



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Appellate Side)

(Coram: Odunga, J)

CIVIL APPEAL NO. 15 OF 2017

JUDY NGOCHI.....APPELLANT

-VERSUS-

KAMAKIA ELE SELELO LEDAMOI.....RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate at Machakos

Hon. Lorot delivered on 2nd February, 2017 in Machakos CMCC No. 813 of 2015)

BETWEEN

KAMAKIA ELE SELELO LEDAMOI.....PLAINTIFF

=VERSUS=

JUDY NGOCHI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 16th October, 2015, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 278,045/- General Damages for pain and suffering and future medical expenses, Costs of the suit and interests.
2. The Respondent's suit was premised on the fact that on 13th November, 2014 the Respondent was lawfully travelling as a passenger aboard motor vehicle registration no. KBC 240Q owned by the Appellant and driven by the Appellant or her authorised agent, servant and/or driver along Nairobi-Machakos when the same was so fast, negligently, carelessly and dangerously driven that it was caused to lose control, hit another vehicle on its rightful lane, veered off the road and rolled severally causing severe injuries to the Respondent. The particulars of negligence were pleaded in the plaint.
3. The said injuries were also pleaded as lacerations of little finger, blunt injury to right arm, fracture right humerus, blunt injury left shoulder, fracture left clavicle and chip fracture of right acromion.
4. On 24th November, 2016, the parties recorded a consent on liability in which judgement was entered in favour of the Respondent against the Appellant in the ratio of 90:10 and the matter proceeded to assessment of damages.
5. In his evidence on damages the Respondent testified that he sustained a fracture of the humerus, the collar bone (clavicle) and fracture of the left knee. He was treated at Kenyatta National Hospital, Mater Hospital and Shalom Hospital, Athi River. It was his evidence that he was admitted at Shalom Hospital on 13th November, 2014 and thereafter at Kenyatta National Hospital. He was also admitted at Mater Hospital on 12th January, 2015 to 16th January, 2016. He produced treatment documents in support of his case as well as the x-rays and produced receipts. It was his testimony that he was seen by **Dr Kimuyu** who prepared for her a report which he produced and paid Kshs 2,000/- for the same. He also produced the P3 form and police abstract report.

6. At the time of his testimony he stated that's he had not healed and was disabled and was using crutches. The court noted that he could not stand and testified while seated. According to the Respondent, his shoulders were bent and could only sleep while facing up which affected his eyes as he could not see far. In cross examination he stated that he could not even see the Appellant's advocate.

7. At the end of the evidence of the Respondent, the Respondent's case was closed and the Appellant opted not to adduce any evidence.

8. According to the medical report prepared by **Dr Kimuyu**, the Respondent sustained lacerations of little finger, blunt injury to right arm, fracture right humerus, blunt injury left shoulder, fracture left clavicle and chip fracture of right acromion. As a result, there were implants inserted on the left clavicle and right humerus and he would require their removal at the cost of Kshs 300,000/=. It was however noted that the left patella injury was on management before the accident date and might have been unrelated to the accident.

9. In his judgement the learned trial magistrate after considering the material placed before him held that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. In this case, however, it was just mentioned. The court however decided to consider the same and incorporated it. The learned trial magistrate then proceeded to make a global sum of Kshs 1,500,00/= which in his view incorporated the award for future medical expenses. As regards special damages, he found that a sum of Kshs 278,045/= proved and awarded the same.

10. In this appeal the Appellant has relied on various authorities in which awards were variously made ranging between Kshs 250,000.00 and Kshs 800,000/=. It was however the Appellant's submission that in this case an award between Kshs 400,000/= and Kshs 600,000/= is reasonable in light of the current trends for similar injuries.

11. The Respondent on the other hand submitted that the Court rightly held that the Respondent was entitled to the said damages taking into consideration that the Respondent required future medical expenses of **Kshs.300,000/=**. Accordingly, trial magistrate in awarding the said general damages also included the amount for future medical expenses as stated in the medical report and as observed by the trial court during the evidence of the Respondent.

