



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HCCA NO 180 OF 2013

DORCAS MUTUTHO ILEVE ALIAS DORCAS PATRICK.....APPELLANT

VERSUS

MUITHYA LYDIA.....DEFENDANT

[An appeal from the judgment of the Chief Magistrate's Court at Machakos before Hon. A. A. Odawo, RM delivered on the 28th day of August, 2013 in Machakos CMCC No. 883 of 2012.]

JUDGMENT

INTRODUCTION

1. This is an appeal against the quantum of damages awarded by the trial court by way of general damages awarded for pain, suffering and loss of amenities in a personal injury claim. By a Memorandum of Appeal dated 10th September, 2013 the appellant appeals against the judgment of the trial court the following grounds of appeal:-

1. "That the learned trial magistrate erred in law and in fact by making an award on general damages which was manifestly low in view of the injuries sustained by the plaintiff and the authorities brought to the attention of the court by the plaintiff.
2. That the learned Resident Magistrate erred in law and in fact by applying wrong principles of law in assessing the general damages to be awarded to the plaintiff and, therefore, arrived at the wrong award.
3. That the learned Trial Magistrate erred in law and in facts by ignoring the appellants submission in her judgment without proper reason for doing so and even when the respondent failed to file his submissions.
4. That the learned Resident Magistrate erred in law and in fact by applying the wrong principles of law by awarding a lower sum for special damages despite the fact that the plaintiff had strictly proved the figures pleaded."

Consent on liability and future medical expenses

2. By Consent of the Parties adopted by the Court as its judgment on the 2nd day of March, 2013 liability was agreed at 85% and 15% in favour of the plaintiff against the defendant. By a further consent adopted by the court on 24th July, 2013 the cost for future medical expenses agreed at Ksh.200,000/=.

Judgment of the trial court

3. In her Judgment delivered on the 28th day of August, 2013 the Hon. A. A. Odawo, RM held as follows:

"The plaintiff has proposed a sum of Ksh. 2,500,000/= for general damages. This is beyond my jurisdiction. I have taken into consideration the injuries sustained in the cited authority and the age of the said authority. I remind myself that past authorities only act as a guide and each case has to be decided on its peculiar circumstances.

I find the injuries in the cited case and their effect to be more severe and distinguishable to the case in point. The plaintiff therein sustained a deformity and underwent several operations. His work performance was also affected. I have further warned myself of the general principle that awards made in such cases should be mere compensation and should not turn out to be punitive. As such I find a sum of Ksh.300,000/= to be sufficient recompense in general for pain suffering and loss of amenities.

The plaintiff forwarded one original receipt as proof of special damages totaling Ksh. 3,000/=. The rest of the receipts forwarded were certified copies, which one cancelled. The court was unable to decipher if payment were made on the cancelled receipt. No explanation was tendered as to the whereabouts of the originals.

In conclusion, I hereby enter judgment in favour of the plaintiff as against the defendant as follows:

- *General damages – Ksh. 300,000/=*
- *Special damages – Ksh. 3,000/=*
- *Future Expenses – Ksh. 200,000/=*
- *Total – Ksh. 503,000/=*
- *Less 15% contribution – Ksh. 74,450/=*
- **Total – Ksh. 427,550/=**

SUBMISSIONS BY THE PARTIES

APPELLANT’S SUBMISSIONS

4. In the Submissions dated 3rd November, 2015, the Appellant urged principal points as follows:

Appeal is on quantum as to pain, suffering and loss of amenities only as parties hereto had recorded a Consent Order on liability and future medical expenses. On 24/7/2013 a further Consent Order was recorded whereby the following documents were admitted into the record without calling the makers thereof:

- a. Discharge summaries
- b. CT scan reports and x- ray request forms
- c. Medical report dated 3/9/2012 by Dr. E. Loiposha
- d. Medical Report dated 11/3/2013 by Dr. Maina Ruga
- e. P3 form

In all the above mentioned documents including the medical report by the respondents doctor Maina Ruga, it is clear that the appellant did sustain the above mentioned injuries. There is further no doubt that the appellant did sustain serious life threatening injuries that occasioned her a lot of pain and agony. The appellant urged the Court to award Ksh. 2,500,000/= for pain and suffering relying on ***Edward Mkamili Katana vs. CMC Motors Group Limited & Shar Panja Hina*** [2006] e KLR HCCC NO 95 of 2002 where Maraga J. (as he then was) awarded Ksh. 2,000,000/= for allegedly similar injuries.

The appellant contended that the trial magistrate herein erred in fact and in law by awarding Ksh. 300,000/= for pain, suffering and loss of amenities. The suit herein was filed on 5/11/2012 and judgment delivered on 28/8/2013 when the Honorable Chief Justice had enhanced the pecuniary Jurisdiction of the court.

In her judgment, the learned trial magistrate indicated that her award was based on her pecuniary jurisdiction of Ksh.500,000/= as her jurisdiction now was up to Ksh. 2,000,000/=.

Relying on ***Butler vs. Butler*** [1984] KLR 225, the court was urged to reverse the award made by the Trial Magistrate as the lower court had:

- a. acted on wrong principles of law;
- b. awarded so excessive or little damages that no reasonable court would; and
- c. Considered matters he ought not to have considered or did not take into account matters which ought to have been considered.

It was submitted that she misdirected herself on her award as pursuant to the Statute Law (Miscellaneous amendments) Act 2012, the Magistrate’s Court Act Cap 10, section 5 was amended to enhance the pecuniary jurisdiction of the magistrate’s courts with the Resident Magistrate Court jurisdiction in civil matters being set at Ksh.2,000,000/-. Therefore the trial magistrate herein could by law award up to two million shillings in the matter.

The appellant relied on ***Ruth Nduni Mwithui vs. Mombasa Liners & CMC Motors Group*** [2012] eKLR, where the High Court, while considering the consequences of a claimant proposing an award of general damages which exceeds the pecuniary jurisdiction of the court held that the magistrate Court should award up to the ceiling of the courts pecuniary jurisdiction and stated the mere proposal of an award of general damages whose effect would exceed the pecuniary jurisdiction of the magistrate’s court does not divest the court of jurisdiction stating that the court should have awarded the maximum of the Magistrate’s Jurisdiction. The appellant therefore urged the Court to be guided by the above decision have awarded the Ksh.2,000,000/= which was the ceiling of her jurisdiction despite the fact that the plaintiff had submitted on Ksh.2,500,000/=. The case of ***Michael Maina Gitonga vs. Serah Njuguna Alias Serah Wanjiru Mungai*** [2012] eKLR

HCCC No 202 of 2009 was cited which awarded Ksh.2,000,000/= where the plaintiff sustained the following injuries:-

- a. Multiple fracture of the pelvis
- b. Dislocation of the right hip with displaced fracture of the right acetabulum
- c. Commuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau, and
- d. Soft tissue injuries to the chest.

THE RESPONDENT'S SUBMISSIONS

Applicable principles

5. The respondent urged that the principles well established by authorities for the assessment of damages in personal injury claims have been: fairness, reasonableness, moderation and *stare decisis*, that is to say, an injury should attract an award equivalent or near equivalent to previous courts awards for nigh similar injuries. The principles were set out in the *locus classicus West (H) & Son Ltd. vs. Shepard* [19640] A.C 326 per **Lord Morris** at page 345 as follows:

“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 process there must be an 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 is far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amount which are awarded are to a considerable extent conventional.”

In *Lim Poh Choo vs. Camden and Islington Area Health Authority* [1979] 1 ALL ER 332, Lord Denning M.R., stated:

“In considering damages in personal injury claims, it is often said; ‘the defendants are wrong doers, so make them pay up in full. They do not deserve any consideration.’ The accident, like this one, may have been due to a pardonable error which may as befall any of us. I stress this so as to remove the misrepresentation, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment he has suffered. That is not the law, he is only entitled to what is in the circumstances, a fair compensation, fair both to him and to the defendants.”

Both the above pronouncement was cited with approval by the Kenya Court of Appeal in *Cecilia w. Mwangi & Anor. vs. Ruth W. Mwangi* C.A No. 251 OF 1996 [1997] eKLR. See also *Mbaka Nguru & another vs. James George Rakwara* C.A No. 133/1998.

According to the plaint and medical report, the plaintiff sustained the following injuries:

- i. Head injury with loss of consciousness and intracranial bleeding,
- ii. Fracture of right radius-distal end,
- iii. Fracture of cervical and thoracic vertebral bones, and
- iv. Fracture of the sternum and 6th rib.

