



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL CASE NO. 159 OF 2013**

**AGNES WAKARIA NJOKA.....APPELLANT**

**AND**

**JOSPHAT WAMBUGU GAKUNGI.....RESPONDENT**

*Being an appeal from the judgment of the Principal Magistrate's Court (K. K. Cheruiyot) Civil Case  
Number 244 of 2011 delivered on 31<sup>st</sup> July, 2012)*

**JUDGMENT**

1. **AGNES WAKARIA NJOKA** the appellant herein had filed a suit against the respondent herein vide **Kerugoya Senior Principal Magistrate's Civil Case No. 244 of 2011** seeking for damages against the Respondent. The basis for the action was injuries the Appellant sustained in the hands of the Respondent who attacked her unlawfully using a panga and caused serious injuries which included loss of left hand from the wrist joint which was cut off completely.

2. The Respondent defended himself pleading "*volenti non fit injuria*" and the fact that he was provoked. He also counter-claimed against the Appellant saying that he was also assaulted and blamed the Police for selectively prosecuting him.

3. The trial court upon hearing the case and considering the evidence adduced found the Respondent 100% liable and assessed quantum and awarded the Appellant Kshs.200,000/- damages and Kshs.80,333/- as special damages. The Appellant felt aggrieved by the amount awarded in general damages and filed this appeal raising 4 grounds which are as follows:

- i. *That the learned magistrate erred in law and fact when he Awarded to the Appellant a sum of Kshs.200,000/- as general damages an award she considered too low in the circumstances of the case.*
- ii. *That the learned magistrate erred in law and fact when he failed to consider the degree and/or magnitude of injuries occasioned by the Respondent to the Appellant while making an award of Kshs.200,000/- thereby failed to exercise his discretion judiciously.*
- iii. *That the learned magistrate erred in law and fact by failing to consider that liability of the Respondent was 100% and the Appellant had lost her hand in the vicious panga attack by the Respondent and that an award of Kshs.1,000,000/- was reasonable under the circumstances.*
- iv. *That the learned magistrate failed in law and fact by not fully considering the submissions of the Appellant while granting the award of Kshs.200,000/- which was very low under the circumstances.*

4. When this appeal came up for directions, the Appellant through counsel sought to have the appeal canvassed through written submissions and this Court granted the directions and directed the Appellant to file and serve the Respondent with the submissions and notice for mention for highlighting of submissions. When the matter came up for mention on 6<sup>th</sup> July, 2015 the Respondent was absent though served and no submissions were filed on behalf of the Respondent.

5. In her written submissions the Appellant pointed out that she suffered the following injuries from the vicious attack from the Respondent on 23<sup>rd</sup> July, 2008:

- i. **2 deep cut wounds on her hand.**
- ii. **Fracture of the skull at occipital.**
- iii. **Deep compound fracture on right forearm.**
- iv. **Loss of the left hand at wrist which was cut off completely.**

6. The Appellant submitted that the Respondent was convicted in a criminal case vide **Gichugu Senior Resident Magistrate's Criminal Case No. 859 of 2008** on 29<sup>th</sup> July, 2011 for the offence of attempted murder contrary to **Section 220** of the **Penal Code** and was sentenced to serve 15 years imprisonment a term that was reduced to Kshs.60,000/- fine or 2 years imprisonment by High Court in Embu on appeal.

7. The Appellant supported the trial court on the issue of liability as it found the Respondent 100% liable on the basis of evidence tendered which included the evidence of conviction of the Respondent in a criminal court for the offence that resulted to the injuries suffered by the Appellant who was the complainant in the criminal court.

8. The main issue in this appeal is the question of quantum. The Appellant has submitted that the award of Kshs.200,000/- as general damages by the trial court was simply too low. In her view an award of Kshs.1 million shillings would be fair and just.

9. I have considered the judgment and the reasons given for the basis of the award. The issue of assessment of damages is usually an issue of judicial discretion and an appellate court rarely interferes with it. The Court of Appeal in **ALI -VS- NYAMBU T/A SISERA STORE [1990] KLR 534** quoted with approval the principles laid down by the **PRIVY COUNCIL IN NANCE -VS- BRITISH COLUMBIA ELECTRIC RAILWAYS CO. LTD [1951] AC 601 Page 613** where it held that;

***“The principles which apply under this head are not in doubt. Whether the assessment of damage be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was 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 is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”***

10. In this appeal this Court notes that the Appellant suffered fairly serious injuries. The Appellant's left arm was completely cut off from the wrist joint. She also suffered fracture of the skull. Although she had recovered from the injuries by the time the matter was heard by the trial court, the amputation of the arm obviously became permanent feature. I have noted that the Respondent at the trial court submitted that an award of Kshs.300,000/- was commensurate with the type of injuries the Appellant suffered. The Appellant on her part had submitted that an award of Kshs.1 million was just in the circumstances and quoted some authorities to buttress her submissions. The trial court took into account the fact that the Appellant had recovered by the time he heard the case and based his opinion on the doctor's medical report dated 20<sup>th</sup> August, 2011. I have evaluated the contents of the report and note that the trial court missed the following vital observations by the doctor;

***“She is not able to do her normal duties and care for herself because of the amputated***

***left hand.”***

So while the trial court’s mind was swayed by doctor’s observation about subsiding of dizziness after about 4 years, the learned trial magistrate failed to take into account the above relevant medical observation. The Appellant’s age which this Court noted from her appearance in Court is advanced and is made worse by the incapacity occasioned by the Respondent’s action.

11. It is in the light of the above that this Court finds that had the learned trial magistrate taken into account the above factors inclusive of the amount submitted by the Respondent, then the award given could have been higher. In the case of **JACKLINE A OBONDO –VS- KENYA BUS SERVICES & ANOR [2007] eKLR** the plaintiff sought to be paid damages on account of injuries she sustained in an accident. The injuries were compound fracture of left radius and ulna bones which led to amputation of the left forearm below the elbow. She also suffered sprained hip and brain concussion. The judge sitting in Kericho awarded Kshs750,000/- as general damages. In another case in another case of **LOISE AWUOR MASENO –VS- DEACONS (K) LTD. T/A SUN-CITY BUS SERVICES [2009] eKLR** the plaintiff suffered serious injuries on her left forearm which led to amputation on the left hand and cut wound on the left shoulder joint. She suffered compound comminuted fracture of the radius of the radius/ulna and head injury leading to loss of consciousness, facial lacerations, scalp lacerations and amputation of the left arm. Justice D. Musinga sitting in Kisii High Court awarded Kshs.1,750,000/-.

12. In the light of the above authorities, this Court finds that the award by the trial court was inordinately too low and erroneous. The learned trial magistrate failed to take into account relevant factors pointed above. I therefore find merit in this appeal. The general damages awarded by the learned trial magistrate is enhanced from Kshs.200,000/- to Kshs.650,000/-. She will also get costs of this appeal and interests. It is so ordered.

***Dated and delivered at Kerugoya this 16<sup>th</sup> day of July, 2015.***

**R. K. LIMO**

**JUDGE**

16.7.2015

Before Hon. Justice R. Limo

Kahiga for appellant present

Ngigi holding brief for Gori present for Respondent

**COURT:** Judgment dated, signed and delivered in the open court in the presence of Kahiga for Appellant and Ngigi for Gori for the Respondent.

**R. K. LIMO**

**JUDGE**

**NGIGI:** I pray for stay for 30 days.

**KAGIGA:** No objection.

**COURT:** A stay of execution for 30 days is granted.

**R. K. LIMO**

**JUDGE**