



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 23 OF 2012

GICHIRA PETER

REAGAN MURIUKI GACHOKI.....APPELLANTS

CYRUS KARANI KIRAGU

VERSUS

JANE NJURA MWANGI.....RESPONDENT

JUDGEMENT

This is an appeal against an award of damages in the sum of Kshs 1,900,000/- in favour of the respondent made by the court of the Chief Magistrate on 14th February, 2012. Liability had been settled by consent with the appellants being liable in negligence to the extent of 90% and the remaining 10% of negligence being that of the appellant.

The appellants have listed four grounds of appeal:

1. THAT the learned trial magistrate erred in law and in fact in awarding Ksh 1,900,000/- as general damages for personal injuries which amount is excessive and inordinately high in the circumstances.
2. THAT Having accepted that the level of the plaintiff's incapacity was 17% which could be reduced by progressive improvement and healing by ankle fusion to relieve pains, the learned trial magistrate erred in failing to take those factors in her judgement which failure resulted in a considerable higher award.
3. THAT the inordinate high award of general damages of Ksh 1,900,000/- represent an entirely erroneous estimate.
4. THAT the decision of the learned trial magistrate is against the weight of evidence.

The appellants' major complaint is that the award by the trial court was manifestly excessive to the extent that it calls for reduction in view of the injuries sustained by the respondent. The respondent sustained injuries which the first doctor (Dr Wambugu) found to be as follows:

- a. A fracture of the right clavicle
- b. A fracture dislocation of the right shoulder joint
- c. Compound comminuted fracture left ankle joint
- d. A fracture dislocation of the right ankle joint
- e. Multiple bruises.

In the opinion of the doctor, the respondent sustained multiple skeletal and soft tissue injuries which

occasioned her pains and ongoing morbidity. He further found that the fractures have since united but with residual deformities. According to the doctor, the respondent may require fusion of the left ankle joint later in life to relieve the pains experienced whose cost the doctor estimated to be Kshs 90,000/-. The doctor also found that the respondent is pre-disposed to osteoarthritic changes across the right shoulder and ankle joints. Finally, the doctor found that the respondent suffered permanent incapacity to the extent of 45%. This report is dated 24th February, 2010.

There is also the second report of Dr Mogire dated 8th September, 2011. Dr Mogire concluded his report by finding that the respondent suffered partial impairment in the region of 17%.

It is clear from the two reports that the respondent had made substantial progress in healing in respect of the soft tissue injuries as well as the fractures she sustained. It is important in this regard that within a year and seven months the respondent incapacity had reduced to 17% up from 45%. It is also clear from the medical evidence that the respondent was in Chogoria Hospital for 29 days, in Embu Hospital for 66 days and in Kijabe Hospital for 36 days.

In assessing the damages for injuries, the trial court found that the respondent had suffered permanent incapacity in the region of almost 100%. That court also took into account the proposal of the appellants that the respondent be awarded a sum of 600,000/- in general damages for the pains suffered and for the pains that she was to continue to suffer and awarded a sum of Kshs 1,900,000/- as general damages less 10% contributory negligence.

Following the assessment of damages that the trial court awarded, it entered judgement in favour of the respondent as follows:

General damages	-	Ksh 1,900,000/-
Special damages	-	Ksh 69,373/-
Total	-	Ksh 1,969,373/-
Less 10%	-	Ksh 196,937.30/-
Total	-	Ksh 1,772,400/- (Ksh one million, seven hundred seventy two thousand, four hundred only) and interest at court rate from date of judgement until payment is full and cost of the suit.

This is the first appeal. As a first appeal court, I am required according to the Court of Appeal in *Selle v. Associated Motor Boat Company Ltd* (1968) EA 123, to reassess the evidence tendered in the trial court and come to my own conclusion bearing in mind that I have not seen the witnesses to which deference in this regard ought to be given to that court. I have reassessed the evidence which was tendered in the trial court and the judgement appealed against as I am required to do. Additionally, I am also required to bear in mind the principles set out in the case of *Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini v. A.M. Lubia and Olive Lubia* (1982 – 88) 1 KAR 727. According to that case, an appeal court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court must be satisfied that either the judge in assessing damages took into account an irrelevant factor or left out an account a relevant one or that the amount he saw inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

In the light of the principles set out in the above case, I find that the trial court erred in law in finding that the respondent suffered: “*permanent incapacitation was almost a 100%*”. This finding is not supported by the evidence of the two doctors. According to Dr Wambugu, the respondent had suffered incapacity in the region of 45%. According to the evidence of the second doctor who examined the respondent after one year and seven months, he found the incapacity of the respondent in the region of 17%. In the circumstances, I find that the trial court took into account an irrelevant factor in assessing the quantum of general damages in the sum of Kshs 1,900,000/-. And for this reason, having considered all

the relevant factors including the incidence of inflation, I hereby reduce that award to Kshs 1,200,000/- being general damages. The respondent will therefore be entitled to the following:

- a. General damages - Kshs 1,200,000/-
- b. Special damages - Kshs 69,373/-

Total - Kshs 1,269,373/-

Less 10% - Kshs 126,937.30/-

Total - Kshs 1,142,435.70/-

(One million, one hundred and forty two thousand, four hundred and thirty five and seventy cents only) plus interest at court rates from date of judgement until payment in full and cost of the suit.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **9th** day of **NOVEMBER, 2015**

In the presence of

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Court clerk Mr Nyaga

J.M. BWONWONGA

JUDGE

09.11.15