



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 11 OF 2018

JACKLINE KWAMBOKA NYAMONGO.....APPELLANT

VERSUS

PATRICK WACHIRA.....RESPONDENT

(Being an appeal from the judgement and decree of Hon Juma delivered on 21st April 2018

in the Chief Magistrate's Court at Narok in Narok CC No 88 of 2016,

Jackline Kwamboka Nyamongo v Patrick Wachira)

JUDGEMENT

1. In this court the appellant has raised six (6) grounds in her memorandum of appeal, in which she is challenging an award of damages in the sum of Kshs 350, 000/= less twenty-five per cent contributory negligence (25 0/0), for being inordinately low in the circumstances of the case. At trial, liability was by consent agreed in the ratio of 75:25 in favour of the appellant. Therefore, the only issue in this appeal is in respect of quantum of damages.

2. In ground 1, 2, 4, 5 and 6 in a coalesced form the appellant has faulted the trial court in law and fact by making an award of Kshs 350,000/=as general damages, which was inordinately low in the circumstances in view of the severe injuries, which the appellant sustained. The appellant sustained the following injuries according to Dr. Ezekiel Ogando Zoga.

- Necrosis of the left gluteal/buttock leading to extensive tissue necrosis.
- An open gaping wound
- Dislocation of the left knee

3. As at 24th December 2014, when the appellant was examined, she complained of inability bear weight on the right lower limb. Upon examination, the appellant was found to be in stable condition and had some weakness on the right lower limb due to extreme loss of muscle and tissue in the gluteal area. The Coles fracture had healed with slight malunion. The doctor concluded that following the road accident the appellant sustained severe injuries, whereby there was extreme tissue loss of the right gluteal area, hence has some weakness on the lower right limb. The appellant also sustained fracture of the left radius which has healed with a permanent disability which the doctor assessed at thirty per cent (30 %).

4. Furthermore, two years later, on 24th January 2017 Dr. Maina Ruga on behalf of CIC General Insurance Co. Ltd examined the appellant. He found her to be 31 years old. The history of the appellant was that she was treated at Narok hospital on 24th December 2014 to 30th December 2014. She was thereafter transferred to Tenwek hospital on 23rd January 2015 to 11th February 2015. She was also attended Mama Lucy Kibaki Hospital. X rays were done and they showed the fracture on the left wrist. A P.O.P cast was applied for three months. The left knee was bandaged and she was given medications. The haematoma on the left gluteal area became septic and necrotic and incision and drainage was done. She was given antibiotic and regular wound dressing. This doctor found as follows. She was in good general condition. There was no swelling and no deformity. The wrist joint movements were normal range. There was no swelling and no deformity in the left knee joint. She was walking normally. There was an open gaping wound in the left gluteal area, which was clean and was not bleeding. In his opinion, the doctor found that the appellant had suffered the same injuries that Dr. Ezekiel Ogando Zoga found; except for the following. That the fracture of left radius had by then healed and that she might require skin grafting for the large gaping wound on the left buttock. He the assessed her level of incapacity at twenty per cent (20%).

5. Counsel for the appellant has submitted that the appellant was admitted in Narok referral hospital for one week. Later she was also admitted in Tenwek hospital for about three weeks. Both doctors confirmed that the appellant suffered severe injuries. They also confirmed that the appellant suffered a permanent disability, which Dr. Zoga assessed it as being 30% disability, while Dr. Ruga Maina assessed it as being 20% disability. According to Dr. Ruga, who examined the appellant two years later, he still found that there was an open gaping wound in the left gluteal area, which was clean and was not bleeding. The doctor found the wound would still need a skin grafting. The left wrist fracture had healed with no residual disability.

6. Furthermore, counsel for the appellant cited the case of **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others (2013) eKLR**, in which the plaintiff was awarded Ssh. 1, 300, 000/= general damages for injuries less severe compared to those of the appellant herein with a permanent disability assessed at 5%. The plaintiff in that case became unconscious following an accident and became conscious the next day. He experienced a lot of pain. He suffered the following injuries.

- Cuts on the head
- One tooth fell and another was broken
- Pain in the chest
- Pain in the right shoulder
- Had difficulty in breathing
- Had cuts on the legs
- Had cuts on left elbow
- Had a fracture of the left leg tibia and fibula, which was in plaster
- Affected nerves.

