



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 70 OF 2013

ROSE JEPKOSGEI KIPKOTI.....APPELLANT

VERSUS

BARNABAS BIWOTT.....RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. T. Nzyoki, Principal Magistrate, delivered on 25 April 2013 in Eldoret CMCC No. 710 of 2010)

JUDGMENT

[1] This is an appeal that was lodged herein on **22 May 2013** by the Appellant, **Rose Jepkosgei Kipkoti**, from the Judgment and Decree of the Principal Magistrate, **Hon. T. Nzyoki**, in **Eldoret CMCC No. 710 of 2010: Rose Jepkosgei Kipkoti vs. Elvis Kipkemboi, Barnabas Biwott and Bhalo Nyebwana**. The Plaintiff had sued the Respondents before the lower court in connection with injuries that she sustained in a road traffic accident, while travelling as a fare paying passenger aboard the 2nd Respondent's motor vehicle **Registration No. KBA 039V**, Toyota Matatu.

[2] It was the contention of the Appellant before the lower court that the accident occurred as result of the negligence of the Appellant or his agent in driving and/or controlling the said motor vehicle. Particulars of negligence and of the injuries suffered were duly supplied in paragraphs 5(a) to (i) of the Appellant's Complaint before the lower court dated **19 August 2010**; while her injuries were set out in Paragraph 7 as follows:

- [a] Head injury with unconsciousness for some days;
- [b] Swollen forehead with tenderness and a cut wound;
- [c] Swollen and tender right eye;
- [d] Swollen and tender neck with a cut wound;
- [e] Blunt trauma to the chest with a cut wound;
- [f] Blunt trauma to the lumbar spine which was tender;
- [g] Swollen and tender right shoulder and right arm with bruises and cut wounds;
- [h] Dislocation of the right shoulder joint;
- [i] Swollen and tender left shoulder and left arm;
- [j] Fractured left radius and left ulna;
- [k] Swollen and tender lower limbs with massive degloving wounds and muscle destruction;
- [l] Fractures of the right tibia and right fibula

[3] The lower court record shows that only the 2nd Defendant entered appearance and filed a Defence through the firm of **M/s Nyaundi Tuiyott & Co. Advocates**. He denied the allegations set out in the Appellant's Plaintiff. At paragraph 7 of the Defence, it was averred, *inter alia*, that, if an accident occurred as alleged, then the same was wholly occasioned and/or substantially contributed to by negligence on the part of the owner of motor vehicle **Registration No. KWL 818** Toyota pick-up. Particulars thereof were supplied in paragraph 7(a) to (j) of the 2nd Respondent's Defence dated **21 October 2010**. The 2nd Respondent further denied that the Appellant suffered injuries as particularized in her Plaintiff.

[4] Thereafter on the **9 May 2012**, a Consent Order recorded settling the issue of liability in the following terms:

"(a) Judgment on liability is hereby entered at 90% in favour of the plaintiff as against the 2nd defendant.

(b) The matter be scheduled for assessment of damages."

[5] The matter was thereafter listed for hearing for the purpose of assessment of damages, and to that end the Appellant and her witness **Dr. Paul Kipkorir Rono** testified on **21 March 2013** and **28 March 2013**, respectively; and on the basis of that evidence and the written submissions that were invited from the parties' respective Advocates, the lower court awarded the Appellant a total of **Kshs. 1,166,446.80** as compensatory damages together with interest and costs. The award was made up as follows:

General Damages for pain and suffering -	Kshs. 1,200,000
Special Damages	- Kshs. 96,052
Sub-total	Kshs. 1,296,052
Less 10% contributory negligence	- Kshs. 129,605.20
Total Award	Kshs. 1,166,446.80

[6] Being dissatisfied with the award, the Appellant filed this appeal on **22 May 2013** against the said Judgment and Decree on quantum on the following grounds:

[a] That the Learned Magistrate erred in law and in fact in awarding damages which were inordinately low and/or insufficient in the circumstances as to amount to an erroneous estimate of the loss/damage suffered by the Appellant;

[b] The Learned Magistrate misapprehended and misunderstood the extent and severity of the injuries suffered by the Appellant leading to erroneous estimates of the damage and loss sustained by the Appellant;

[c] The Learned Magistrate erred in law and in fact in failing to consider the evidence on record, the Appellant's submissions and the court record in its entirety in awarding damages, thereby arriving at a wrong decision in regard to general damages;

[d] The Learned Magistrate erred in law and in fact by disallowing claim for future medical expenses.

[7] Accordingly, it was the Appellant's prayer that the appeal be allowed in its entirety; that the Judgment in **Eldoret CMCC No. 710 of 2010** on quantum be set aside, and that in its place, the Court be pleased to do a re-assessment of damages and enhance the same. The Appellant also prayed that an award be made for future medical expenses as well as the costs of the appeal.

[8] The appeal was canvassed by way of written submissions which were filed herein on **15 November 2017** by the law firm of **R.M. Wafula & Co. Advocates** on behalf of the Appellant; and on **30 November 2017** by the firm of **M/s Nyaundi Tuiyott & Co. Advocates** for the Respondents. In his written submissions, **Mr. Wafula** restated the principles governing award of damages, namely:

[a] that before an award of quantum of damages is made in any case, the court has to bear in mind and consider the nature of the injuries sustained, the pain undergone, the effect on the health of the Plaintiff according to its degree and its probable duration, whether likely to be temporary or permanent, the expenses incidental to effect cure or lessen the amount of pain, and the pecuniary loss.

[b] That awarding general damages is a discretionary matter and the same is guided by comparable awards of recent times and similar injuries.

[c] That in making compensation/awards in physical injury cases, money does not and cannot renew the physical frame of the claimant who had been injured; and that money cannot perfectly compensate a battered physical frame.

[9] **Mr. Wafula** urged the Court to reconsider the grievous nature of the injuries suffered by the Appellant as proved before the subordinate court by the Discharge Summary, Dr. Z. Gaya's Medical Report, Dr. S.I. Aluda's Medical Report and the P3 Form, all produced as exhibits before the lower court. For those injuries, Learned Counsel for the Appellant had proposed an award of **Kshs. 4,000,000/=** before the lower court. He had relied on the case of **Victor Muyoga vs. Linus Watito Kariuki HCCC No. 2797 (Nairobi)**; **James Orara Machuka vs. Julius Nyabuti Ogeto HCCC No. 2048 of 1999 (Nairobi)**; and **Jenipher Milayo Okuko vs. Kenya Bus Services Ltd.** He urged the Court

to note that the injuries suffered herein are far more serious had a disabling effect on the Appellant; and the fact that the Appellant still had not fully healed and would need further treatment. He urged the Court to enhance the award to **Kshs. 4,000,000/=**.

[10] On behalf of the Respondent, it was the submission of **Mr. Songok** that the trial court properly exercised its discretion in assessing the damages awarded. He urged the Court to note that the authorities relied on by the trial court were in respect of similar injuries but which had a higher percentage of permanent disability of 30-35% as opposed to the Appellant's which was assessed at 10% by Dr. Gaya. Counsel further submitted that denial of future medical expenses was justified, granted that it was neither pleaded nor proved before the lower court. He relied on **Kenya Bus Services Ltd vs. Gituma [2014] EA 91** for the proposition that further medical treatment is a special damage claim and therefore ought to be specifically pleaded and proved.

[11] This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] Before the lower court, the Appellant testified on **21 March 2013** and stated that she was travelling aboard in **Motor Vehicle Registration No. KBA 039V** on **14 December 2009**; and that the motor vehicle was involved in a road traffic accident in which he was injured. She was admitted at **Moi Teaching and Referral Hospital** between **14 December 2009** and **8 January 2010**. She set out the injuries she suffered as and produced documents in proof of the particulars of the loss she suffered by way of special damages.

