



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 25 OF 2015**

**(CORAM: J.A. MAKAU - J.)**

**ROSELINE VIOLET AKINYI.....APPELLANT**

**VS**

**CELESTINE OPIYO WAGWAU.....RESPONDENT**

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***(Being an Appeal from a Judgment dated 26.05.2015 in Civil Case No. 97 of 2010 in Siaya Law Court before Hon. Mr. C.A. Okore - SRM)***

**J U D G M E N T**

1. The Appellant **ROSELINE VIOLET AKINYI** was the Defendant at the Lower Court whereas the Respondent **CELESTINE OPIYO WAGWAU** was the Plaintiff. The Respondent had sued the Appellant following a traffic road accident involving the Respondent who was a passenger in the Appellant's motor vehicle on 21<sup>st</sup> October 2010, Reg. No. KBT 159T along Luanda-Siaya Road seeking the following orders: -

***(a) General Damages for pain, suffering and loss of amenities.***

***(b) Costs of the suit***

***(c) Interest on (a) and (b) above at 14% per annum from the date of judgment till payment in full***

***(c) Any other relief deemed just by the Honourable Court.***

2. The firm of M/S Peter M. Karanja entered appearance for the Respondent after ex-parte judgment in favour of the Respondent was set aside and filed defence thereto on 30<sup>th</sup> April 2014. The Appellant denied liability and prayed that Respondent's suit be dismissed with costs.

3. The Appellant and Respondent recorded consent order in terms of liability at 75:25 percent in favour of the Respondent and the consent adopted by the Court was as per the proceedings of 24<sup>th</sup> July 2014 as regards the injuries sustained by the Respondent and the documents in support of the same were adopted for the purpose of adjudging on quantum of the damages. That upon submissions, the trial court delivered judgment on 28<sup>th</sup> May 2015 in favour of the Respondent awarding her Kshs.800,000/=, less 25% leaving a balance of Kshs.600,000/=.

4. Aggrieved by the trial court's judgment, the Appellant preferred this appeal setting out ten (10) grounds of appeal, however at the hearing of the appeal Mr. Karanja, Learned Advocate, for the Appellant, urged that the whole appeal is only against the quantum of damages awarded and squarely limited his arguments on the issue of quantum of damages. Mr. Musomba, Learned Advocate for the Respondent opposed the appeal urging the Court to dismiss the appeal as it is without merits.

5. I have very carefully perused the pleadings by both parties, the evidence tendered at the Lower Court, the opposing submissions, on the issue of quantum and I propose to deal with the issues raised by both parties in dealing with the issue of quantum of damages.

6. In the instant case, the injuries sustained by the Respondent are clearly set out under *paragraph 5* of the Respondent's Complaint dated 29<sup>th</sup> October 2010 as follows: -

***(i). Cervical spondylosis with dislocation on neck support.***

***(ii). Septic wound (sharp) on left side of neck.***

***(iii). Tenderness on left side of the neck.***

***(iv). Extreme tenderness frontal chest.***

***(v). Multiple septic wounds on left upper arm including elbow.***

***(vi). Tenderness lower back and both hips.***

***(vii). Swollen knees with wounds.***

***(viii). Swollen left leg with slight wound.***

***(ix). One toe nail right foot uprooted."***

The Appellant in support of injuries she sustained, produced a Referral letter as exhibit P1; notes from Kisumu New Nyanza Provincial Hospital as exhibit P2; bundle for notes exhibit P3; P3 form as exhibit 4. The documents produced by the respondent thus P1, P2, P3 and P4 do not all agree with injuries pleaded under paragraph 5 of the Complaint as there is no disclosure of any fracture. The relevant medical documents relied upon by the Respondent is therefore the P3 form as the Respondent did not seek and produced any medical legal report on her injuries. The injuries sustained by the Respondent and pleaded are not disputed at all by the Appellant. The injuries pleaded and documents in the respondent's exhibits P1, P2, P3 and P4 can be termed as severe soft tissue injuries.

7. The injuries as per P3 form dated 22<sup>nd</sup> October 2010 are recorded as follows:-

***a. Head and neck: - Cervical spondylitis with dislocation on neck support.***

***- Septic wound (sharp) on Lt side of neck.***

***- Tenderness on Lt side of neck.***

***b. Thorax and Abdomen: Extreme tenderness frontal chest.***

***c. Upper Limbs: Multiple septic wounds on left upper arm including elbow.***

***d. Lower Limbs: - Tenderness lower back and both hips.***

***- Swollen knees with wounds.***

*- Swollen left leg with slight - wound.*

*- One toe nail uprooted (right foot).*

8. Mr. Karanja, Learned Advocate, for the Appellant contends, the Learned trial Magistrate erred in law and fact in entering judgment for general damages without considering the applicable principles as established by precedent; awarding general damages, that was manifestly excessive in the circumstances as to amount to an erroneous estimates of the loss suffered by the Respondent, in failing to correctly apprehend the respondent's injuries and in misapprehending the evidence leading to arriving at an erroneous award of damages, that the trial court erred in failing to lay the basis for arriving at an award of Kshs.800,000/= and further in failing to consider the Appellant's counsel submissions and authorities attached thereto. Mr. Karanja urged this court to reduce the award referring to several authorities on the test upon which the court can interfere with an award of general damages.

