



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO.156 OF 2016

TRANSTRAC LIMITED.....1ST APPELLANT

PAUL MWANJURI.....2ND APPELLANT

VERSUS

NALANGU LOKWAIT.....RESPONDENT

(Appeal from the decision of the Chief magistrate (the Honourable David Kemei

delivered on the 16th November 2016 in Nakuru CMCC civil suit No. 157 of 2015)

JUDGMENT

1. This appeal is against the award of both general and special damages by the trial court in its judgment delivered on the 16th November 2016.

The Respondent sustained serious injuries in a road traffic accident involving the appellant's motor vehicle.

The trial court awarded general damages for pain and suffering in the sum of Kshs.3,000,000/= and Kshs.200,000/= towards future medical expenses. Special damages were allowed at Kshs.897,924/=.

2. The appellants by this appeal challenge the award of Kshs.3,000,000/- General damages and the special damages, having abandoned their appeal on damages for future medical expenses.

Liability was resolved by consent of the parties at 80% in favour of the Respondent.

3. The primary duty of the first appellate court is to re-evaluate and re-consider the court record to determine whether the conclusions reached by the trial court are to stand or not and to give reasons either way **Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) E 123.**

4. When the matter of *quantum* of damages is challenged the court must satisfy itself that in assessing the damages, the trial court took into account all relevant factors to come to the award.

If it finds that the award is inordinately too high or too low as to be a wholly erroneous estimate of the damage, it will intervene and disturb the said award – **Kemfro Africa Ltd t.a Meru Express Service, Gathogo Kariri –vs- A.M. Lubia & Another (1998) e KLR and Bashir Ahmed Butt –vs- Uwais Ahmed Khan (1982-88) KARS –**

5. In arriving at the awards on damages, the trial court relied on the medical documents and evidence presented before it. In particular the medical report of Dr. Wellington Kiamba dated the 10th March 2014, medical records from Mediheal Hospital as well as the preliminary medical report dated 22nd December 2012.

6. The injuries sustained by the Respondent are not in contestation

These are

- (a) *fractures to the left inferior and superior ramii of the pelvis,*
- (b) *fracture of the midshaft of the left femur*
- (c) *comminuted fracture of the right femur at the distal 1/3*
- (d) *deep cut wound on the forehead.*

Dr. Kiamba assessed permanent disability at 60%.

7. It is the appellant's submission that the award of Kshs.3,000,000/= in general damages was excessive, and not commensurate with the injuries sustained, and not comparable with decided cases contrary to the Court of Appeal's observations in **Stanley Maore -vs- Geoffrey Mwanda Civil Appeal No. 147/2002 (2004) e KLR** that

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

8. I have considered awards proposed before the trial court Kshs.5,000,000/= by the Respondent and Kshs.600,000/= by the appellants. The appellants citing the case **Antony Keriga Mogesi -vs- Florence Nyomenda Tumbo (2015) e KLR**. The injuries sustained by the plaintiff in the above case were open book pelvic fracture, cut wound on the left upper eye, facial cut wound and on the sacroiliac joint.

The said injuries are far less serious and cannot be comparable to those sustained by the respondent herein with multiple fractures.

9. The Respondents submission for Kshs.5,000,000/= were supported by the awards in **Peace Kemuma Nyangeria -vs- Michael Thuo & Another (2014) e KLR** wherein for fractures of right Ischium/inferior public ramus of pelvic bone Kshs.2,500,000/= was awarded in 2014.

In **Mary Pamela Oyiema -vs- Yess Holding Ltd (2011) e KLR**, for comminuted fracture of right femur, compound fracture of right tibia and fibular together with soft injuries, the court awarded Kshs.900,000/= in 2011.

10. The Respondent submits that the trial magistrate's awards were not excessive to justify disturbance by this court, and reiterated that the case of **Peace Kemuma (Supra)** was relevant and awards comparable.

11. I have considered other comparable decisions. The Respondent sustained multiple fractures and was hospitalized for three weeks. Permanent incapacitation was assessed at 60%. In the case **Regina Mwikali Wilson -vs- Stephen M. Gichuhi & Another (2015) e KLR**, Mabeya J awarded a sum of Kshs.2,500,000/= for fractures to the neck, fracture to the humerus fracture to the right leg and fracture right hip bone in 2015.

In **Polyline W. Kinura alias Roselyne Muthui Katee -vs- Ochero Kibra & 3 Others Nakuru HCCC No. 237 of 2009**, for fractures to the right tibia and fibula, posterior dislocation of left hip, an acetabulum fracture, and soft tissue injuries, the plaintiff was awarded Kshs.1,500,000/= in 2009.

12. I am aware that no two injuries can be exactly similar but can only be comparable, and depends on the severity nature and post injury prognosis.

At time of trial in 2016, it was noted that the Respondent was walking with a stick, and the leg was shortened. He had fixation plates *in situ* at the fracture sites. She could not continue with her fish selling business, and had developed osteoarthritis.

In his judgment the trial magistrate considered several authorities to arrive at the sum of Kshs.3,000,000/= for pain and suffering and loss of amenities.

13. Upon re-examination of the medical evidence and documents, I find that the award of damages by the trial court was slightly on the higher end and deserves this court's disturbance albeit to a very small level.

Assessment of damages is purely at the discretion of the court but upon principles as set out in the cases cited and in particular **Butt -vs- Khan and Kemfro Africa Ltd (Supra)**.

Having rendered myself as above, I set aside the award of Kshs.3,000,000/= and substitute it with an award of Kshs.2,700,000/= subject to 20% contributory negligence as agreed and recorded by the parties.

14. Special damages

The respondent had pleaded special damages in her Further Amended Plaintiff dated 13th November 2015 in the sum of Kshs.891,324.02.

The appellants challenge is that the award of Kshs.819,590/80 was not proved.

In the case **Haln -vs- Singh (1985) KLR 719** the Court of Appeal rendered that

“--special damages must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstance and the nature of the act themselves.”

15. In the above case the respondent produced proforma invoices specifying equipment in question with values. The court reduced the values stating that

“--these were the only equipment whose value were to an extent availed in accordance with legal requirements...”

The court however proceeded to render that without evidence of payment of the proforma invoices would not amount to a receipt.

16. I am aware that it is now acceptable that a hospital bill or invoice from medical treatment need not be paid first for a claimant to claim compensation, because many times claimants are unable to pay hospital bills on demand and are discharged and released upon signing a guarantee for payment in future or by offering security by way of land title deeds of any other asset with a promise to pay.

17. Ibrahim J (as he then was) in **Thomas Kabaya Ngaruiya -vs- David Chepesiror (2012) e KLR** was of the same opinion that special damages though not paid may be granted if it is proved that such hospital bills were indeed incurred and are secured by a guarantee or deposit of a security. See also the case **George Kigamba -vs- Buuri Dairy Farmers Co-operative Society (2018) e KLR** in respect of guarantees, and requirements for stamp duty before they can be admissible in evidence.

18. In the circumstances and taking into account the realities of most of the Kenyan populace inability due to financial constraints to settle hospital bills upon discharge, and upon strict proof that indeed such expenses were incurred by the claimant while admitted for treatment, I find that such hospital/treatment expenses ought to be allowed pending payment, but upon strict proof.

19. I have seen the Mediheal hospital bills produced by the Respondent. There is no doubt that the respondent was a patient therein having been admitted therein from 4th November 2011 to the 27th April 2011. The discharge summary confirms this.

However, it is not clear who incurred the said hospital bill in the sum of Kshs.891,324/02. The bill stated as estimate is in the names of **Joyce Tiren**. The plaint shows the plaintiff's names as **Nalangu Lokwait** so is her identity card.

Dr. Kiamba's medical report dated 10th March 2014 states the plaintiff's name as **Nalangu Lokwait alias Joyce Lesangiti**.

The Mediheal hospital case summary states the patient's names as **Joyce Lesaigiti**.

20. I have perused the demand notice sent out to the Appellant before action on the 26th March 2012. Four claimants are stated as

1. Nalangu Lokwait
2. Jane Nairianti Tiren
3. Resevillan N. Tiren
4. Jackson K. Changole – all stated as having been lawful passengers in the Appellant's vehicle.

21. On cross examination, the Respondent stated that the names appearing on the **hospital bills – Joyce Tiren**, were also her names, and stated that the bills were partly paid, but could not state how much was paid and by who, nor the balance outstanding.

She further stated that some unnamed person offered a title deed to secure the balance of payments to the hospital.

22. The P3 form states the Respondents names as Nalangu Lokwait as well as the police abstract.

There is no evidence tendered of any part payment of the hospital bill, nor the form of the security placed with the hospital, and by who. Other than stating so, the Respondent failed to tender any proof.

23. Looking at the documents produced, it is not clear whether the said bills were indeed incurred by the respondent. I say so because the respondent/claimant failed to verify or offer any evidence to the various names attached to herself. Why would she give different names to different entities, yet she had her official names as stated in her Identity Card? Very relevant information was withheld from the court thus clouding the court with doubt as whether or not the hospital bills were indeed incurred by the respondent.

24. For those reasons, I am not persuaded that the special damages pleaded as Kshs.891,324.02, but awarded by the trial magistrate at **Kshs.897,924/=** were indeed incurred by the Respondent.

No significant proof was tendered as demanded under **Section 107** of the **Evidence Act, Cap 80 Laws of Kenya**. The facts and existence of the legal right or liability were not proved on a balance of probability, the required proof in a civil claim.

25. The upshot is that the award of special damages of Kshs.897,924/= is set aside as not proved.

26. The end result is that the Appeal succeeds with costs being borne by the Respondent, at 80% scale fees or as may be agreed by the parties.

Dated, signed and delivered this 9th Day of May 2019.

J.N. MULWA

JUDGE