[13] It was further the evidence of the Appellant before the lower court that, after her discharge from **Moi Teaching and Referral Hospital**, she presented herself before **Dr. S.I. Aluda** on **10 April 2010** for examination and thereafter was referred for a medical report by the Respondent's doctor, **Dr. Z.W. Gaya** who also examined here and prepared a medical report dated **5 July 2011**. Both reports were produced before the lower court by consent on **21 March 2013**.

[14] The Appellant also called **Dr. Paul Kipkorir Rono** of **Moi Teaching and Referral Hospital** as her witness. **Dr. Rono** testified as **PW2** before the lower court and confirmed that the Appellant was seen at their facility on **14 December 2009**, after having been involved in a road traffic accident; and that she was admitted while undergoing treatment until her discharge on crutches on **8 January 2010**. It was further the evidence of **Dr. Rono** that the Appellant had been taken to the theatre for three operations for insertion of metals in her upper and lower limbs; and was required to attend the hospital for follow up sessions. In his assessment, the Appellant had suffered grievous harm.

[15] In the light of the evidence that was placed before it, the lower court assessed General Damages due to the Appellant for her pain, suffering and loss of amenities at **Kshs. 1,200,000/=**. It is instructive that the Appellant's Counsel abandoned Ground 4 of the Grounds of Appeal and conceded that the lower court was right in not making any award in respect of the Appellant's future treatment, for the reason that the same was neither pleaded nor proved. Thus, the only issue that falls for my determination, granted the Grounds of Appeal, the submissions made in respect thereof and the evidence adduced before the lower court is the question whether the award was so inordinately low or insufficient in the circumstances as to amount to an erroneous estimate of loss and damage suffered by the Appellant.

[16] The lower court record shows that the court took into account the injuries sustained by the Appellant as well as the comparable awards made in the cases of **Victor Muyoga vs. Linus Watito Kariuki HCCC No. 2797 (Nairobi)**; **James Orara Machuka vs. Julius Nyabuti Ogeto HCCC No. 2048 of 1999 (Nairobi)**; and **Jenipher Milayo Okuko vs. Kenya Bus Services Ltd**. Accordingly, the lower court noted that:

"The Plaintiff's injuries were severe and serious. At the age of 43 years she is unable to walk and stand for long. The plaintiff has not fully healed. Taking into account the lapse of time since the three cases relied upon were determined, I am persuaded that an amount of Kshs. 1,200,000/= general damages for pain, suffering and loss of amenities is sufficient to compensate the plaintiff."

[17] I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

"...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."

[18] Accordingly, to determine whether or not that assessment was reasonable I have given due consideration to the authorities that were drawn to the attention of the lower court by Learned Counsel for the parties and note that:

[a] in **Victor Muyoga vs. Linus Watito Kariuki HCCC No. 2797 of 1997**, in which the Plaintiff suffered a fracture and dislocation of the right elbow, a fracture of the distal third of the left femur, compound fracture of the right fibula, multiple leg and heel lacerations and chest injury, an amount of **Kshs. 800,000/=** was awarded in **2000** as general damages for pain suffering and loss of amenities.

[b] In James Orara Machuka vs. Julius Nyabuti Ogeto HCCC No. 2048 of 1999 (Nairobi); the Plaintiff suffered head injury with contused right eye and cut lower lip, contusion of left upper arm, fracture of right femur, shattered right patella, fracture of both tibia and fibula of left leg, as well as a fracture of both medial and lateral *malleoli*. Although the Plaintiff healed from the injuries, he had to use a walking stick as he had suffered permanent disability of 35%. A sum of **Kshs. 1,200,000/=** was awarded on **20 November 2001**.

[c] Jenipher Milayo Okuku vs. Kenya Bus Services Ltd Kisumu HCMCA No. 172 of 2001 in which the Plaintiff suffered a fracture of the left tibia and fibula, trauma to the left shoulder, blunt chest injuries and laceration of the right thigh and was awarded **Kshs. 750,000/=** as general damages for pain, suffering and loss of amenities on **26 April 2004**.

[d] In Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers vs. Augustine Munyao Kioko [2006] eKLR, the Plaintiff suffered multiple bruises on the forehead, a deep cut on the palm of the left hand, a fracture on the left radius and ulna bones, severe injuries on the left arm, thumb and fingers; and injuries on the left fore- arm. Permanent disability was assessed at 35%. An amount of **Kshs. 600,000/=** was awarded as general damages on **28 July 2006**.

[19] In this matter, the Respondent suffered head injury, swollen forehead with tenderness and a cut wound; swollen and tender right eye; swollen and tender neck with a cut wound; blunt trauma to the chest with a cut wound; blunt trauma to the lumbar spine which was tender; swollen and tender right shoulder and right arm with bruises and cut wounds; dislocation of the right shoulder joint; swollen and tender left shoulder and left arm; fractured left radius and left ulna; swollen and tender lower limbs with massive degloving wounds and muscle damage as well as fractures of the right tibia and right fibula. Dr. Aluda's medical report shows that, as at **10 April 2010**, the Appellant had not fully healed from the injuries but was expected to make improvements in that regard. By the time she was examined by **Dr. Gaya**, on **5 July 2011**, the Appellant was found to have recovered, but with multiple deformities on the left leg, while the right leg had a chronic ulcer. Dr. Gaya assessed her permanent disability at 10%.

[20] In the premises, the two medical practitioners were of the common view that the injuries the Appellant had sustained were quite severe; and that they included fractures of the left radius, right shoulder, right scapular and right tibia and fibula. In Dr. Gaya's opinion, the Appellant was left with a permanent disability of 10%. Clearly therefore, the authorities brought to the attention of the lower court were largely on point. The only notable omission, and therefore an error in principle in my considered view, is the failure by the lower court to specifically take into account the inflation factor; and in this connection I find instructive the decision of **Wambilyanga, J** in HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf, that:

"The Court will essentially take into account the nature of the injuries suffered the period of recuperation, the extent of the hearing whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[21] It is notable that in the case of James Orara Machuka vs. Julius Nyabuti Ogeto HCCC No. 2048 of 1999 (Nairobi); in which the Plaintiff suffered head injury with contused right eye and cut lower lip, contusion of left upper arm, fracture of right femur, shattered right patella, fracture of both tibia and fibula of left leg, as well as a fracture of both medial and lateral *malleoli*, a sum of **Kshs. 1,200,000/=** was awarded on **20 November 2001** for more or less comparable injuries. I would agree with the Appellant that the lower court's award of **Kshs. 1,200,000/=** over a decade later without taking into consideration the impact of inflation amounted to a misdirection. I note that in Zachary Kariithi vs. Jashon Otieno Ochola [2016] eKLR, for instance, **Kshs. 1,500,000/=** was awarded on **12 October 2016** for comparable injuries. In the circumstances of this case, I consider an award of **Kshs. 1,800,000/=** to be reasonable recompense to the Appellant for her pain, suffering and loss of amenities. Accordingly, I would set aside the award of **Kshs. 1,200,000/=** that was made by the lower court and substitute the same with an award of **Kshs. 1,800,000/=**. There being no dispute about the special damages awarded, I would allow the appeal, and substitute the Judgment made in the subordinate court with the following award in favour of the Plaintiff:

General Damages :	Kshs. 1,800,000/=
Special Damages :	Kshs. 96,052/=
Sub-total	Kshs.1,896,052/=
Less 10% contributory negligence:	Kshs. 18,960.52
Total Award	Kshs. 1,877,091.48

Hence, Judgment is hereby entered for the Appellant in the aforesaid sum together with interest and costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE