



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 124 OF 2016

LUCY NYAKINYI MACHARIA.....APPELLANT

VERSUS

ELIJAH KARANJA MUIRU.....1ST RESPONDENT

NGATA MAIGUA.....2ND RESPONDENT

(Being an appeal against the judgment of the W. Ngumi Senior Resident Magistrate delivered on 23rd February 2015 in Githunguri SRMCC No. 59 of 2013)

J U D G M E N T

1. By the Plaint filed on 11/12/2013, the Plaintiff in the lower court and now the Appellant herein sued the Defendants, now the 1st and 2nd Respondents claiming compensation for injuries allegedly sustained on 30th May, 2013. The Plaintiff averred that she was lawfully travelling in the 2nd Defendant's motor vehicle registration number **KAQ 217Y** as a fare paying passenger; that the 1st Defendant so negligently and/or carelessly drove the said motor vehicle that he caused the same to lose control while negotiating a corner and collided with motor vehicle registration number **KAX 315U** and as a result of the accident the Appellant suffered injury, loss and damage.

2. The 1st and 2nd Respondents filed their Defence on 7th March, 2014, denying any liability for the accident. In particular, they denied that the 1st Respondent was the driver and that the 2nd Respondent was the registered owner of motor vehicle registration number **KAQ 217Y**.

3. The matter proceeded to a full hearing. By consent, liability was apportioned at 90:10% in favor of the appellant. On quantum, the trial magistrate entered judgment as follows:

a. General damages	Kshs.	180,000/=
b. Special damages	Kshs.	6,650/=
Less 10% contribution	<u>Kshs.</u>	<u>18,665/=</u>
Total	<u>Kshs.</u>	<u>167,985/=</u>

4. The Appellant is dissatisfied with the lower court's judgment and has preferred the present Appeal. In her Memorandum of Appeal, she has listed five grounds of appeal as follows:-

“a .That the Learned Magistrate erred in law in assessing quantum on general damages for pain and suffering at Kshs. 180,000/= thereby resulting into an erroneous judgment.

b.That the Learned Magistrate erred in fact and in law in failing to appreciate that the appellant had suffered serious injuries which called for a higher assessment of general damages thereby resulting in an erroneous judgment.

c.That the Learned Magistrate erred in fact and in law in failing to take into account that the appellant had suffered as a result of the injuries sustained 10% permanent incapacity thereby resulting into an erroneous assessment of quantum.

d.That the Learned Magistrate erred in law in failing to consider recent existing authorities citing similar injuries as sustained by the appellant thereby resulting to an erroneous judgment on quantum.

e. That the Learned Magistrate erred in fact and in law in failing to appreciate the fact that the appellant's medical evidence was unchallenged thereby resulting into an erroneous assessment of general damages on pain and suffering."

5. The Appellant's case, as it emerged at the trial was that she was travelling in motor vehicle registration number **KAQ 217Y** from **Komothai** to **Ruiru** on the material date. She testified as **PW2**, to the effect that the vehicle was being driven at such a high speed that the passengers were complaining and it is at this point that the driver collided with an oncoming vehicle. She stated that her right leg was fractured and she was taken to **Ngewa Health Centre** for first aid and later to **Kiambu District Hospital** for treatment.

6. She testified that she is a teacher and thereafter could not work for eight months. She further stated that her work entails standing for long, that she cannot carry heavy loads and cannot climb stairs while at her school. It was her testimony that she struggles to stand and experiences pain, stiffness and numbness. She prayed for compensation. In cross examination, she confirmed her injuries to be bruises on the face and a fracture of the right leg.

7. **Dr Jane Ikonya (PW1)** examined the Appellant and prepared her medical report. She stated that the Appellant had sustained multiple bruises on the face and a fracture on the right tibia. That an x-ray was done, and fracture was confirmed. That on examination, she complained of limping and pain while walking or standing for a long time. She was said to have suffered temporary incapacity for eight months and "serious" incapacity assessed at 10%.

8. The court directed that parties dispose of the appeal by way of written submissions.

9. The Appellant submitted that the principles upon which an Appellate Court will disturb an award for damages were laid out in the case of **Butt v Khan (1977) 1 KAR**. The Appellant's injuries were said to be undisputed and were described as multiple bruises on the face and a fracture of the right tibia. According to the Appellant's doctor, permanent incapacity was assessed at 10%. Counsel submitted that the trial Magistrate was not justified at all in awarding the Appellant a sum of Kshs. 180,000/= as general damages for pain and suffering. Counsel cited several authorities to support his proposition among them **Stephen Mutisya vs Peter Mutuku Katuli HCCA NO. 98 of 2004-Machakos** where the plaintiff was awarded Kshs. 600,000/= for a fracture of the tibia and **Lucy Ntibuka vs Bernard Mutwiri & others HCCC NO. 17 of 1983-Meru** where the plaintiff was awarded Kshs. 500,000/= for multiple soft tissue injuries.

10. The Respondent submitted that the trial magistrate's finding on quantum was commensurate and comparable to awards for similar injuries. Counsel submitted that from the evidence on record, the Appellant suffered a single fracture of the right tibia and as such the award of Kshs.180,000/= was sufficient. Reliance was placed on the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd (2013) eKLR** where it was held that comparable injuries should be compensated by comparable awards. It was contended that cases relied on by the Appellant are not similar or comparable in terms of injuries. It was emphasized that an appellate court will not interfere with quantum of damages unless the award is so high or low as to be founded on wrong principles.

11. Counsel quoted several cases to support the award of Kshs. 180,000/= among them Michael **Adeka Khaemba & 2 others v Rassangylo Muli Kumuyu (2018) eKLR** where an award of Kshs. 600,000/= for a fracture was reduced to Kshs. 200,000/= and in the case of **Elizabeth Mulwa vs Tawfiq Bus Services (2003) eKLR** where the plaintiff was awarded Kshs. 250,000/= for fracture of the femur, tibia and fibula. In conclusion, the award herein was defended, the Respondent asserting that it was not erroneous or based on a misapprehension of the facts and as such, the appeal should be dismissed.

12. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I.**

The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did"

13. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately low by the Appellant while the Respondent defends the awards. While considering the matter, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30.**

14. It was held in that case that:

"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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." see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.**

15. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance"*.

16. By her plaint, the Appellant pleaded at paragraph 8 the following injuries:

- a) Multiple bruises on the face
- b) Fracture right tibia

These injuries were stated in testimony of the Appellant (**PW2**) and Dr. Ikonya (**PW1**) who tendered medical records (**Exh 1A, Exh 2A, 2B** and **Exh 4**). In her submissions on this appeal, the Appellant has argued that the award was not justified as the trial court failed to appreciate that the Appellant's injuries were serious and that recent authorities relating to similar injuries were not considered.

17. In her submissions at the trial, the appellant, in urging an award of KShs.600,000/=, had highlighted the alleged resulting shortening of the fractured leg and assessment of permanent incapacity at 10%. The sole authority cited was an old one, **Monicah Kalondu Matule v Sheikh Mohamed Ali and Another Nairobi HCCC No 4164 of 1993**. A summary, apparently from a case digest was attached to the submissions. The Plaintiff in that case sustained fracture of the left tibia/fibula bones and soft tissue injuries. She was hospitalized for 3 months and the fracture healed with angulation and shortening which required surgery. She was awarded KShs.300,000/=.

18. The Respondents equally relied on a dated authority albeit a little more recent i.e. **Nairobi HCCC No 335 of 2004 Isaac Mwenda Michemi v Mutegi Rugano**. The Plaintiff therein had sustained a fracture of the tibia/fibula bones as well as several soft tissue injuries. His fracture healed without adverse sequela. He was awarded KShs.100,000/= for pain and suffering in 2004. It is evident in the lower court's judgment that the Appellant's submissions were not considered. The court observed in the judgment that no submissions had been filed by the Appellant. This is evidently because the Appellant's submission were only filed on 23rd February 2015, the date when the judgment was delivered. It is futile for the Appellant to blame the trial court for their own tardiness.

19. That said, there was no basis for the trial court to consider a doctor's report annexed by the Respondents to their submissions. That report, by **Dr. Leah Wainaina**, dated 26th April 2014, comprised of evidence and could not be tendered in this manner, unless there was a consent by the parties. Equally, the court below did not make a specific finding as to the extent of the proved injuries, especially in light of the fact of the "smuggled" medical report by **Dr. Leah Wainaina**.

20. For my part, having reviewed the evidence by **PW1** and **PW2** at the trial, I would nevertheless agree with the trial court's finding that the initial injuries in the case of **Isaac Mwenda** appear slightly more severe than those of the Appellant in the present case; the only caveat being that, the prognosis in the two cases ought to be considered as well. On a proper review of the Appellant's evidence in this case, she only proved that she suffered a single tibia bone fracture and soft tissue injuries. For the following reasons. The alleged shortening of the affected leg was neither pleaded in the plaint nor satisfactorily proved at the trial. The Appellant herself made no reference to a shortening of her leg in her rather elaborate testimony on the effects of the fracture on her mobility.

21. Secondly, the doctor (**PW1**) admitted during cross-examination that she did not view any x-ray reports when she examined the Appellant, almost 18 months after the accident. The exact extent of the alleged leg shortening was not stated in her evidence. The Appellant had testified that she continued to suffer pains after the fracture healed, but did not produce any records of follow-up treatment when challenged. While it may be reasonable to accept the Appellant's assertions that after the fracture healed she could not walk or stand for long without pain, or be able to bear heavy weights, that is not same as saying that she had developed a limp due to the leg shortening and therefore 10% permanent disability.

22. On this appeal, the Appellant has attempted to make up for the failure to submit on time in the lower court on quantum, by presenting authorities, which even differ from the one contained in the late submissions before the court below. Similarly, the Respondents while reiterating submissions in the lower court also introduced new authorities on quantum. This is unacceptable in an appeal. I recently had occasion to comment on such practice in a different appeal in which I quoted the words of **Ochieng J in Silas Tiren and Another v Simon Ombati Omiambo [2014] e KLR**.

23. I am in full agreement with the sentiments of **Ochieng J** in his judgment in **Tiren's** case wherein he took exception to the introduction of new authorities on the appeal stating inter alia that:

"None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."

24. The trial court cannot be faulted for basing its decision on the evidence and submissions placed before it in arriving at the award. However, in considering the case of **Isaac Mwenda**, the court ought to have given attention not only to the actual initial injuries but also the respective prognosis. The Plaintiff therein may have suffered a fracture to the tibia/fibula bone, but he was 21 years old and he healed well. In this case, the Appellant sustained a fracture to the tibia. She was 35 years old. Her evidence was that due to the fracture, she cannot walk or stand for long or bear heavy weights due to pain. This affects her work as a teacher, which requires her to stand up for long. These appear to be the consequences flowing directly from the tibia fracture and were not controverted.

25. In the circumstances, the sequela in this case may be somewhat more severe than in **Mwenda's case**. Had the court considered these matters, it would have possibly arrived at a higher award than the sum of KShs.180,000/=. In my considered view, an award of KShs.350,000/= would have been more appropriate in the circumstances of this case. The court therefore sets aside the award in the lower

court and substitutes therefor an award of KShs.350,000/= (THREE HUNDRED AND FIFTY THOUSAND) as general damages for pain and suffering.

26. This award is in addition to the sum of KShs.6,650/= allowed as special damages and will be subject to the liability ratio agreed at 90.10% in favor of the Appellant. The Appellant will also be awarded the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF JUNE 2019.

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C. MEOLI

JUDGE

In the Presence of:-

No appearance for the Appellant

No appearance for the Respondent

Court Assistants – Kevin/Nancy