



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

**AT NAKURU**

**CIVIL APPEAL 70 OF 2012**

**COLD CAR HIRE AND TOURS LIMITED.....1<sup>ST</sup> APPELLANT**

**JOHNSTON ALLAN MUZUNGU.....2<sup>ND</sup> APPELLANT**

**PETER GITIA NGIGE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**ELIZABETH WAMBUI MATHERI.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 13<sup>th</sup> December, 2011 by Hon. E. Juma, Chief Magistrate in Nakuru CMCC No. 329/2008)**

**JUDGMENT**

This appeal arises from the decision by Honourable E. Juma Chief Magistrate in CMCC No. 329 of 2008 in which judgment was entered in favour of the Respondent herein.

**FACTS**

The Respondent had sued the Appellants for damages arising out of a motor vehicle accident. The Honourable Magistrate awarded a total sum of Kshs.1,807,466/= out of which Kshs. 1,400,000/- was for general damages and specials damages of Kshs.407,488/=.

The Appellants being dissatisfied with the said judgment, in relation to general damages, filed this appeal seeking to have the said decision set aside. In turn, the Respondent filed a cross appeal seeking for an enhancement of the general damages awarded and future medical expenses.

It is not in dispute that the Respondent sustained serious bodily injuries arising from the road traffic accident. The Respondent was examined by two doctors and two medical reports were tendered as evidence.

Upon perusal of the medical reports of Dr. Kiamba and Dr. Malik and the Further Amended Plaintiff dated 7<sup>th</sup> October 2009, the injuries sustained by the Respondent as a result of the accident were as follows:-

i) Comminuted fracture of the right acetabulum;

ii) Dislocation of the right hip joint resulting in total hip replacement.

Consequential to the aforementioned injuries, the Respondent developed other complications which are also not indispute; deep vein thrombosis in both legs with a high risk of being predisposed to blood clot formation; inability to squat; and inability to sit and stand for a long period of time.

Dr. Kiamba examined the Respondent about 1 ½ years after the accident assessed her permanent incapacity at 50% and found that the Respondent would require another hip replacement at an estimated cost of Kshs.300,000/=. The report is dated 18/6/2008 and the doctor estimated the replacement would be required in approximately 10 years from the said date.

Dr. Malik's report is dated 25/02/2010 and he examined the Respondent 3 years after her accident and assessed her incapacity at 35%. This court is of the view that the Respondent had made some improvement hence the finding of 35% permanent disability.

### **ISSUES FOR DETERMINATION**

I have read the written submissions filed by Counsels for both parties together with the annexed authorities and the issues found for determination

- i. Whether to reduce or enhance the award for general damages
- ii. And whether to award future medical expenses.

### **ANALYSIS**

This being the first appellate court it is incumbent upon this court to re-assess and re- evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Car Ltd V. Bimomo and 2 others**, (2004) 2KLR 10.

The Respondent is seeking an enhancement of the award and has proposed the sum of Kshs.2,500,000/= while the Appellants are seeking a reduction to a sum that is not in excess of Kshs.500,000/=.

As rightly submitted by both parties, the test on whether an appellate Court should disturb an award of damages is set out in **Butt v. Khan** [1977] 1 KAR where Law, J.A held:-

**“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high low.”**

Similarly, the Court of Appeal in **Kemfro Africa Ltd T/A Meru Express Service Gathongo Kanini V. A. M. Lubia & Olive Lubia** (1982- 1988) 1KAR 727 held that :-

**“An appellate court can only interfere with the quantum of damages awarded by a trial Judge, where it is satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant factor, or that the amount awarded is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.**

Reference is also made to the case of **Michael Maina Gitonga vs Serah Njuguna HCCC No. 202 of 2009** where Ouko J (as he then was) laid down other factors that should be taken into consideration:when assessing damages, which are:

- a. **Assessment of damages is a matter of opinion and discretion and also depends on the facts and circumstances in each case;**

- b. **Money cannot renew a physical frame, battered and shattered, the award is only to give reasonable compensation;**
- c. **Awards must be assessed with moderation;**
- d. **It is desirable that so far as possible comparable injuries should be compensated with comparable awards;**
- e. **In awarding damages, fairness must be observed to both the plaintiff and the defendant as ultimately it is the tax payers who have to pay, thereby injuring the public.**

In support of their prayer to have the award in general damages reduced to Kshs.500,000/-, the Appellants have relied on the case of **Kimilili Hauliers V. Samuel Kingogo** [2011] eKLR. The Respondent in the said case suffered a compound fracture to his left femur and ankle and blunt injuries to his pelvis and hips.

With respect, these injuries are not comparable to those suffered by the Respondent herein.

On the other hand, the Respondent in support of her prayer for Kshs.2,500,000/= has relied on the following authorities:-

**James Katua Peter V. Simon Mutua Muasya** [2008]eKLR

The plaintiff therein suffered similar injuries to the respondent injuries save he also suffered a fracture to his left tibia, fibula and medial malleolus. As a result of his injuries, his left leg was shortened by 10cm. Permanent incapacity was assessed at 70%. The Court awarded Kshs.2,000,000/=

**James Njau Kariuki V. Mary Goreti Wakwibubi**, [2007] eKLR.

The plaintiff therein suffered a fracture dislocation of the left hip involving a fracture of the femur, fracture of the femoral head, dislocation of the knee joint, and other soft tissue injuries. As a result of these injuries, the plaintiff suffered a shortening of the leg, loss of libido and he required a hip replacement. Permanent disability was assessed at 50%.

It is evident that the plaintiffs in both of these cases suffered more grievous injuries compared to those of the Respondent herein.

However, having taken into consideration the degree of the injuries in all the above authorities and those of the Respondent herein and the awards made, therein, this court is satisfied that the award of the trial Court for general damages was assessed with moderation and was not inordinately high or too low in the circumstances.

This court sees no reason to interfere or disturb the trial court's award.

The next issue to be addressed relates to future medical expenses. In the respondent's cross appeal, she is seeking future medical expenses of Kshs.700,000/= as costs for a hip replacement and Kshs.350,000/= for future laboratory tests and anti-coagulant medicine.

This court has perused the judgment of the trial court and is at a loss as to why the trial court made a finding to disregard the issue of future medical expenses on the grounds that it had not been pleaded.

Having perused paragraph 6(a) of the Amended Plaintiff and Further Amended Plaintiff dated 7/10/2009, this court notes that the Respondent did indeed plead and pray for an award for future medical expenses. Kshs.300,000/= was for the hip replacement and Kshs.100/= per month for laboratory tests and Kshs.100/= per week for anti-coagulants. Dr. Kiamba's medical report supports this save that he has quoted Kshs.300/= for the monthly laboratory tests.

I note that nothing is offered by the Appellants in their written submissions to controvert the Respondent's submissions under this head. I will therefore proceed to grant the Respondent future

medical expenses in the sum of Kshs.400,000/= for the hip replacement taking into account that the proposed cost of Kshs.300,000/= was given in 2008.

With regard to the future laboratory tests and anti-coagulant medication, the Respondent is praying to have the same to be awarded for a period of 25 years – an estimate of how long the Respondent expects to live.

However due to the vicissitudes and unpredictability of life, I will award these expenses for a period of 10 years which comes to a total sum of Kshs.88,000/=. The calculations are worked out as follows:

- i. Future lab tests: -  $10 \times 300 \times 12 = 36,000/=$
- ii. Anti-coagulant medication:-  $52 \times 10 \times 100 = 52,000/=$ .

### **FINDINGS**

For the reasons set out above this court makes the following findings;

This court finds no reason to interfere with the award for general damages.

This court finds that the Respondent is entitled to an award for future medical expenses and awards a sum of Kshs.488,000/= which shall carry interest at court rates from the date of filing suit.

### **DETERMINATION**

The appeal is found lacking in merit and is dismissed in its entirety.

The cross- appeal is found to be partially successful and the judgment of the trial court is hereby set aside and substituted with judgment in the total sum of Kshs.2,295,466/= made out as follows:

- a. Liability against the Appellants - undisturbed – as apportioned by the trial court.
- b. General damages for pain and suffering – undisturbed – -  
Kshs.1,400,000/=
- c. Special damages -undisturbed - Kshs. 407,466/=
- d. Future medical expenses - Kshs.488,000/=
- e. Total - Kshs.**2,295,466/=**

Each party shall bear their own costs of the appeal.

The Respondent shall have half the costs of the cross appeal.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 11th day of February, 2015.**

**A. MSHILA**

**JUDGE**