REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. 9 OF 2016

MARY KAUNGANI NKARI……........………………………………APPELLANT

VERSUS

PHILIS KEZIA MUKWANJERU KIRIMI………………………RESPONDENT

JUDGEMENT

1. This is an appeal that arose out of the judgment of **Hon. A. G. Kibiru, Senior Principal Magistrate** delivered on **23rd March, 2016** in Chuka Senior Principal Magistrate's Court Civil Suit No. 122 of 2014. In that case the appellant had been sued by the respondent for negligence in a road traffic accident where the respondent suffered injuries when the appellant's vehicle motor vehicle registration **No.KAW 234W** hit her. The parties agreed on the question of liability at 80% blame on the appellant while the respondent shouldered **20% blame**. The trial court proceeded to quantify the damages payable and awarded the respondent **Kshs.600,000/= as general damage** and **Kshs.16,585/= special damages**. The appellant felt aggrieved and filed this appeal.

2. The main ground of appeal in this appeal is that the trial court erred in **awarding Kshs.600,000**/= which figure the appellant opines is inordinately excessive in the circumstances. The appellant contends that the award does not correspond with the nature of injuries suffered by the respondent and that the learned trial magistrate failed to adhere to the conventional principle that comparable injuries ought to attract comparable awards in general damages. In this regard the appellant has cited the case of **WEST (H) & SONS LTD –VS- SHEPHARD [1964] ACT** to support his proposition that awards must be reasonable and be assessed with moderation. It is submitted that the award given in the lower court did not meet the legitimate desires of fairness, reasonability and justice to both parties.

3. The appellant has cited the following cases to support her contention that the respondent should in her view have been awarded Kshs.200,000/=

i. Samuel Mungai Njau –vs- Wanainchi Sanitary & Hardware Ltd [2004] eKLR.

ii. Francis Mwangi Muchine –vs- Francis Kimani Mbugua [2001] eKLR.

iii. Isaac Mwenda Micheni –vs- Mutegi Murango [2004] eKLR

iv. Mulwa Musyoka –vs- Wadia Construction [2004] eKLR

The above decisions all by **Hon. Justice (retired) M. A. Angawa** show that the plaintiffs were awarded between **100,000/= and 150,000/=** for comparable injuries that the appellant submits are comparable to the kind of injuries suffered by the respondent herein. The appellant has therefore urged this court to find basis to interfere with the award made by the trial court in this instance and reduce the award to

Kshs.200,000/= as the amount awarded by the trial court was in her view too high.

4. The respondent on the other hand has supported the trial magistrate contending that the injuries suffered by the respondent was serious and that the award given was not excessive. He has cited the case of **KIRUGA –VS- KIRUGA & ANOR [1998]** in urging this court as the first appellate court to re-evaluate the evidence tendered at the trial and come up with own conclusion and further urged this court not to substitute its own factual finding unless it finds that the trial court was plainly wrong. In her view, the trial court was correct to award the respondent herein **Kshs.600,000/=** as **general damages** as the same in her view was not inordinately high or excessive. She has cited the following authorities to buttress her submissions.

i. Stephen Wanderi Kamau & Anor –vs- Gladys Wanjiku Kungu[2006] eKLR

ii. Charles Mwania & Anor –vs- Batty Hassan [2008] eKLR

iii. Janet Opiyo & Anor –vs- Stephen Tuwei [2012] eKLR

iv. Joash M. Nyabicha –vs- K.T.D.A. & 2 others [2013] eKLR

In the above cited decision the courts awarded between **Kshs.600,000/=** to **Kshs.1,000,000/=** but I will come to the issue whether the injuries suffered in the above cases were comparable with the instant case. The respondent has urged this court to disregard the authorities cited by the appellant arguing that they were decided much earlier than the decisions she has cited herself in her written submissions.

5. I have considered both submissions and authorities cited by both parties in this appeal. I agree with the respondent's contention that this being a first appeal, the work of this court is simply to re-evaluate the evidence tendered at the trial court with a view to coming to its own conclusion and determine whether the award made by the trial court was correct and justified in relation to the nature of the injuries suffered by the respondent a claimant. I am also properly guided by the decision in the case of **Lukenya Ranching & Farming Co-operative Society Ltd –vs- Kaloveko [1970] E.A**. **414** where the following observations were made;

> ***"The principles which apply under this head are not in doubt whether the assessment of damages be by a judge or jury, the appellant court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of the first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one) or short of this, that the amount awarded was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."***

In the instant case the respondent's injuries were pleaded as follows:

a. Fracture of right tibia lateral third involving the ankle joint.

b. A cut at medial aspect near the knee joint.

c. Burnt wound scar on the gluteal region.

d. Contusion to the back.

The respondent told the trial court that she was treated and discharged the same day at **Chuka Hospital** and that she later went for further treatment in **Chogoria PCEA Hospital and Embu General Hospital.**

6. The issue of liability was agreed on at the trial where the appellant **accepted 80%** of the blame while the respondent agreed to **shoulder 20%.** I have looked at the nature of the injuries suffered and the authorities, cited by both parties. It is true that it is a common principle of law that comparable injuries should attract comparable and commensurate awards set by previously decided cases in order to maintain to some extent semblance of uniformity. I say so because it is not easy at times to find exact nature of injuries happening in different accidents. The injuries can be similar but the similarity most of the time is limited by different factors that come into play when accidents occur. Having said that courts have over time found ways in doing comparisons which to a larger extent have formed the basis upon which the principles cited above have been applied to serve the interest of justice.

7. I have looked at the authorities cited by the appellant and though I agree that the cases cited show comparable nature of injuries to the instant case, the decisions were made more than a decade ago and therefore I taking inflation into consideration on award of **between Kshs.100,000/= to Kshs.150,000/=** cannot be justified for the simple reason that **Kshs.100,000/= of ten years** ago cannot be **equated to Kshs.100,000/=** of today or more **specifically 2016** when award was made.

8. I have also looked at the authorities cited by the respondent and noted that the nature of the injuries suffers by the victims in those cases were far too serious than in the instant case. So even if the cases cited are recent I am not persuaded that the same should be used as a yardstick to the instant case. The first cases cited for example shows that the plaintiffs suffered serious injuries that required skin grafting to heal the injuries. The other cases showed that the plaintiffs had similarly suffered serious injuries that required admission in hospital for several weeks and other specialized treatments that are to in anyway comparable to the sort of injuries suffered by the respondent.

9. Upon my own re-evaluation of the evidence tendered at the trial in regard to the injuries suffered by the respondent and having carefully considered the authorities cited by both appellant and the respondent, my conclusion is that the **amount of Kshs.600,000/= awarded** by the **learned trial magistrate** was inordinately high that the same amounted to **an erroneous estimate** even after taking inflationary factor into consideration. In the premises, I find merit in this appeal. The **award of Kshs.600,000/=** is **set aside** and in **its place an award of Kshs.300,000/= is awarded** as that in my view would **be a just and fair compensation** in view of the injuries suffered. The award will therefore be as follows;

a. General damages Kshs.300,000/=

b. Proven special damages Kshs. 16,585/=

Subtotal Kshs.316,585/=

Less 20% Kshs. 63,317/=

Amount awarded Kshs.253,268/=

The **appellant** shall **have half costs** of **this appeal** but **costs in the lower court** to the respondent **is upheld.**

DATED AND DELIVERED AT CHUKA THIS 15TH DAY OF JUNE, 2017

R.K. LIMO

JUDGE.

15/6/2017

Judgment dated, signed and delivered in open court in the presence of Murithi holding brief for Kariuki for the Appellant and Kijaru holding brief for Respondent.

R.K. LIMO

JUDGE

15/6/2017