12. It was submitted that the court was guided by the evidence and demeanour of the Respondent in arriving at the award given to the Respondent considering that his life was forever changed by the accident. In support of the submissions the Respondent relied on **Bethwel Mutai vs. China Road & Bridge Corporation [2008] eKLR**, where the court awarded the sum of Kshs.800,000/= as general damages where the plaintiff sustained Fracture of the Left Clavicle, Fracture of the Right Humerus and Fracture of the Right Femur. He also cited the case of **Dennis Nyamweno Openda vs. Anwarali & Brothers Limited & Another [2015] eKLR** where the plaintiff suffered fractured left clavicle, fractured right humerus, unstable multiple fractures of the pelvic bones (open book pelvic fracture), lacerated scalp wounds, right radial nerve injury leading to a right wrist drop and muscle wasting, blunt chest wall injury and urethral strictures complicating pelvic fracture and prolonged catheterization and was awarded KShs.1,800,000/= in the year 2015. Also cited was **Pocylene W. Kinuva Alias Roselyne Muthui Katee vs. Ocharo Kibira & 3 Others Nakuru HCC No. 237 of 2002** where the plaintiff suffered a transverse fracture of the right tibia and fibula, compound segmental fractures of the left tibia and fibular bones and posterior dislocation of the left hip with an acetabulum fracture and was awarded Kshs. 1,500,000/= in 2009. Lastly, the Respondent relied on **David Thanju Karanja vs. Samuel Kimani Mombasa HCCC No. 60 of 1999** where the plaintiff suffered fracture of the right tibia, fracture of the right femur, fracture of the left femur, fracture of the mandible hand injury to the left foot fractures of metatarsals was awarded Kshs.1 million in 2002.

13. Based on the above authorities and injuries suffered by the Respondent and the fact that the trial court observed he could no longer walk without crutches or even stand in court to testify, it was submitted that the award made by the trial court was sufficient considering the injuries and circumstances of the Respondent. The Respondent therefore prayed that the appeal be dismissed with costs.

Determination

14. As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. As regards the quantum of damages, I agree with the position of Court of appeal in **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR**, as follows:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd –vs- Shephard [1964] AC 326 at page 345:

‘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 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.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Pho Choo v Camden and Islington Area Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab v Kinanu [1982-88] 1 KAR 90.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full.

They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so 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 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.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

15. However, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

16. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

17. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

18. Having considered the decisions that are on record, it is my considered view that the case that comes nearest to the instant case is Bethwel Mutai vs. China Road & Bridge Corporation [2008] eKLR, in which an award of Kshs 800,000.00 was made in 2008. Accordingly, considering the inflation, I am of the view that an award of Kshs 1,000,000.00 would have been adequate compensation for general damages for the injuries sustained by the Respondent.

19. As regards the award for future medical expenses, the learned trial magistrate noted, rightly in my view that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. Ringera, J (as he then was) in Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002 held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisumu Civil Appeal No. 154 of 1993, held that cost of future medical operation is special damages, which must be pleaded. See also Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246. The learned trial magistrate seems to have appreciated this but proceeded to make an award under that head notwithstanding the fact that the particulars thereof were not expressly pleaded. Whereas the particulars of special damages may be supplied at the hearing, the manner of doing so was explained by the Court of Appeal in William Kiplangat Maritim & Another vs. Benson Owenga Civil Appeal No. 180 of 1993, in which it was held that if the

particulars of special damages are not known at the time of filing of the plaint, they should be supplied at the hearing by way of an amendment of the plaint. It was therefore held by the Court of Appeal in **Jinnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998**, that:

“Special damages must be pleaded with as much particularity as the circumstances permit and it is not enough to simply aver that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit those particulars are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing and it is only where particulars of special damages are included in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.”

20. It is therefore my view and I so hold that the learned trial magistrate was in error when he made an award incorporating the award in the nature of future medical expenses. It is also my holding that the learned trial magistrate ought not to have awarded special damages that exceeded the sum pleaded. While there is nothing objectionable about an award of lesser amount than pleaded and particularised, it is clearly not permissible to award a sum in excess of the sum pleaded unless the pleadings are amended.

21. In the premises, I allow this appeal, set aside the award of damages made by the learned trial magistrate and substitute therefor an award of Kshs 1,000,000.00 being general damages and Kshs 278,045/- special damages making a gross total of Kshs 1,278,045.00. This is to be discounted by 10% leaving a net of Kshs 1,150,240.50. The Respondent shall have the interest on the general damages at court rates from the date of the judgement appealed from till payment in full while interest on special damages will accrue from the date of filing suit at court rates till payment in full. As the appellant has not fully succeeded in the appeal, there will be no order as to the costs of the appeal.

22. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 22nd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Kariuki for the appellant

Miss Gichuki for Mr Mutua Makau for the Respondent

CA Geoffrey