**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 12 OF 2015**

**DICKSON GITHAE KIBUE.....APPELLANT**

**-VERSUS-**

**LUCY WANJIKU NDERITU.....RESPONDENT**

***(Being an appeal from the judgment and decree in Nyeri Chief Magistrate's Court Civil Case No. 92 of 2011 (Hon. Wilproda Juma, Chief Magistrate) delivered on 31 March 2015)***

**JUDGMENT**

On 13 November 2008, the respondent was travelling as a lawful passenger in the appellant's public service vehicle registration number KAV 396 R. Somewhere around Kiangwaci area along Sagana-Karatina Road, the vehicle was involved in a traffic accident as a result of which the respondent was injured. There was no other vehicle involved and therefore the accident was a self-involved one. As a result of this accident, the respondent sustained injuries to the limbs; lacerations on the head; a cut wound on the left anterior leg; and finally, a fracture of the right tibia and fibula.

By a plaint dated 28 April 2011 and amended on 5 December 2011, the respondent sued the appellant for damages, both special and general with costs of the suit and interest. The suit was founded on the tort of negligence which she attributed to the appellant.

The appellant denied the claim in its defence filed in response to the amended plaint dated 14 December 2012. He attributed the accident to the respondent's negligence and, in the alternative, he contended that the respondent's claim was fraudulent because she claimed to have been involved in an accident when she was not. Further, and in the alternative, the appellant attributed the accident to the negligence of unidentified motorcyclist who, it was alleged, suddenly swerved into the lane in which the appellant was driving.

After taking the evidence, the learned magistrate found the appellant to have been negligent and solely liable for the accident. She awarded the respondent the sum of Kshs. 2,000,000/= in general damages and Kshs. 316,755/= as special damages.

The appellant was not content with this decision and therefore has appealed against it to this honourable court on the following grounds:

> ***1. The learned magistrate erred in fact and in law in finding that the plaintiff was entitled to general damages that were too high in view of the injuries suffered by the plaintiff and without considering the provisions of cap. 405 (amended) on guidelines of how injuries of a particular nature ought to be compensated and the available authorities on similar injuries.***
>
> ***2. The learned magistrate erred in fact and in law in failing to consider the defendant's submissions on quantum.***
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> ***3. The learned magistrate erred in fact and in law in failing to consider conventional awards for general damages in cases of similar injuries***
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> ***4. The learned magistrate erred in law and in fact in making an award that was against the weight of the evidence on record.***

Liability was not contested perhaps because the appellant did not testify and the only evidence given on his behalf was by a police officer who, in any case, testified that a motorcyclist contributed to the accident. The motorcycle, as noted, was unidentified and neither was its rider joined to the suit against the appellant. Whatever the case, it is inconceivable that the respondent who was only a passenger could have been blamed for the accident.

According to her evidence, the accident occurred because the driver of the vehicle in which she was travelling was driving at a very high speed to the extent that as he attempted to avoid hitting a motor cyclist ahead of him, he lost control of the vehicle which veered off the road and overturned.

It follows that, the only question that this honourable court is concerned with at this stage is that of assessment of general damages.

Assessment of damages is always the province of the trial court and the appellate court will be hesitant to interfere with the exercise of the trial court's discretion in that regard unless it is apparent that, in exercising its discretion, the court proceeded on wrong principles and arrived at an erroneous award in the sense that it is either too high or too low in the circumstances of a particular case. It has been so stated in **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 Bashir case the Court of Appeal noted 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. 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 Kemfro Africa Limited, the same Court said at page of its decision that 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 respondent's evidence on the injuries she sustained was that she was injured on the head and both legs. As matter of fact, so she testified, her right leg was fractured. At the time she testified on 6 November 2013, four years later, she was walking on crutches; the court also noted that she had scars and a deformed right leg. She was treated at Jamii Hospital in Karatina and at A.I.C Kijabe Hospital. She produced the medical notes from the two hospitals in proof of the fact of her treatment.

Those records show that the respondent was initially treated of a forehead laceration before being referred to A.I.C Kijabe Hospital on 14 November 2008 where she was admitted after it was established that she sustained what is described in the medical report as 'a right gustillo IIIA tibia fibula fracture.'

She was operated on in the course of her treatment at this facility; she was also treated with antibiotics, analgesics, dressing changes and physiotherapy exercises until she was discharged on 22 December 2008; however, she couldn't move without crutches. On 11 February 2009 the external fixator was removed and PTB cast with a window was put before she was scheduled for posterior lateral bone graft tibia in the theatre.

She was admitted again on 17 May 2009 for 'right iliac crest borne graft posterior lateral born graft of non-union tibia fracture percutaneous Achilles tendon and fibula lengthening osteotomy.' She was discharged on 20 May 2009.She was readmitted and taken to the theatre on 25 June 2009 for dressing change and for external fixitator right tibia. It is only on 1 July 2009 that she was discharged. On 3 August 2009 she was reviewed and booked for surgery to correct her right tibia which still had a non-union fracture.

When she was reviewed on 6 January 2010 the fracture had clinically and radiographically healed. The external fixitator was removed; the respondent was discharged and could only return for further treatment or checkups if it was necessary.

Dr Fred Muleshe who testified with respect to the nature and extent of the respondent's injuries examined her on 23 September 2010, almost two years after the accident. He relied on the respondent's medical history and in particular the medical records from the hospitals in which the respondent had been treated to compile his own report. At the time of examination, the respondent had no complaints save for a swelling of the right ankle joint. He observed that the respondent was in a fair general condition although she now wore a scar on the right lower limb and on the left lower limb as well. The scars had healed though. She also had a healed scar on the head. She was ambulating on two crutches which she would discard once she is fully recovered.

In the doctor's opinion, the respondent sustained severe skeletal injuries mainly involving the right lower limb. His prognosis was that as a result of the injuries the respondent sustained, she was likely to suffer from post-traumatic osteo-arthritis for which she will require lifelong medication.

This evidence was not controverted and going by the record, there is no doubt that the learned magistrate considered it in her assessment of the general damages. It is also apparent from this medical evidence that the respondent was severely hurt to the extent that the injuries she sustained have left a potential life-long dent on her anatomy and health.

The question always is, how much is sufficient to compensate for such injuries? In answering this question, I must start by saying that there are no scientific means available that courts employ to ascertain the damages payable in any particular case; all they do is to award what is reasonable, taking into account the circumstances of each particular case. In doing so, they pay due regard to awards that have been made in near similar circumstances as the cases before them and make what is commonly referred to 'conventional awards.'. In **H. West & Son, Ltd & Another versus Shepard [1963] 2 All ER 625 Lord Morris of Borth-Y-Gest** said at page 631;

> ***My lords, the damages which are to be awarded for a tort are those which "so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act" (Admiralty Comrs v Susquehanna (Owners), The Susquehanna (Per Viscount Dunedin, [1926] All ER Rep 124 at p 127, [1926] AC 655 at p 661)). The words "so far as money can compensate" point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But 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 endeavour to secure some uniformity in the general method***

***of approach. By common assent 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.***

Turning back to the appellant's situation, it is apparent that the appellant did not cite any decision which ordinarily should have been the basis upon which he would have persuaded the court to award what, in his view, was a reasonable compensation for the injuries that the respondent suffered. All that was said with respect to quantum in the submissions dated 30 August 2014 filed in the trial court on 1 September 2014 on his behalf was:

***Your Honour, The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act No. 50 of 2013 came into operation on 28th January 2014, Paragraph 34(iv) of the Schedule places compensation for such injuries at 10% of Kshs. 300,000/=is more than sufficient compensation (The same is attached herewith).***

Despite not presenting any decisions from which the learned magistrate could make a comparable award the learned counsel for the appellant now submit at this stage as follows:

***Your Lordship, it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. In Denshire Muteti Wambua versus Kenya Power & Lighting Company (2013) it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping the correct level of awards in similar cases***.

