



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 7 OF 2019

THE BOARD OF TRUSTEES ANGLICAN CHURCH

OF KENYA DIOCESE OF MARSABIT.....APPELLANT

VERSUS

THW (Suing Through Her Father and Guardian Ad Litem

HWGRESPONDENT

(Being and Appeal from the judgement and decree of Hon. B.M. Ombewa Principal Magistrate Marsabit in Civil suit No.2 of 2017)

JUDGMENT

THW was involved in a road traffic accident on the 10.4.2015. She brought a civil suit against the appellant seeking general damages. Before the trial court parties recorded a consent on liability whereby the respondent absorbed 20% while the appellant admitted 80% liability. The appeal is only on the quantum of damages awarded by the trial court. The respondent was awarded Ksh.5million for pain, suffering and loss of amenities a her further Ksh.4,320,000 for cost of nursing care. The appellant is dissatisfied with the award and preferred this appeal on the following grounds:-

- 1. That the learned trial Magistrate erred in law and fact by adopting the sum of Ksh.18,000/= to compute the cost of nursing care whereas no evidence or sufficient basis was laid to support the sum of Ksh.18,000/=.***
- 2. That the learned trial Magistrate erred in law and fact by failing to find that the sum of Kshs.18,000 pleaded by the plaintiff was not strictly proved and therefore the same could not be used as a basis for computing the cost of nursing care.***
- 3. That the learned trial Magistrate erred in law and fact by failing to appreciate that comparable injuries should as far as possible attract comparable awards and thereby made an award of Ksh.5Million in respect of general damages, which award is excessive in the circumstances.***
- 4. That the learned trial Magistrate is against the law weight of evidence on record.***

Mr. Kariuki appeared for the appellant. Counsel submit that the amount of damages awarded is excessive. There was no basis laid before the court for the award of Ksh.4,320,000/= for nursing care. This amount was computed at the rate of Ksh.18,000/= per month for a period of 20 years. There was no proof raised before the court to show that the respondent was spending Ksh.18,000 per month on nursing care. It should be noted that this particular award is in the nature of special damages claim which is required by the law to be pleaded with clear particularity and then formerly and specifically proved by documentary evidence in terms of receipts or payment bonds during the trial. The claim was not proved to the required standard of the law and the trial court erred by awarding the same. It is also not clear on what basis the trial court arrived at a multiplier of 20 years. The award is erroneous and the same should be set aside.

It is further submitted for the appellant that the award of Ksh.5million as general damages is extremely excessive and is an erroneous estimate of the damages payable to the respondent. The respondent suffered head injuries and hip dislocation. It is unfortunate that the respondent was still unable to stand and walk at the time of the trial but the chances of recovery have never been ruled out by any medical evidence. The appellant proposed an award of Ksh.700,000/= as general damages. The appellant relied on the cases of **FRANCIS OCHIENG & ANOTHER -V- ALICE KAJIMBA (2015) eKLR, JULIUS KIPROTICH -V- ELIUD MWANGI KIHOSHIA(2006) eKLR and DAVID KIPLANGAT SANG -V- RICHARD KIPKOECH LANGAT & ANOTHER (2006) eKLR.**

Mr. Orayo appeared for the respondent. Counsel submit that the trial Court was right in making an award for nursing care or nurse aid. Such

award was payable considering the injuries sustained by the respondent. Counsel relies on the case of **NGURE EDWARD KARANJA -V- YUSUF DORAN NASSIR (2014)eKLR, NAKURU HCC 157 OF 2012** where Justice H.A. Omondi made such an award. There was sufficient evidence that the respondent required nursing care. **PW2 and PW3** testified to that effect. A sum of Ksh.20,000 per month was pleaded in the Plaintiff. The respondent could require nursing aid for a period of 58 years since she is 22 years and life expectancy in Kenya is expected to be 80 years. The multiplier of 20 years adopted by the trial court is not excessive. With regard to damages for pain and suffering, counsel relies on the same authority where the plaintiff was awarded Ksh.5million in 2014 for comparable injuries.

This is a first appeal and the court has to evaluate the entire evidence afresh and make its own conclusion. The parameters upon which this court can interfere with the finding of the trial court are well established. In the case of **Butt V Khan (1981)KLR, 349** the court held as follows:-

The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates.

