



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 84 OF 2017**

**ANNET NOTI JEFWA KAYAA.....APPELLANT**

**VERSUS**

**DAVID NJAU KUNGU.....1<sup>ST</sup> RESPONDENT**

**LUCY KABURA MIGWI..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the judgment of M.W. Murage, (RM) in Milimani CCMC No. 59 of 2015 delivered on 10<sup>th</sup> February 2017)***

**JUDGMENT**

1. This appeal emanates from the trial court's decision in Milimani CCMC No. 59 of 2015. In the suit, the appellant, *Annet Noti Jefwa Kayaa*, then the plaintiff sued the respondents *David Njau Kungu* and *Lucy Kabura Migwi* seeking damages for pain, suffering and loss of future earnings as well as special damages in the sum of KShs.666,125; costs of the suit and interest. The reliefs were sought following a road traffic accident whose occurrence the appellant blamed on the negligence of the 1<sup>st</sup> respondent who was the driver, servant or agent of the 2<sup>nd</sup> respondent.

2. In her plaint dated 5<sup>th</sup> January 2015, the appellant averred that she was lawfully walking towards museum hill on or about 29<sup>th</sup> August 2011 when the 1<sup>st</sup> respondent caused motor vehicle registration number KAT 993U to veer off the road thereby knocking her down and dragging her on the road till the vehicle was stopped by an electric pole; that following the accident she sustained injuries which were pleaded in paragraph 6 of the plaint.

3. Upon being served with summons to enter appearance, the respondents did not enter appearance or file a defence. Interlocutory judgment was thus entered against them in favour of the appellant on 5<sup>th</sup> May 2015. Formal proof thereafter proceeded for assessment of damages at the conclusion of which the learned trial magistrate entered judgment in favour of the appellant against the respondents in the following terms:

- i. Liability at 100%;
- ii. General damages in the sum of KShs.250,000; and
- iii. Special damages in the sum of KShs.3,500.

4. The appellant was aggrieved by the trial court's decision on quantum hence this appeal. In her memorandum of appeal dated 1<sup>st</sup> March 2017, the appellant attacked the trial court's award of general damages on grounds that it was too low compared to contemporary awards made for similar injuries; that in arriving at the award, the learned trial magistrate disregarded the evidence adduced by the appellant and case law relied upon. The appellant also complained that the learned trial magistrate erred when she awarded her KShs.3,500 in special damages instead of KShs.66,125 which was pleaded and proved.

5. The appellant in her written submissions filed on 15<sup>th</sup> July 2019 expounded on her grounds of appeal and urged the court to set aside the trial court's judgment and award her KShs.1,200,000 in general damages; special damages in the sum of KShs.666,125; damages for future medical expenses as well as costs of the appeal and interest.

6. This is a first appeal to the High Court on quantum of damages. The starting point is to acknowledge that as a general rule, the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously taking into account the facts of each case particularly the injuries sustained by the plaintiff and comparable awards previously made for comparable injuries.

It is settled law that though an appellate court has jurisdiction to interfere with an award of damages made by a trial court, that jurisdiction

must be exercised cautiously and only in limited circumstances. Those circumstances have been enumerated in many authorities both by the High Court and the Court of Appeal. The common thread that runs through those authorities is that an appellate court should interfere with an award of damages by the trial court only if it was satisfied that in arriving at its decision, the trial court considered irrelevant factors or failed to consider a relevant factor or acted on misrepresentation of facts or applied the wrong legal principles.

7. An appellate court will also interfere with an award of damages if it is apparent that the award was either too low or too high as to justify an inference that it was an erroneous estimate of the damage suffered. All these principles were enumerated in **Kemfro Africa Limited T/A Meru Express Services, (1976) and Another V Lubia & Another [1987] KLR 30** where the Court of Appeal expressed itself as follows:

***“The principles 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 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 damage...”***

8. With the above principles in mind, I have carefully considered the grounds of appeal, the evidence on record as well as the judgment of the trial court. From the judgment of the learned trial magistrate, it is clear that the trial court considered the evidence adduced by the appellant, the medical reports and the appellant’s written submissions in arriving at her decision. There is therefore no merit in the appellant’s complaint that the learned trial magistrate failed to consider her evidence and case law cited on her behalf in arriving at her decision.

9. In arriving at her decision to award the appellant general damages in the sum of KShs.250,000, the learned trial magistrate stated as follows:

***“From the medical report and the case summary, it is clear that the plaintiff suffered degloving injury right leg – lower 1/3 plus ankle, cut wound – scalp, cut wound left elbow, pain, swelling and bleeding. The plaintiff submitted KShs.800,000 as general damages. I have considered the authorities cited. The injuries in these authorities are more severe than the injuries sustained by the plaintiff in the present case. I find the award of KShs.250,000 sufficient in general damages. I so award. ...”***

10. A perusal of the plaint and Dr. Mwaura’s medical report dated 8<sup>th</sup> April 2013 confirms that the learned trial magistrate was correct in her finding regarding the injuries the appellant had sustained which informed her decision on the award of general damages. In paragraph 6 of the plaint, the plaintiff pleaded that she sustained the following injuries:

- a) Degloving injury of right leg and lower ankle;
- b) Cut wound of the scalp;
- c) Cut wound of the left elbow;
- d) Fracture of the left arm.

11. Dr. Mwaura’s medical report though confirming the other injuries did not support the appellant’s claim that she had also sustained a fracture of the left arm. At the time of examination, the injuries had healed save for pain on the left ankle on exertion and decreased movements at the same ankle due to scar contracture. The doctor assessed functional disability at 10% on the left leg.

12. It is important to note that though the medical report indicates that the appellant had sustained injuries on the left ankle which led to functional disability on the left leg assessed at 10%, the plaintiff had not pleaded that she had sustained any injury on the left leg. The injury pleaded was on the right leg and lower ankle. It is not clear how the doctor came up with his findings related to alleged injuries on the appellant’s left leg and alleged functional incapacity since he did not testify in the lower court to explain the basis of his findings or to clarify whether reference to the left leg was a mistake meant to refer to the right leg.

13. As parties are bound by their pleadings, that aspect of the doctor’s report did not support the appellant’s pleadings on the injuries she claimed she sustained as a result of the 1<sup>st</sup> respondent’s negligence. It was thus irrelevant as far as assessment of general damages payable to the appellant was concerned. The learned trial magistrate was therefore correct when she did not take into account the alleged residual incapacity when considering the award on general damages.

14. In view of the foregoing, I am unable to agree with the appellant’s submissions that the learned trial magistrate erred in her award of KShs.250,000 general damages. In her proposal for an award of KSh.1,200,000, the appellant relied on the authorities of **Leonard Njenga Nganga & Another V Lawrence Maingi Ndeti, [2018] eKLR** and **P.N. Mashru Ltd V Omar Mwakoro Makenge, [2018] eKLR**.

15. In the **Leonard Njenga Nganga & Another case, [supra]**, the plaintiff had sustained a deep cut on the forehead, fracture of the right collar bone (clavicle), compound fractures on the right hand (both bones of right radius spinal bones), a fracture of the femur, deep cut in the lower lip, loss of the lower teeth denture and injury to the gums, fracture on the left ankle and dislocation to the ankle joint and generalized body pain. Justice Odunga substituted the award of general damages by the trial court in the sum of KShs.2,150,000 with an award of KShs.1,500,000. In the **P.N. Mashru Ltd case, [supra]**, the plaintiff had sustained serious injuries which included fracture of the femur distal third, fracture of the temporal bone with haematoma, head injury to the right frontal parietal bone with brain oedema and left subdural haematoma. Justice Kamau confirmed the trial court’s award of KShs.1,200,000 general damages.

16. From the foregoing, it is clear that the authorities relied on by the appellant to demonstrate her claim that the award made by the lower court was too low as to warrant interference by this court cannot come to her aid since the injuries sustained by the plaintiffs in those cases

are completely different from the injuries sustained by the appellant in this case. The injuries sustained by the plaintiffs in those cases were far much more severe and are not comparable to those sustained by the appellant. They included multiple fractures and head injuries. As stated earlier, there is no evidence that the appellant herein sustained any fracture.

17. Given the injuries sustained by the appellant in this case as pleaded and proved, I am unable to fault the trial magistrate's award of KShs.250,000 as compensatory damages for the appellant's pain and suffering. The amount was reasonable and sufficient for the appellant's injuries given the value of the Kenya shilling in the year 2017 when the award was made. I cannot say that the amount was too low or too high as to warrant an inference that it was an erroneous estimate of the damage suffered. There is also no indication in the judgment that in arriving at her decision, the learned trial magistrate applied any wrong legal principle. I therefore find no basis to disturb the trial magistrate's award of general damages. The same is consequently confirmed.

18. On special damages, the appellant has asserted that she had pleaded and proved a sum of KShs.666,125 but despite this fact, the learned trial magistrate erroneously awarded her a measly KShs.3,500. I find no basis for this complaint by the appellant since her plaint dated 5<sup>th</sup> January 2015 reveals that she pleaded for special damages in the sum of KShs.3,000 for the medical report and KShs.500 for copy of motor vehicle records.

19. The court record reveals that there are two medical reports authored by *Dr. G.K. Mwaaura* dated 8<sup>th</sup> April 2013. One of the reports appears to have been filed together with the original plaint. That report did not have any indication that the appellant required any future medical treatment and its estimated cost.

The second medical report bearing the same date was filed on 7<sup>th</sup> November 2016 as a supplementary medical report. This is the report that contained a finding by the doctor that the appellant will require future surgery to remove the contracture on the left ankle and plastic surgery to remove a scar on the same leg at a cost of KShs.500,000. This report was however irregularly and unprocedurally filed without leave of the court well after the appellant had closed her case on 13<sup>th</sup> October 2016. It was not therefore admissible as evidence to prove the appellant's claim that she will be required to spend KShs.500,000 in future medical expenses. The medical report that was properly on record which was referred to by the learned trial magistrate did not have such evidence. I am in the premises unable to fault the trial magistrate's award of special damages.

20. The claims for future medical expenses and medical expenses in the sum of KShs.162,625 were not pleaded in the original plaint. They were pleaded in an amended plaint dated 28<sup>th</sup> October 2016 which was purportedly filed with leave of the court granted on 28<sup>th</sup> October 2016. A perusal of the trial court's proceedings on 28<sup>th</sup> October 2016 reveals that though leave to amend the plaint was sought, the same was not granted. The amended plaint was therefore irregularly filed without leave of the court and was not properly on record. The learned trial magistrate failed to appreciate this fact and proceeded as though the amended plaint was regularly on record. Any claim on the basis of the amended plaint was consequently not valid and should not have been considered by the trial court. Nothing therefore turns on the appellant's claim that the trial court erred in awarding her KShs.3,500 in special damages instead of KShs.666,125.

21. For the foregoing reasons, I do not find any merit in the appellant's appeal. The same is accordingly dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of November, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Salach: Court Assistant

No appearance for the appellant

No appearance for the respondents