This, of course, is true as it is the correct position of law and this submission ought to have been made before the learned trial magistrate, if not for anything else, to guide her in her assessment of the general damages. It is, however, intriguing that although the learned counsel for the appellant are undoubtedly aware of the correct position in law, they chose to ignore it and opted instead to rely on a section of the law that has since been invalidated by courts of competent jurisdiction. The structured compensation which they referred to introduced by **Section 6** of the **Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013** was declared unconstitutional by this Court sitting at Nairobi in **Constitutional Petition No. 148 of 2014 Law Society of Kenya versus Justus Mutiga & Others;** this decision was eventually upheld by the Court of Appeal **in Civil Appeal No. 141 of 2018 Justus Mutiga Others versus Law Society of Kenya & Another 2018 eKLR.**

At the very least, the appellant's counsel cannot be heard to argue at this stage that the award made was far-removed from comparable awards when they never cited any cases where awards similar to what, in their respectable view, the learned magistrate ought to have made.

The appellant's omission was, however, not a carte blanche for the learned magistrate to award what would, in the circumstances be considered an inordinately excessive amount. She was still bound to bear in mind the relevant factual and legal considerations, not least, those that I have referred to in this judgment in assessing the damages. As far as I gather, she did consider these matters except that, for reasons that are now obvious, she did not have the benefit of reading any decisions by the appellant's learned counsel on comparable awards that may have been awarded in similar circumstances; all she had were decisions submitted by the respondent's learned counsel in support for client's cause; she asked for Kshs' 4,000,000/= in general damages and cited the decisions and awards made in **Nyeri High Court Civil Case No. 95 of 2002 Sylvano N. Nyaga & Another versus Joseph Kogi Ngoitho & 2 Others and Nyeri High Court Civil Case No. 48 of 2006 James Mureithi Nganga Versus Julia Waithaka & Another** to buttress her claim.

In Sylvano Nyaga(supra) the plaintiff suffered a severe closed head injury resulting in unconsciousness for five days and confusion for 12 days. He also sustained a closed fracture of the right radius and ulna with dislocation of the elbow joint for which he underwent two operations. He suffered swollen brain with contusion of the cerebellum. He was admitted in hospital for 35 days. The injuries resulted in post-traumatic epilepsy, poor memory, cognitive function, feeling of inadequacy, reduction of the right upper limb function and chronic post traumatic syndrome. It was also established that he would require regular medication for the rest of his life and would need a further operation to remove a plate in his right arm. The court awarded him Kshs. 2.5 Million in general damages for pain and suffering; Kshs. 11,340,000/= towards loss of future earnings besides future medical expenses and special damages.

In the James Mureithi Nganga (supra) the claimant sustained deep and extensive cut wounds on the head; laceration wounds on the left side of the chest; fractured left clavicle and deep laceration wound on the left upper limb; deep cut wound on the right thigh; blindness; mental sub normality; physical deformities; and loss of any meaningful ability to provide for himself in future. This court awarded him Kshs. 2.5 Million for pain, suffering and loss of amenities; he was also awarded Kshs. 828,000/= under the head of loss of future earnings and future medical expenses of Kshs. 262,200/=

There is no doubt that the injuries the claimants sustained in the two cases were more severe than what the respondent suffered. But I also note that the awards were made in the year 2005, about 15 years ago.

Taking all these factors into consideration I would opine that the global award of Kshs. 2,000,000/= the learned magistrate was the best she could make in the circumstances. I find no basis to interfere with her discretion in arriving at the figure she came to. In the ultimate, I find and hold that the appellant's appeal has no merits and it is hereby dismissed with costs to the respondent.

**Signed, dated and delivered in open court this 18th day of October 2019**

**Ngaah Jairus**

**JUDGE**