9. Mr. Musomba, Learned Advocate, on his part relied on his submissions and orally urged that the Appellant misapprehended the injuries sustained by the Respondent, urging that it was not soft tissue injuries as such but she had suffered serious injuries. He urged that Respondent had suffered fracture near the head referring to a document on *page 26*, of the record of appeal (which was not produced as an exhibit before the trial court) being an X-ray of the right foot, indicating there was a lateral marginal cuboid chip fracture. He urged the trial court in coming to the award of Kshs. 800,000/=, the court was guided by the evidence produced before it and the pleadings. That the court also considered the submissions before delivering the judgment as well as the authorities relied upon by the Appellant's counsel in his submissions which he urged were not relevant as they are old and injuries sustained by the claimant, in those cases are not relevant to the injuries sustained by the Respondent. He agreed however, with the authorities relied upon by the Appellant's counsel, setting down the principles upon which the Appellate Court can interfere with an award which was set by an inferior court. Mr. Karanja, Learned Advocate, in a quick rejoinder pointed out that the only injuries the Respondent alluded to have sustained are the only injuries mentioned in the P3 form, adding that that the X-ray described under *page 26* of the Record of Appeal, record was not produced at the trial court and urged the court further to look at the pleadings which clearly did not mention any fractures.

10. The Respondent at the Lower Court relied on the case of **Mary Muhonja V BOG Erusui Girls High School HCCC 132 of 1992**, asking for Kshs. 1.2million. The injuries sustained by the Plaintiff in that case, were 2<sup>nd</sup> degree burns on the dorsum of her right hand extending from the proximal phalangs to the elbows and rib cage. The court in that case awarded general damages for pain suffering and loss of amenities assessed at Kshs. 450,000/=. I have perused the evidence adduced before the trial court, the pleadings and the exhibits P1, P2, P3 and P4, produced by the Respondent and I have not found any connection of the Respondent's injuries, in anyway with the case relied upon by the Respondent in this case. The Respondent in this case did not sustain any burns. The Respondent main injury was the dislocation of the neck support; there is no way in which it can be said the injuries are similar to those sustained by the Plaintiff in **Mary Muhonja V B.O.G Erusui Girls High School (supra)**. That aside the trial court did not in its judgment mention any of the authorities submitted to it by the parties, hence it is difficult to know on what basis the court ended up, awarding the Respondent an award which the Appellant is challenging. The Respondent in this appeal did not quote other authorities in support of the award, opting to rely on the authority given at the Lower Court.

11. The Appellant submitted an award of Kshs.200,000/= as general damages would be sufficient award in respect of Respondent's injuries referring to the case of **Mary Nyazdua Ngale V Sheikh Omar Bin Dahman, HCCC 122 of 1999[2005]eKLR**; in which case the Plaintiff had sustained a dislocation of the cervical spine, C.3 and C.4 leading to numbness of the right upper and lower limbs and a contusion to the shoulder. He was left with stiff neck. The High Court awarded Kshs.300,000/= as general damages.

12. In Nairobi, **HCCA No. 240 of 2002, John Kamoche Muiruri V Hezron Kiranga Njaga [2009]eKLR**, the Plaintiff in this case sustained the following injuries: -

*(i) Blunt injury to the back of the neck leading to the dislocation of cervical vertebrae C5 and*

C6.

*(ii) Multiple lacerations on the scalp and forehead.*

*(iii) Bruises to both shoulders.*

*(iv) Deep lacerations on the right waist.*

*(v) Head injury with loss of consciousness.*

The High Court awarded Kshs.250,000/=.

13. I have considered the two authorities: **Mary Nyazdua Ngale V Sheikh Omar Bin Dahman(supra)** and **John Kamoche Muiruri V Hezron Kiranga Njaga(supra)** and I have found the injuries sustained by the respective Plaintiffs thereto to be similar to the injuries sustained by the Respondent in this case, however, the injuries sustained by the Plaintiffs in the two cases were more serious and with serious consequences compared with the ones sustained by the Plaintiff herein, however, I note the two cases were decided 12years and 8years ago, respectively, hence the need to take in account the high rates of inflation since then.