He was in Thika hospital for two months and five days

He was thereafter treated in four other hospitals including KNH, Kijabe and Kikuyu

Thereafter he used clutches due to injury in left leg

He was awarded one shillings million and three hundred thousand (Kshs 1,300,000/=) as general

damages. I have also considered the second authority cited by counsel and I find that the plaintiff in that case suffered equally more serious injuries than the appellant in the instant appeal.

Counsel for the appellant therefore urged the court to set aside the magisterial award of Kshs. 350,000/= and substitute it with an award of Kshs 2,000,000/= as general damages.

7. Counsel for the respondent supported the magisterial award as reasonable compensation. He submitted that the injuries suffered by the appellants in the cases cited by counsel for the appellant were more serious than the appellant in the instant appeal. They are therefore not useful for comparison purposes.

8. Furthermore, counsel cited *Cecilia W Mwangi & another v Ruth W Mwangi [1997] eKLR*, in which the Court of Appeal observed that high awards are bound to be a burden to the vast majority of the people. In that regard, that court pronounced itself in the following terms: “...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 will afford. Large awards inevitably are passed on to members of the public, the majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.”

9. I have considered these rival submissions. It should be borne in mind that the assessment of damages is in the discretion of the trial court. An appeal court may only disturb an award by the trial court if it took into account an irrelevant factor or failed to consider a relevant factor. Additionally, an appeal court may disturb the award if it is inordinately low or manifestly so high that it is an erroneous estimate of the damages: *see Kemfro Africa Ltd v A.M. Lubia & Another [1982-88] I KAR*

10. I have considered the injuries sustained by the appellant and comparable injuries in other decided cases. I find that the injuries sustained by the appellant were severe with a resulting disability being a gaping wound in the gluteal region of the buttocks, which according to Dr. Maina Ruga had not healed, when he examined her two years later after the accident. The fracture of the left radius had healed well with no resulting deformities. The doctor found that the gaping wound in the left buttock would need skin grafting. The appellant was in Narok referral hospital for one week and three weeks in Tenwek hospital. The hospitalization of the appellant for about four weeks in the two hospitals is an indication of the pain and suffering sustained by her. After re-assessing the injuries sustained, the resulting disability in the region of 20% including the pain and suffering and loss of amenities the appellant during those four weeks of hospitalization and fall in the purchasing power of the shilling, I find that the trial court awarded inordinately low damages in the circumstances of the case. These are factors that the trial failed to give sufficient weight. In the circumstances, I hereby enhance the award to shillings 700,000/= general damages less 25% contributory negligence, which translates to shs 525,000/= general damages add shs 4,000/= and the total award comes to shs 529,400 general damages. I therefore uphold grounds 1,2,4, 5 and 6 of the appeal.

11. In ground 3 the appellant has faulted the trial court in law and fact in awarding special damages of Kshs 4,000/= when the appellant had in fact pleaded and proved Kshs 319,598. 69. In this regard, counsel for the appellant did not submit in respect of these damages. Counsel for the respondent therefore submitted that the appellant has therefore abandoned grounds 1 and 3. Counsel for the respondent submitted that these damages were not proved. Additionally, there was no consent in respect of special damages.

12. The appellant in paragraph 5 of her plaint pleaded special damages. She did not lead evidence in support of those pleadings. They were not agreed upon as having been spent by consent. The law in this regard is that special damages must be pleaded and proved. This was not done. In the circumstances, I find that they were not proved. I therefore dismiss this ground 3 of the appeal.

13. The appellant has succeeded in her appeal. The appeal is hereby allowed with the result that the magisterial judgement and decree are hereby set aside. She will therefore have the costs of the appeal.

14. The upshot of the foregoing is that I hereby enter judgement for the appellant in the sum of Kshs 525,000/= general damages plus Kshs 4,000/= special damages with costs and interest at court rates.

Judgement signed, dated and delivered in open court at Narok this 7th day of November, 2019 in the presence of Mr. Langat holding brief for Mr. Modi for the respondent and in the absence of the appellant.

J. M. Bwonwong'a

Judge

7/11/2019