



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 87 OF 2013

JUDITH NYANCHOKA NYAMATO.....APPELLANT

VERSUS

ANTHONY NYAKWARA.....RESPONDENT

(Being an Appeal from the Judgment/decree and Orders of Honourable R. Amwayi,

Resident Magistrate delivered 21st May 2013 in Nakuru CMCC No. 352 of 2012)

JUDGMENT

1. The appeal before be is on *quantum* of damages awarded to the appellant in **Nakuru CMCC No. 353 of 2012** as being inordinately low. The appellant had been injured following a road traffic accident involving motor vehicle registration **Number KBM 828N** on the 23rd October 2011 whereof she sustained injuries.

Upon hearing of the case, the trial court awarded her general damages of Kshs.400,000/= for pain and suffering and special damages of Kshs.176,363/=. Liability was by consent recorded at 85:15 in favour of the appellant.

2. The injuries sustained by the appellant are stated in the Medical Report prepared by Dr. Wellington Kiamba dated 5th March 2012 and based upon a discharge summary dated 28th October 2011 from Nakuru Provincial Hospital, Tenwek Hospital and other medical records.

These are stated as

- **Fracture of the neck of the left femur**
- **Dislocation of the right hip joint**
- **Soft tissue injuries of the left side of the forehead, chest, and injury to the leg.**

She was admitted at the Nakuru Provincial for four days. Open reduction and internal fixation of the fracture of the neck was done by plating.

Her left leg was shortened and complained of headaches. She remained with a scar on her forehead. Due to the dislocation of the hip the doctor opined that she was likely to have

difficult labour being a young woman.

He assessed permanent disability at 50%.

3. In the submissions by the appellant, it is sought on enhancement to Kshs.2 Million and future medical expenses of Kshs.150,000/=.

Several authorities were cited being being **Orion Hauliers Ltd -vs- Michael Esikhati C.A. No 55 of 2010, Desmond Lempoko -vs- KCB (2013) e KLR and Julius Edwin Muriuki -vs- George Kithinji Mulandi (2014) e KLR**

I have considered the injuries in the said cases, they range from fractures of the femur with shortened leg and dislocation of the hip joint. A sum of Kshs.800,000/= was awarded for pain and suffering.

4. In his submissions before the trial court, two digest authorities were cited being **Rosemary Bulinda -vs- Peter Kinyanjui HCCC No. 816 of 1998** and **Simon Githiomi -vs- Peter Wachira HCCC 91 of 1993**. Being digests, the full reasoning and extent of injuries could not be ascertained by the court.

I have considered the trial courts judgment. It is stated clearly that the court considered the authorities and stated that an award of damages must be within limits set out by decided cases and within Kenyan economy. He further stated that the doctor who prepared the medical report, Dr. W. Kiamba did not state that the sum of Kshs.150,000/= was required for future medical expenses. See **CA154/92 (UR) Charles Sande -vs- Kenya Co-operative Creameries Ltd.**

5. While opposing the appeal, the respondent submitted that the claim for future medical expenses was not pleaded therefore the court could not award a special damage that was not pleaded. Further the appellant did not demonstrate how the award on general damages was inordinately low.

6. An award of damages is at the discretion of the court. An appellate court will be slow to interfere with that discretion in the assessment of damages unless it is shown that at arriving at the said award, the court took into account or failed to take into account a relevant factor and thus arrived at an erroneous estimate of damages.

See **Kemfro Africa Ltd t/a Meru Express & Another -vs- A.M Lubia (1982-88) I KAR 727 and Butt -vs- Khan (1977) I KAR.**

I have considered the cited authorities by the appellant as well as those cited by the respondent.

The appellant emphasizes that the appellant sustained a fracture of the neck of the left femur and a dislocation of the right hip joint among other injuries with a a 50% permanent disability.

I have not been provided with any authority with comparable injuries where an award of close to Kshs.2 Million was awarded. Admittedly the metal implants in the appellant's leg would be removed at one time or another at a cost. But unless that future expense is pleaded as a special damage it is treated as a general damage and considered in the assessment of general damages. In all the authorities cited for comparable injuries, the damages are in the region of Kshs.800,000/= and were delivered in the years 2013 and 2014.

7. I am not persuaded that the trial Magistrate disregarded the appellants evidence on record and the seriousness of the injuries sustained by the appellant nor the medical report. To the contrary I find that the trial magistrate analysed the said authorities and the medical report as is evident from the judgment. Considering the authorities above I find that the ward of Kshs.400,000/= to be on the lowside and for that reason I will interfere with his discretion and enhance the award for pain and suffering to Kshs.800,000/= which is more reasonable and comparable to recent authorities where such awards were granted for comparable injuries.

8. For the above reasons, the trial Magistrates judgment on *quantum* of damages is set aside and substituted with one that the appellant is awarded Kshs.800,000/= damages for pain and suffering. I will however not award the sum of Kshs.150,000/= future medical expenses for reasons stated above. This sum will be subject to the agreed contributory negligence of 85% in favour of the appellant.

9. Each party shall bear its costs of the appeal.

It is so ordered.

Dated, Signed and Delivered this 19th Day of January 2017.

JANET MULWA

JUDGE