Similarly, in the case of **Shabani V City Council of Nairobi(1985) KLR, 516**. The Court of Appeal equally held as follows:-

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 based on some wrong principle or on a misapprehension of the evidence.

Before the trial court only three witnesses testified. PW1, HWG, is the respondent's father. He testified that the respondent was involved in an accident on 11.4.2015 in Marsabit near Jirime. She sustained head injuries and injuries on her leg. She could not walk and lost consciousness as a result of the accident. However, she had started talking. She was admitted at Kenyatta National hospital (ICU) for two months. She was also treated at St. Teresa's Mission Hospital, Kiirua. **Dr. John Mwanzia** prepared a medical report for her. For a period of about two (2) years she was feeding by the use of a pipe. He had employed two people to help her. He was paying them Ksh.10,000/= per month. At the time he was testifying the respondent was lying inside a car that was parked outside the court. She cannot stand up. She is fed while on bed and also washed on bed. The two people assist her day and night. She is assisted to turn. She used to work at the Ward Administrator's office as a casual laborer.

PW2 TDD and **PW3 JMW** testified that they are neighbours to the respondent. They were employed by PW1 to assist the respondent who was involved in a road traffic accident. They wash her, remove urine and feed her. They carry her from place to place. She is unable to do anything by herself. Each of them is paid Ksh.10,000/= every month. They even started assisting her while at Kenyatta National Hospital.

In the case of **BHOGAL -V- BURBIDGE AND ANOTHER,[1975] E.A. 285**, the Court of Appeal held:-

(iv) Some degree of uniformity must be sought in the award of general damages and recent awards in comparable cases in local courts may be looked at;

In the case of **KIGARAGARI -V- AYA[1985] KLR, 273** the Court of Appeal held:-

1. In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.

2. In order for the appellate court to interfere with the High court award on general damages, it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred.

In the case of **TAYAB -V- KINAU [1983] KLR,114 at 115**

The court of Appeal observed:-

8. (a) The money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional. West (h) & Son Ltd V Shephard [1964] AC 326 at 345.

(b) 'in considering damages in personal injury cases, it is often said: "the defendants are wrongdoers, so make them pay up in full they do not deserve any consideration". That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.

(c) Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life You are not to consider the value of existence as if you were bargaining with an annuity office... I advise you to take a reasonable view of the case and give what you consider fair compensation.."

(Lim Poh Choo V Camden and Islington Arew Health Authority]1979] IAILER 332 at 339).

(d) "I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the tax payers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

(LimPoh Choo V Camden and Islington Arew Health Authority(ibid).

9. In awarding damages, the court ought to assess the general picture, the whole circumstances, the effect of the injuries, the particular person concerned and uniformity. The court must also be guided by recent awards in comparable cases in the local courts. In this case the High Court award was wrong in principle when measured against awards in other cases. (Bhogal V Burbidge [1975]EA 285).

The above cases gives a synopsis of what a Court is expected to do in a case involving the award of damages arising from an accident. The appeal is only on the quantum of damages as assessed by the trial court. A medical report prepared by Dr. John Mwanzia dated 8.8.2016 explains the respondent's injuries in the following terms:

CURRENTLY

- Examination as at 8/8/2016
- Client is bed ridden-confined to bed, unable to take care of self and is unable to participate in any activity.
- Higher mental functions are impaired – speech is impaired, has memory loss, disoriented and lacks insight.
- Feeds through a gastrostomy tube
- Has multiple scars on the neck, gluteus and hip region.
- Has stiffness of both upper limbs and lower limbs, and also neck stiffness.
- Has chronic pain requiring use of strong analgesics i.e opioids.

CONCLUSION

- THW involved in Road Traffic Accident on 10.04.2015, where she sustained severe head injury with hip dislocation. Admitted in Kenyatta National Hospital ICU for 3 months, later admitted in Kiirua hospital for 1 month
- Currently is bed ridden and has impaired higher mental functions, body stiffness, contractures and chronic pain requiring use of strong analgesics stiffness, contractures and chronic pain requiring use of strong analgesics.
- She requires palliative care for life.

The accident occurred on 10.4.2015. Dr. Mwanzia examined the respondent on 8.8.2016, a period of over one year. PW1 testified on 8.2.2018. Even at that time which is approximately three years later, the respondent was still bed ridden.

Counsel for the appellant cited three authorities. The case of **FRANCIS OCHING & ANOTHER -V- ALICE KAJIMBA, MIGORI Civil Appeal No.22 of 2015 (2015)eKLR**, the claimant sustained mild head injury with bilateral temporo-parietal scalp haematoma. She was admitted on 17th January, 2013 and discharged on 23rd January, 2013. Kash.350,000/= was awarded as damages. Justice Majanja held as follows:-

"The injuries sustained by the respondent were multiple soft tissue injuries without any fractures. I have also found that the respondent did not lose 7 teeth as stated in her testimony. The respondent sustained head injuries which aggravated the injuries. Considering the cases cited and inflationary trends, I find that an award of Ksh.350,00/= would be reasonable in the circumstance." (emphasis added)

Mr. Kariuki also made reference to the case of **JULIUS KIPROTICH-V- ELIUD MWANGI KIHOSHIA; NAKURU HCC NO.207 OF 2004(2006)eKLR**. The plaintiff in that case sustained a fracture of the Pelvis, severe injury to the abdomen resulting into peritoneal haematoma and a deep cut wound on the right parietal scalp measuring 4cm by ¼ cm. The Pelvis united properly. Justice L. Kimaru awarded Ksh.450,000 as general damages for pain suffering and loss of amenities on 31st May 2006.

Counsel for the appellant also relies on the case of **DAVID KIPLANGAT SANG -V- RICHARD KIPKOECH LANGAT & ANOTHER; Kericho No.91 of 2004(2006) eKLR**. The plaintiff sustained severe head injuries with loss of consciousness for four days, blunt chest injury with fracture of two (2) ribs, fracture of the tibia fibula, upper tibia and left acetabulum with hip dislocation. Fracture of the left

medial malleolus. Permanent incapacity was assessed at 30%. Justice L. Kimaru awarded Ksh.550,000 as general damages for pain, suffering and loss of amenities on 7th June, 2006.

Mr. Orayo relies on the case of **NGURE EDWARD KAREGA V YUSUF DORAN NASSIR (Supra)**. The plaintiff was admitted at Aga Khan hospital for two months. He suffered a fracture on the 6th cervical and a fracture on the right leg, bruises on the head and palms. The fractures took long to heal and the injury on the spine rendered him unable to work. He underwent surgery for purposes of stabilizing the backbone. The plaintiff testified in court and stated that he was unable to do anything at home without assistance as he was partially paralysed on the right hand and was consigned to a wheel chair. Justice H.A. Omondi awarded Ksh.5,000,000/= as general damages for pain and suffering.

It is true that accident victims should not view court awards as mathematical computation to their losses up to the last penny. Awards of general damages should not be seen as punishment to those being called upon to settle the same. There should be a balance between the injuries suffered and the need to make reasonable compensation to accident victims. However, compensation for accident victims should not be so low as to be meaningless to the victim. The Court should not close its eyes on the suffering experienced by the accident victim. The court should strike a balance between the two competing claims. On the one hand, there is the party being called upon to compensate the victim. Such a party would try as much as possible to convince the court to make a very minimal award and where possible have the claim dismissed without any compensation. On the other hand, there is the accident victim who is seeking maximum compensation for the injuries suffered.

I have seen the authorities relied upon by Counsel for the appellant. In my view they do not provide comparable injuries. One can have several fractures of all the limbs but if the fractures in the long run end up uniting very well and the victim ultimately recovers, then the court will be in a position to see that the victim is out of danger. Where an accident victim suffers head injury and is bedridden for over three (3) years, it is quite difficult to anticipate and objectively conclude that the victim will in the long run recover from the injuries. Even if a victim indeed ultimately recovers from the injuries, the Court should take into account the pain and suffering the victim undergoes before getting healed.

I do find that the authority of **Ngure Edward Karega (Supra)** provide similar injuries. It is a 2014 decision. In that case the court awarded damages for loss of earning capacity which had been pleaded. In this case that claim was not pleaded and properly not awarded. The claimant in that case could testify and was in a wheelchair. The accident in the Ngure case occurred on 15th November 2010 and judgement was delivered on 16th May, 2014. In a span of about four years, the claimant was talking and could be placed on a wheelchair. In the current case, the respondent is still bedridden and has now started talking. Considering the circumstance of the case, I do find that the award of Ksh.5,000,000/= as damages for pain and suffering and loss of amenities is not inordinately high or excessive.