The respondent urged that a comparable award is to be found in *Awadh Ahmed Basadiq vs. Elijah Meru Mangala* HCCC No. 154 of 2000 where Khaminwa J. in 2002 awarded Ksh. 400,000/= as general damages to the plaintiff sustained the following injuries:

- a. Multiple contusions on head, neck and abdomen
- b. Structure of femur
- c. Compound fracture;
- d. Fracture of left tibia and fibula.

The respondents reasoned that given the above authorities both on principles and precedents, it is the defense's humble submission that the award given for general damages by the trial magistrate, is reasonable taking into account the nature of injuries sustained by the appellants herein and as such its respondent submission that the appeal herein has no merit and the same should be dismissed with costs.

DETERMINATION

6. The two doctors for the plaintiff and for the respondent largely agreed as to the nature of the injuries and recovery therefrom as follows:-

1. Plaintiff's Doctor - Dr. E. Loiposha, medical report dated 3rd September, 2012

- Fractures of spinous Processes C6, C7 and T1
- Intercelebral hemorrhage – right cerebellar hemorrhage
- Fracture of manubrium sternum
- Fracture of the right 6th rib
- Distal radial fracture – right upper limb, and
- Bruises on the face.

With expected full recovery with osteoarthritis formation requiring physiotherapy and analgesics estimated cost of Ksh.400,000/=.

2. Respondent's Doctor- Dr. Maina Ruga's medical report dated 11th March, 2013 Injuries:

- Head injury with loss of consciousness and intracranial bleeding
- Fracture of right radius – distal end
- Fracture of cervical and thoracic vertebral bones
- Fracture of the sternum and right 6th rib.

She suffered severe harm, sustained head injuries, chest injuries with fracture of one rib and some cervical and thoracic vertebral bones. She will require occasional analgesic medications and physiotherapy for the neck and back. She is at increased risk of developing osteoarthritis on the neck and thoracic spine.

7. The future medical costs have been agreed at Ksh.200,000/=. There was no challenge on the trial court's finding and award in special damages.

Jurisdiction of the court

8. The trial magistrate did not fail to award the Ksh.2,500,000/= because she had no jurisdiction to grant such a sum. The statement that the court had no jurisdiction to grant the wishes of the appellant at Ksh.2,500,000/= was clearly made in passing. It is clear that the court awarded the sum it did after considering the nature of the injuries in this particular case against the case in which the high award was made and finding the former to be less serious and the authority therefore, distinguishable. Accordingly, no benefit is made of the authorities for the award of the maximum of a court's jurisdiction where the damages considered appropriate outstrip the court's jurisdiction referred to above.

9. In his judgment of 10th May, 2006, Maraga, J. (as he then was) in *Edward Mzamili Katana v CMC Motors Group LTD & Another* [2006] eKLR relied on by the appellant held as follows:

“In the making these proposals counsel cited authorities ranging from those with minor injuries and decided over a decade ago to those of paraplegia. I am of course not going to be influenced by these figures. As stated by the Court of Appeal in **Ossuman Mohammed & another vs Saluro Bundit Mohammed, Ci Appeal No. 30 of 1997 (unreported)** quoting from the case **Kigaraari vs Aya** [1982 – 88] 1 KAR 768:

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.”

No two cases can have exactly the same injuries and disabilities or effects. Each case has to depend on facts. Past cases therefore only provide a guide. In the case of **Hassan Mohammed Adam vs Tracom Limited & Another** Nakuru HCC No. 508 of 1999 with less serious injuries than those suffered by the plaintiff in this case a sum of Ksh.750,000/= was awarded on 15th July, 2003 as general damages for pain and suffering. In **Timon Kalavi Jappinea & Another Vs Texcal House Service Station Ltd & Another** with slightly more serious injuries Ksh.1,750,000/= was awarded as general damages for pain and suffering in 1998.

In this case there is no doubt that the plaintiff suffered serious injuries. As stated by Dr. Hemant Patel in report of 17th June 1999 Ex. 2 the plaintiff was in an extreme state of shock on admission to Pandya Memorial Hospital. He also suffered a lot of pain. He underwent a total of four operations and ended up with the shortening of his left leg. That has affected his performance. As a policeman he can now only perform office duties. He cannot do field work live alone play any games he used to enjoy. The injury have also affected his chances of promotion.

Taking all these into account and the fact that the plaintiff is now about 52 years old **I consider a sum of 2,000,000/= as reasonable compensation for pain and suffering and loss of amenities.**

Assessment of damages and interference by an appellate Court

10. I respectfully agree with the principles for consideration of awards of general damages as set out in the various precedents that damages must be conventional, with comparable injuries being remedied by comparable awards made in similar cases while giving allowance for

changes in the value of money generally, and that the amounts should aim to achieve a fair compensation for both the plaintiff and the defendant and to be reflective of the comparative health of the Kenyan economy, as well as sensitive to ability of the defendants to meet the liability. See *West (H) & Son Ltd. v. Shepard* [1964] A.C 326; *Lim Poh Choo vs. Camden and Islington Area Health Authority* [1979] 1 ALL ER 332; *Butler vs. Butler* [1984] KLR 225 and *Kigaraari v. Aya* [1982 – 88] 1 KAR 768.

11. Considering the principles for assessment of damages and upon which an appellate court will interfere with the award of damages by a trial court the Court of Appeal in *Butler v. Butler* [1984] KLR 225 as shown in the head-note held:

“8. In awarding damages, a court should consider the general picture and all the prevailing circumstances and effect of the injuries on the claimant but **some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts.**

9. The fall in the value of money generally, and the levelling up and down of the rate of exchange between the currencies of Kenya and of the country from which comparable cases are derived, **must be taken into account.**

10. The assessment of damages is more like an exercise of discretion by the trial judge and **an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damage that no reasonable court would, or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”**

12. In *Shabani v. City Council of Nairobi* (1985) KLR 526, the Court of Appeal reiterated the principle that **“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 based on some wrong principle or on misapprehension of the evidence.”**

13. I consider, as did the trial court, that *Edward Mzamili Katana* supra is not a suitable guide in this case because the award therein of Ksh.2,000,000/= for pain, suffering and loss of amenities was in respect of much more severe injuries with multiple operations and permanent disability. In the present case, the appellant/plaintiff’s own doctor found that the plaintiff would recover fully with some future medical intervention estimated at ksh.400,000/= but which was after filing of the suit agreed between the parties at ksh.200,000/=. The trial court’s judgment while finding the award in *Edward Mzamili Katana* supra as inappropriate guide in this case because of the seriousness of the injuries therein is not shown to have considered comparable awards in similar injuries.

CONCLUSION

14. The trial court exercised discretion in the award of damages in this matter. The trial court was not limited by its pecuniary jurisdiction under the law but by the nature and extent of injuries suffered by the appellant/plaintiff and taking the view that the award in *Edward Mzamili Katana* supra was in respect of more serious injuries, arriving at an award of Ksh.300,000/= which cannot be said to be inordinately low as to amount to an erroneous estimate. However, the trial court is not shown to have considered comparable awards for the comparable injuries. To this extent only, I do find an error in principle to warrant an interference with the discretion of the trial court. In the submissions before this Court, the Respondent offered the case of *Awadh Ahmed Basadiq vs. Elijah Meru Mangala* HCCC No. 154 of 2000 where Ksh.400,000/= was awarded for pain and suffering and loss of amenities in very similar case of multiple fractures on 7/6/2002. Taking into consideration the fall in the value of money in the period of eleven years between 2002 when *Awadh Ahmed Basadiq* was decided to the date of the trial court’s Judgment on 28th August, 2013, I consider that an award of Ksh.600,000/= would have been an appropriate award for pain, suffering and loss of amenities.

ORDERS

15. Accordingly, for the reasons set out above, the trial court’s award for pain, suffering and loss of amenities is set aside and substituted with an award of damages in the sum of Ksh.600,000/= so that the total award in damages in the matter becomes as follows:-

- i. General damages – Ksh.600,000/=
- ii. Special damages – Ksh.3,000/=
- iii. Future Expenses – Ksh.200,000/=
- iv. Total – Ksh.803,000/=
- v. Less 15% contribution – Ksh.120, 450/=

Total – Ksh.682, 550/=

together with interest from the date of judgment in the trial court.

16. The appellant will have the costs of the appeal to be paid by the respondent.

Order accordingly.

EDWARD MURIITHI

JUDGE

DATED AND DELIVERED ON 2ND DAY OF JULY 2018

ODUNGA J.

JUDGE

Appearances:

M/S L. M. Wambua & Co. Advocates for the Appellant.

M/S J. Maluki & Co. Advocates for the Respondent.