14. In this appeal, I have perused the trial court's judgment and I have noted that the trial court made a number of fundamental errors by failing to make findings on the injuries sustained by the Respondent in view of the unproduced documents relied upon by the Respondent. The trial court should have in view of the exhibits P1, P2, P3 and P4 have made a decision as to the validity or invalidity of unproduced documents but put as part of the record and whether the Respondent sustained other injuries other than the ones pleaded. A party in a suit is always bound by its pleadings. The Respondent's counsel attempted to rely on unproduced X-Ray receipt showing the Respondent sustained fractures. I find the Respondent had not pleaded she had sustained, fractures and had not produced the document on page 26 of the record of appeal as evidence and as such, the said document could not be applied in assessment of damages. That the trial court failed to state the basis of its award. I find that was a fundamental error calling for the Appellate Court to interfere with the trial court's judgment on an award. That though the trial court stated it had considered authorities cited, it did not make any attempt of analyzing any of the authorities submitted to it.

15. In **Kemfro Africa Ltd V Lubia (1987)KLR 257**, the Appellate Court addressed itself thus: -

*“The issues in this appeal are, therefore, first whether or not the award in Civil Suit 2381 should be reduced by Kshs. 25,000 and, secondly, this Court should interfere with the award in Civil Suit 2382?”*

*The Principles to be, observed by an Appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **Ilanga V Manyoka, [1961]EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Cooperative Society Ltd V Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.”***

16. In assessing of damages, the general approach has always been that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. In **Morris Mugambi and Another V Isaiah Gitiru C.A. No. 138 of 2002: -**

*“We have considered the material placed before the Learned Judge by way of medical reports and legal submissions and we wish to state that in assessment of damages, the general method of approach should be that comparable injuries should as far as be compensated by comparable*

awards keeping in mind the level of awards in similar cases.

*In so saying, we adopt fully what was said by Lord Morris of Both-y-Gest in H-WEST AND SON LTD V SHEPHARD [19640 AC 326 at P.345.*

*But money cannot renew a physical frame that has been battered or shattered. All that Judges and courts can do is award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour 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 so far as possible comparable injuries should be compensated by comparable awards. When all this is said, it still must be that amounts which are awarded are to a considerable extent conventional.*

*While we bear in mind the foregoing, we must still come to the question of whether this Court would be entitled to interfere with the assessment of general damages by the Learned Judge. The general approach is that for this court to interfere with an award of the superior court, it must be shown that a relevant factor was taken into consideration or an irrelevant factor was taken into account, or that the trial judge did not appreciate the importance of some material evidence or that the award is so inordinately low or high that some such like mistake must be assumed.”*

17. In **Simon Taveta V Mercy Mutitu Njeru[2014]eKLR**, the Court of Appeal addressed itself thus: -

*“In Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004, this court differently constituted (G.B.M. Kariuki, Kiage and Murgor JJ.A) reiterated the principles under which this Court would interfere with the award of damages as stated and applied in the Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini V A.M.M.Lubia & Another, (1982-88)1 KAR 777. In the case of Arrow Car Limited V Bimomo & 2 Others (2004) 2 KLR 101, it was stated that comparable injuries as far as possible be compensated by comparable awards. Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004, it was stated that awards have to make sense and have to have regard to the context in which they are made; they have to strike a chord of fairness. As was stated by Lord Denning in Kim Pho Choo V Camden & Islington Area Health Authority, (1979) 1 All ER 332, in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the Plaintiff and the Defendant.*

*In the instant case, the context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”*

18. I have very carefully considered the trial court’s judgment and authorities relied upon by the Appellant’s Counsel and I am satisfied that the trial court in assessing the damages took into account an irrelevant factor and left out of account a relevant one, failed to take into account that compare injuries should as far as possible be compensated by comparable awards, made an award without justification and without considering comparable injuries and awards attracted by them, I find the trial court erred in awarding an award so inordinately high, that it must be a wholly erroneous estimate of damage. That the award by the trial court has therefore to be interfered with.

19. Having considered the nature of injuries sustained by the Respondent and the authorities relied upon by the Appellant, thus **Mary Nyazdua Ngale V Sheikh Omar Bin Dahman (supra) and John Kamoche Muiruri V Hezron Kiranga Njaga (supra)**, I find the injuries sustained by the Plaintiffs in those cases to be similar to the ones sustained by the Respondent, in this appeal, though the injuries sustained by the Respondent, were less serious than those sustained by the Plaintiffs in those cases, and upon taking into account of the high rates of inflation since then, I would reduce the amount awarded to the Respondent from Kshs.800,000/= to Kshs.500,000/= less 25% equalling to Kshs.375,000/=.

20. The upshot is that the appeal is allowed. I proceed to make the following orders: -

**(a) The Judgment of the Trial Court is set aside and substituted as follows: -**

**(i) The quantum of general damages set aside and substituted with general damage of Kshs.500,000/= less 25% contributory negligence equalling to Kshs.375,000/=.**

**(ii) Appellant gets costs of appeal but the Respondent to get costs of the Lower Court with interest.**

**DATED AND SIGNED AT SIAYA THIS 5<sup>TH</sup> DAY OF APRIL 2017.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT.**

**In the presence of:**

**Court Assistants:**

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

**Mr. Peter M. Karanja:** for Appellant

**Mr. Kulecho Musomba:** for Respondent

**J.A. MAKAU**

**JUDGE**