



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CIVIL APPEAL NO. 6 OF 2015

LUCY WARUGURU GATUNDU.....APPELLANT

Versus

MIRIAM NYAMBURA MWANGI.....RESPONDENT

(Being an appeal from the Judgement in Nanyuki Chief Magistrate

Court Civil Case No. 60 of 2014 –by Hon. T W Cherere –

Chief Magistrate on 19th November 2014)

JUDGMENT

1. The respondent **MIRIAM NYAMBURA MWANGI** was pillion passenger on motor cycle registration number KMCK 181K. She alleged in her suit before the Chief Magistrate Court, at Nanyuki that the appellant **LUCY WARUGURU GATUNDU** negligently managed, controlled or drove her motor vehicle registration No. KBK 467P causing it to collide with the motor cycle upon which the respondent was a passenger. As a consequence therefore the respondent suffered injuries for which she claimed special and general damages. The trial court by its judgment, delivered on 19th November, 2014 awarded judgment for the respondent as follows:

- **General damages Ksh. 2,000,000**
- **Special damages Ksh. 468,415.00**
- **Future Medical expenses Ksh. 84,000.00**

2. The appellant was aggrieved with the award of general damages and has accordingly filed this appeal. By this appeal the appellant has set out 4 grounds of appeal. Those grounds of appeal, however, only bring out two issues for consideration.

3. The first issue is whether the respondent proved her injuries as pleaded in her plaint. The second issue is whether the award of general damages, by the trial court, was manifestly excessive.

FIRST ISSUE

4. The respondent by her plaint pleaded the following injuries:

- *Right mid-shaft femur fracture;*
- *Comminuted compound tibia/fibula fracture;*
- *Right thigh ecchymosis and tenderness;*
- *Right leg 10cm cut wound;*
- *Septic bone loss; and*
- *Tenderness of right hip.*

5. The respondent's medical report which was produced as an exhibit at trial also revealed injuries that were a replica of the injuries pleaded in the plaint. The respondent in evidence stated that she was injured in her right leg then proceeded to produce as an exhibit the medical report which detailed those injuries. In this court's view the respondent sufficiently proved the injuries pleaded on a balance of probability. It follows that in respect to the first issue it is found in the positive. The injuries were proved as pleaded.

SECOND ISSUE

6. The trial court analysed the authorities relied upon by the appellant and concluded that those cases were **"unrelated"** to the parties' case. In other words that the authorities relied upon by the appellant, in as far as the injuries were concerned, were uncomparable to the injuries suffered by the respondent.

7. The defendant relied on the case:-

- *BENJAMIN SHELEMIA V SCOOPY ENTERPRISES LTD [2011] eKLR where the injuries were sustained chest confusion, fracture of the right tibia bone, fracture of the right fibula bone, dislocation of the right ankle joint and bruises on left knee.*

The award for general damages was Ksh. 450,000

- *GIBSON KARIITHI KAIRU & ANOTHER-V- JOSEPH MUTIO PETER [2009] eKLR:*

The claimant injuries were sustained fracture on the right leg and injuries to the hip and ears. The court awarded Ksh. 400,000 in general damages.

- *CHRISTOPHER MUVO NDETI – V- KENNETH MWANIKI [2004] eKLR where the claimant suffered amputation of right arm at the shoulder. He received physiotherapy to enable him use his left hand. He was awarded Ksh. 500,000*
- *SHREE ENTERPRISE (K) LTD & ANOTHER –V - PETER NDIRANGU KARIUKI [2010] eKLR. The claimant suffered comminuted fracture of the right radius and ulna. A fracture of the right scapula/shoulder blade and soft tissue injury to the right leg and scalp. The claimant was awarded Ksh. 300,000 in general damages.*

8. The respondent in this case was hospitalised for 5 months at the Kenyatta National hospital following the accident. At that hospital she was x-rayed, received antibiotic and analgesics, debridement and dressing of wound, transfusion, external fixation of right tibia then was discharged on plaster cast. She was also fitted with interlocking nails to the right thigh, and received skin grating and had physiotherapy for mobilization. The medical report, exhibited in evidence revealed that after examination of the respondent the following were found:

- *below knee right leg case extending to the toes of the proximal phalanges;*
- *Lateral right thigh post-operation scar extending from above knee to below hip;*

- **20-20cm grafted skin scar on the anterior aspect of right thigh;**
- **6cm linear scar on the lateral aspect of the right thigh, and**
- **12cm linear scar on the anterior aspect of the right knee**

The report concluded that the respondent had immobilised right lower limb at 50%. Respondent at the time of being examined was noted to require future medical treatment at the value of Ksh. 84,000.

9. The trial court in considering the various authorities cited by the parties found the case of **MICHAEL NJAGI KARIMI – V- GIDEON NDUNGU NGURIBU [2013] eKLR** most appropriate. The case was decided a year before the trial court’s judgment. In that case the injuries thereof were comparable to the respondent’s injuries and permanent incapacity was 35% compared to the respondent’s which was 50%. The court in that case of **MICHAEL NJAGI KARIMI (Supra)** awarded Ksh. 2 million in general damage. It is that award that guided the trial court as it made an award in general damages for the respondent of similar amount.

10. There is case Law which guides the appellant court in its consideration of appeal on award of damages. In considering an appeal against an award of general damages, the Court of Appeal in **P A Okelo & M.M. t/a Kaburu Okelo & Partners Vs Stella Karimi Kobia & 2 Others (2012) eKLR citing the case Kemform Africa Ltd t/a Meru express Services (1976) & Another vs Lubia & another (1978) KLR 30** stated:

“On general damages the principle is that this court, in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court must be satisfied either that the Judge in assessing the damages took into account an irrelevant factor or left out a relevant one, or that sort of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

11. This court having re-evaluated the trial court’s evidence, bearing in mind that it did not have the benefit of seeing or hearing the witness who testified, finds that there is no basis of interfering with the trial court’s exercise of its discretion in making an award in general damages. The trial court did not take into account irrelevant factors nor did it leave out relevant factors, nor was the award of general damages low or inordinately high.

12. Accordingly the answer to the second issue identified above is in the negative. The trial court’s award in general damages was not excessive.

14. It is on those finding that appellant’s appeal fails. It is dismissed. The trial court’s award in damages is upheld. The respondent is awarded costs of this appeal.

DATED AND DELIVERED THIS 30th March 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Ndungu

Appellant: Lucy Waruguru Gatundu

For the Respondent :

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE