothy Kanyua Mbaka & Another versus Attorney General & Another** where the claimant is said to have been awarded the sum of Kshs. 10,000,000/= in general damages for pain and suffering and loss of amenities. In that case, the claimant is said to have suffered a severe pelvic injury with fracture of pubic ischial ricin, trauma of the bladder and urethra, rupture of the urethra loss of sexual function and permanent incapacity, amongst other injuries.

On his part, counsel for the appellant opined that a sum of Kshs. 450,000/= would be sufficient in general damages and in this regard, he relied on **Muthamiah Isaac Versus Leah Wangui Kanyingi (2016) eKLR** where the claimant is said to have sustained fracture of the right

superior pubic ramii; fracture of the right inferior pubic ramii and a blunt injury on the left leg yet he was awarded Kshs. 400,000/=. He also relied on **George Osewe Osawa versus Sukari Industries Limited (2015) eKLR** where the plaintiff is said to have sustained a fracture of the pelvis and was awarded Kshs. 400,000/= in general damages. Other decisions which the learned counsel for the appellant cited in support of his opinion on damages were **Lilian Wanja versus Cyprian Mugendi Igonga & 2 Others (2016) eKLR** where the claimant was awarded Kshs.500,000/= in general damages for a fracture of the pelvis, a dislocation of the hip and multiple soft tissue injuries to the face, chest, the right wrist and elbows and **Jane Muthoni Nyaga versus Nicholas Wanjohi Thuo & Another (2010)eKLR** where an award of Kshs 300,000/ was made in general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip.

In his judgment, the learned magistrate dismissed the proposed awards by both the respondent's and the appellant's counsel; as far as the respondent is concerned, it was the learned magistrate's view that the injuries sustained by the claimant in the authority in support of the proposed award were far more serious than those sustained by the respondent. The appellant's proposed award, on the other hand, was rejected for being inordinately low and, in any event, the cases cited by the learned counsel for the appellant in support of his proposed award were not comparable to the respondent's claim because the injuries sustained by the claimants in those cases were deemed to be less severe.

Having rejected the awards in cases presented by the respective counsel, the learned magistrate chose to assess the general damages based on the award made by this Court sitting at Mombasa in **High Court Civil Case No. 291 of 1993, Miganiko versus Hakika Transporters** where an award of Kshs. 500,000 under that head was made for multiple fractures of the pelvis, rupture of the urinary bladder and intra-abdominal injury. The claimant is said to have been hospitalized for two weeks during which time she underwent an operation to repair the bladder and the pelvic; a catheter was also inserted in her bladder. The injuries resulted in a permanent distorted pelvis and inability of the claimant to have normal child birth. She could not stand for long and neither could she lift objects. She also complained of pain during sexual intercourse and could only deliver by caesarian section.

The learned magistrate opined that the injuries sustained by the respondent were almost similar to those sustained by the claimant in Miganiko case; however rather make a similar or a near similar award, he opined that an enhanced award of 2,000,000/= would be adequate compensation in general damages taking into account the inflationary trends and considering that the award in the precedent had been made 25 years earlier.

The role of the appellate court in assessment of general damages is quite limited for the simple reason that ascertainment and award of general damages falls within the discretion of the trial court; it is a principle which has been reiterated in several decisions of which the oft-cited ones are **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** and **Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 728**. In the former decision the Court of Appeal noted:

An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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.

And in the latter case, the same Court said at page 730 that:

The principle 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 damages.

The pertinent question that logically follows is whether the learned magistrate took into account an irrelevant factor or overlooked a relevant one in assessing the damages; or, whether the award he made was inordinately high or inordinately low as the respective parties contend.

According to the appellant, the learned magistrate misapprehended the injuries sustained by the respondent and in that regard relied on the pleadings by the respondent and his testimony which were not supported by evidence, in particular the medical evidence.

From what I gather, all the learned magistrate did was to rehash the pleadings not just in the plaint but in the statement of defence as well. There is nothing in that judgment to support the submission by the learned counsel for the appellant that in assessing general damages, the learned magistrate was influenced by particulars of injuries as pleaded in the plaint without medical proof.

