



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 61 OF 2013

(An appeal from the Judgment of the Ag. Senior Principal Magistrate, Embu in CMCC No. 199 of 2012 dated 28/11/2013)

LUCY MUTHONI MUCAKI.....APPELLANT

VERSUS

FRIDAH NYAGUTHII.....RESPONDENT

J U D G M E N T

The appellant was sued by the respondent in Embu CMCC No. 199 of 2012 for general and special damages arising from injuries suffered by the respondent in a road traffic accident on 23/11/2011 along Kubukubu road in Embu Town. The respondent was knocked by the appellant's vehicle registration number KAG 386 B Toyota Corolla whereas negligence was attributed to the appellant.

The appellant initially obtained interlocutory judgment which was later set aside by consent of the parties.

Liability was agreed at the ratio of 75:25 in favour of the respondent against the appellant. Documents were admitted in evidence by consent and later parties filed submissions on quantum.

The court assessed and awarded general damages of Kshs.650,000/= less 25% plus special damages of Shs.51,906/= totalling to Kshs.538,406/=.

The appellant was ordered to pay Kshs.538,406/= to the respondent plus costs of the suit and interests from the date of the cause of action.

The appellant being dissatisfied with the judgment appealed putting forth three grounds:-

1. *That the learned magistrate erred in law and in awarding Kshs.650,000 as general damages for injuries suffered by the plaintiff and the amount is excessive in the circumstances.*
2. *That the learned magistrate failed in law and in fact in failing to consider authorities cited by the defendant in his submissions when giving the judgment for general damages.*
3. *That the learned magistrate erred in law and fact by directing himself to the wrong principles and by not addressing the correct issues arising from the parties' pleadings/claims.*

Basically the appellant argued that due to the failure by the learned trial magistrate to consider his submissions and authorities, the result was an excessive award which he urges this court to set aside and substitute with a reasonable award based on comparable decisions.

The duty of the first appellate court was explained in the case of *JABANE VS OLENJA [1986] KLR 661*

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi - vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”

The guiding principles for interfering with an award of damages were explained in the case of **BUTT VS KHAN [1977] 1 KAR LAW JA (cited in the case of KENYATTA UNIVERSITY VS ISAAC KARUMBA NYUTHE [2014] eKLR)** where it was held that:-

An appellate court will not interfere with an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the wrong principles, misapprehended evidence in some material respect and gave a figure inordinately high or low.

The appellant in her submissions urged the court to award Kshs.200,000/= for loss of amenities. She relied on the case of **ZACHARIA WAWERU THUMBI VS SAMUEL NJOROGE THUKU HCA 445 OF 2003 [2006] eKLR** where the High Court on appeal upheld an award of Shs.180,000/= on grounds that the appellant had not suffered any permanent incapacity. Although the injuries in the said appeal were said to be comparable, the injuries were not stated to give the learned magistrate the opportunity to compare them with those suffered by the respondent herein. This explains why the magistrate did not cite or consider the appellant's authority. This court also faces a similar predicament.

The respondent before the trial court urged the court to give her an award of Shs.700,000/= general damages relying on two authorities.

1. In the case of **BETHWEL MUTAI VS CHINA ROAD AND BRIDGE CORPORATION MOMBASA CIVIL SUIT NO. 200 OF 2007**, the plaintiff sustained the following injuries:-

- fracture of the left clavicle
- fracture of the right humerus
- fracture if the right femur

The first two fractures were operated on and professionally fixed with an interlocking nail. Th plaintiff was awarded Kshs.800,000/= on 25/4/2008.

2. In the case of **SAVCO STORES LTD VS DAVID MWANGI KIMOTHO Machakos HCA No. 12 of 2005**, the plaintiff sustained injuries including:-

- fracture of the left tibia and left tibula
- fracture of the left elbow
- deep cut wound on the left forehead and consequently suffered 20% disability.

The appeal court upheld an award for Kshs.800,000/= for general damage inclusive of future medical expenses.

The medical report of Dr. Stephen M. Wambugu dated 14/1/2012 stated that the respondent suffered the following injuries;-

- Bruises at the base of the left big toe medially;
- spiral fracture of the tibia at left ankle joint;
- dislocation of the left ankle joint

The report of Dr. Gichohi of Meridian Medical Centre dated 23/5/2011 is not at variance with that of Dr. Wambugu. It shows that the respondent sustained left ankle fracture dislocation and soft tissue injury on

the left first toe and developed post traumatic arthritis of the left ankle joint. The only point of departure between the two doctors is that Dr. Gichohi said the plaintiff suffered permanent disability without stating what the disability was. The opinion was based on the fact that the respondent had difficulty while walking due to pain at the left ankle joint.

The injury was only a few months old at the time of examination and the pain was expected to subside on full union of the fracture. There is no justification to state that the respondent suffered permanent disability.

The authorities relied on by the respondent involved more serious injuries with multiple fractures which required professional fixing and hospitalization. The respondent herein was treated as an out patient at Embu Provincial Hospital and fixed with a knee plaster of paris, was given antibiotics and analgesics. The injuries in the two authorities were not therefore comparable with the ones sustained by the respondents.

The authority of the defendant was not helpful in that the injuries sustained were not stated in the judgment. However, the decision brought one point home, that no permanent incapacity was suffered by the plaintiff in that case and in this case.

It will be in the interests of justice to look at independent decisions.

In the case of **AMBROSE MICHENI KINYAMU VS GILBERT BUNDI & ANOTHER [2012] eKLR**, the appellant sustained fracture of the right leg on the ankle. The appellate court enhanced the award given by the trial court to Kshs.400,000/= in 2012.

In the case of **BEATRICE WAIRIMU WANDURUA VS C. DORMAN LIMITED [2009] eKLR** appellant sustained serious injuries to her legs which resulted in compound fractures of the left tibia and dislocation of the left ankle joint. The court of appeal awarded Kshs.550,000/= in 2009.

It is important to note that the injuries sustained in the **AMBROSE KINYAMU case (supra)** are comparable to the ones in this case while those in the **BEATRICE WANDURA case (supra)** are slightly more severe and the award in both cases was lower than that in the present case yet the awards were made in the 2012 and 2009 respectively were lower than the award in this case.

I have considered the injuries sustained and the award made by the learned magistrate. I reach a conclusion that the award was not based on comparable decisions and that it was inordinately high in the circumstances.

For this reason I find the appeal merited. The award for general damages of Shs.650,000/= is hereby set aside and substituted with one of Kshs.450,000/=. The award is hereby reduced by the 25% (Kshs.112,500) contribution amounting to 337,500/= plus special damages of Kshs.51,906/=. The amount payable to the respondent by the appellant is Kshs.389,406/= plus costs and interests of the suit as ordered by the trial court.

Each party to meet its own costs of this appeal.

The appeal is allowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for ithiga for respondent