On the issue of damages for nursing care, the appellant contends that no evidence or sufficient basis was laid to support the sum of Ksh.18,000/= (ground 1 of appeal) and that the sum of Ksh.18,000 pleaded by the respondent was not strictly proved (ground 2 of appeal). PW1 testified that the respondent could not take care of herself. He had employed PW2 and PW3 to take care of the respondent. He was paying each one of them Ksh.10,000 monthly. PW2 and PW3 also testified to that effect. They have been taking care of the respondent from the time of the accident and were being paid Ksh.10,000 each monthly. The trial court saw the respondent lying inside a car and she could not move.

The trial court held as follows:-

The plaintiffs is seeking Shs.21,000,000/= under this head. In paragraph 5(c) of the plaint, the plaintiff pleaded a figure of Ksh.18,000/= per month as the cost of employing a nurse. Dr. Mwanzia stated in his medical report that the plaintiff was 22 years old. That she will need palliative care for life. It is my considered view that the plaintiff is entitled to the cost of nursing in the circumstances. However, I will use the figure pleaded as the costs of nursing per month. I consider a period of 20 years to be reasonable. I therefore award the plaintiff the cost of nursing at shs.18,000 per month for 20 years. This give a figure of shs.4,320,000/=.

The claim for nursing care was pleaded. The respondent claimed a sum of Ksh.18,000 monthly with a rider that the amount was revisable. There was evidence adduced to the effect that PW2 and PW3 were taking care of the respondent. Definitely, it is not expected that PW1 was to prepare payslips for PW2 and PW3. The Court cannot simply overlook the evidence of PW1, PW2 and PW3 and hold that in the absence of any documentary evidence in the form of a pay slip or acknowledgment of receipt of payment of salary form or any other document, then the claim for nursing care was not proved. Such line of argument would be stretching a civil case too far. The standard of proof is that of on a balance of probabilities. The respondent was brought to court. She could not come out of the vehicle and testify. Three years after the accident she was bed ridden. Assuming PW2 and PW3 were not taking care of the respondent, still there is the plain fact that the respondent cannot take care of herself. The court cannot assume that within the next few months or years she will be able to stand up, walk and resume her normal duties. The estimate of 20 years is a reasonable one. Although the respondent could now talk, it is clear that she would take long to be healed, if at all she will recover from her injuries.

In the case of **Ngure Edward Karega (Supra)**, the Court awarded Ksh.3,091,200 as damages for Nurse Aide. The Court further awarded Ksh.5,133,600 for specialized needs such as diapers, catheter, Bed pads and urine bags. The Court noted as follows:-

The report by Dr. Wellington Kiamba confirms that the plaintiff sustained fracture of the right acetabulum and the cervical vertebra C6 with narrowing of the spinal cord, resulting into paraplegia vertebractory of C6 and fusion of C6 and C6 being done from the level of T6 upto the feet.

The report confirms that the plaintiff has lost sensation from the nipples from upto the feet, and has urine incontinence, and has an indwelling catheter. He is also incontinent of stool and uses diapers, has weak muscle power on both arms, and complete loss of muscle power limb, and he has a foot drop.

The doctor describes the plaintiff as bed-ridden and will always require an assistant as he cannot do anything for himself. He concludes that nothing can be done to restore the plaintiff to his former health. He risks developing bed sores in future, and has to be on drugs for constipation. He assessed his injuries at 100% disability.

Given the evidence on record, I do find that a basis was laid for the award of damages for nursing care. The respondent requires palliative care. She cannot do anything on her own. She is only 22 years old and that the more reason why such damages ought to be awarded for the period of 20 years. According to Dr. Mwanzia, the respondent requires palliative care for life. An estimated period of 20 years cannot be held as unreasonable.

I do find that the award of Ksh.5,000,000 as damages for pain, suffering and loss of amenities to be fair and not excessive. I see no good reason as to why this court should interrupt with that award. Equally, I do find that Ksh.4,320,000 as damages for nursing care to be reasonable. The total award of Ksh.9,320,000/= less 20% contribution can not be held as punishment to the appellant. The case involves someone whose life has totally changed. The possibility of recovering from the injuries are very narrow. She may not get married in her life. It is likely that she has lost all what life has to offer in form of enjoyment, work, play and having friends to move around with. She is confined to a bed where she takes her meals, takes her bath and sleeps. I do find that the trial court made a fair compensation.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and Delivered at Marsabit this 9th day of April, 2019

S. CHITEMBWE

JUDGE