I understand the learned magistrate to have relied on the medical report by Dr Kanina as proof of the injuries stated in that report and not in the plaint. I suppose it is for this reason that he adopted the decision in Miganiko case where he found the injuries sustained by the claimant in that case to have been relatively similar to the injuries alluded to by Dr. Kanina rather than the respondent himself.

The appellant's counsel also submitted that the learned magistrate appears not to have given any attention to the medical report by Dr. Wambugu. Here again I respectfully disagree with the learned counsel because the learned magistrate made specific mention of this report in his judgment; to quote him, he said:

Dr Wambugu in his report Pexh 1 dated 9.12.2015 agreed with Dr. Kanina save for the cost of future operations which he estimated at 150,000/- at Kenyatta.

Looking at the two reports, they are largely consistent as to the nature and extent of the injuries and the respondent's prognosis. As the learned magistrate pointed out, rightly in my view, they were similar in fundamental aspects except for their opinion on the cost of future operations to remove the urethral stricture should it recur. Nothing much should be made of this variation because Dr Wambugu was specific that if the operation was to be undertaken at a particular hospital the amount would be what he suggested. The point, however, is that the learned magistrate considered the two medical reports contrary to the appellant's counsel's submission that he disregarded his client's

doctor's report.

In a nutshell, there is nothing in the learned magistrate's judgment to suggest that he either considered an irrelevant factor or failed to consider a relevant factor in assessment of general damages.

The only other question in respect of general damages is whether the award made was inordinately high or inordinately low.

While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.

Turning back to the present appeal, I must hasten to agree with the learned magistrate that none of the decisions submitted by both the learned counsel for the appellant and the respondent was of any useful guide to the trial court. While the awards in general damages made in those cases may have been appropriate, depending on the peculiar circumstances of those cases, they were, in my humble view, incomparable to the award that could possibly be made in the respondent's claim in the lower court; this is because the extent of the injuries in the string of cases that the trial court was presented with are very much at variance with those injuries sustained by the respondent. In simple terms, the claimant in the one case that the respondent relied on suffered severer injuries than those that the respondent sustained. On the other hand, the claimants in the cases which the appellant relied on sustained less severe injuries. It follows that the figures proposed as general damages were extreme at both ends, being disproportionate to the nature and extent of injuries suffered by the respondent. It is for this reason that I am not prepared to fault the learned magistrate for going out of his way to find what, in his view, was the appropriate precedent on which he could rely in ascertaining a reasonable award in the circumstances.

By way of recapitulation, it cannot be denied that the respondent suffered severe injuries and endured a lot of pain in the process. He was admitted in hospital and operated on no less than two occasions. What's more, he is likely to be operated on in future, the two doctors having been agreement that the urethral stricture may recur. His doctor went further to warn that besides the recurrence of the stricture and the need for an operation, the respondent was also exposed to the danger of impotence. Apart from the damage to his body and body organs, the respondent also lost his valuable time while undergoing treatment; he couldn't attend college in his indisposed state. Taking all these factors into account, I am hesitant to disturb the learned magistrate's award of Kshs. 2,000,000/= in general damages.

As far as special damages are concerned, the respondent pleaded the sum of Kshs 560,000/=. According to the consent recorded on 3rd June, 2016 he was allowed to file receipts as part of the further documents in proof of special damages. Indeed, the respondent filed further list of documents dated 23rd June, 2016; however, a casual perusal of these subsequent documents shows that they are the same documents, including the receipts, that were in the respondent's original list of documents filed simultaneously with his claim. Those receipts included in the original list represented expenses totaling Kshs. 476,016/=. I would agree with the appellant that this is the sum that was proved and to which the respondent was entitled as special damages. I would therefore allow the 11th, 12th and 13th grounds of appeal.

Except for this variation in the award of the special damages, I find that the appellant's appeal lacks merit and it is hereby dismissed. The respondent's cross-appeal is also dismissed for reasons I have given. Parties shall bear their respective costs. It is so ordered.

Signed, dated and delivered this 18th day of January, 2019

Ngaah Jairus

JUDGE