



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 102 OF 2011**

**FLORENCE NJOKI MWANGI..... APPELLANT**

**Versus**

**PETER CHEGE MBITIRU.....RESPONDENT**

*(Appeal arising from the Judgment of Hon. S. Muketi  
Chief Magistrate Nyeri in Civil Case No. 390 of 2010)*

**JUDGMENT**

1. By a plaint dated 24th August 2010 the appellant sued the respondent for special and general damages arising out of a road traffic accident on 31st March 2009 while the same was traveling as a fare paying passenger in motor vehicle registration No. KBA 740Z as a result of the negligence of the respondent's driver.

2. As a result of the said accident the appellant at paragraph 6 of the plaint pleaded that the same sustained the following injuries:

- a) Fracture of the right mid shaft femur.***
- b) Fracture of the left mid shaft femur.***
- c) Degloving wound on the right fibia fibula necessitating skin grafting***
- d) Amputation of the right foot behind the ankle joint.***
- e) Multiple cuts on the forehead.***

3. The appellant further pleaded special damages of Ksh. 68,189 made up as follows:

- a) Medical bills - Ksh. 55,689
- b) Medical report - Ksh. 5,000
- c) Transport expenses - Ksh. 7,300
- d) Police abstract - Ksh. 200

4. The Respondent through the firm of Kairu & McCourt Advocates filed a defence in which he denied the occurrence of the said accident and the particulars of negligence and on a without prejudice basis attributed the same to the negligence on the part of appellant.

5. Based upon the said pleading the matter proceeded to hearing before Hon. S. Muketi then Chief Magistrate wherein DR. BENSON MACHARIA testified on behalf of the appellant as P.W.1 and stated that the appellant sustained injuries to both thigh bones, she had fractures, deep gloving injury on the right knee, ankle and the head and that at the time of examination the lower limb was shorter and metal plate was still there which would be removed after 5 years at a cost of Ksh. 60,000.

6. Under cross examination P.W. 1 stated that there was no amputation and that at the time of examination the appellant was using a walking stick. The appellants evidence was that she was a sales lady but stopped working after the accident. On the material day she was sitted next to the driver going to Thika from Karatina and while approaching Kenol there were convey of vehicles and the respondent's driver over took three of those motor vehicles and in attempt to avoid head on collision with a lorry on the opposite direction swerved back and rammed from behind.

7. As a result of the accident the appellant was admitted for three months. Under cross examination the appellant stated that her heel was slightly cut.

8. In his defence the respondent called DR. ISACK NDERITU who testified that the appellant had sustained fracture on the two thigh bone, injuries on the right ankle and knee and that there was evidence of skin grafting though no amputation was done. Under cross examination D.W.1 confirmed two fractures and classified the injuries as soft tissue.

9. Based upon the said evidence the trial court found the respondent liable for the accident and upon the authorities of HCC NO. 349 OF 1996 AND 21 OF 2007 submitted by the appellant and MULWA MUSYOKA v WADIA CONSTRUCTION HCCC NO. 1321 OF 1997 submitted by that the respondent awarded general damages of Ksh. 700,000/- and special damages of Ksh. 12,680/- pleaded and proven.

10. Being dissatisfied by the said judgment the appellant filed this appeal and raised the following grounds:

1. ***The trial magistrate erred in law in awarding general damages for pain, suffering and loss of amenities in the sum of Ksh. 700,000/- which sum was excessively and unreasonably low in light of multiple severe injuries sustained by the appellant.***
2. ***The trial magistrate erred in law and fact in failing to award general damages for future medical expenses which had been pleaded and proved in evidence.***
3. ***The trial magistrate erred in law in failing to award general damages for loss of future earning and earning capacity.***
4. ***The trial magistrate erred in law in disregarding case law cited without giving reasons and or distinguishing these case law.***

1. Directions were given that the appeal be determined by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the appeal was wholly against the award of damages and submitted that the trial court failed to appreciate the severity of the injuries sustained by the appellant and therefore made an excessively low award.

2. It was submitted that based upon the two medical reports produced and as supported by the cases of MADINA GATHONI vs ALI SHALO SHOSI & ANOTHER MALINDI HIGH COURT CIVIL CASE NO. 11 OF 2006 where justice Omondi assessed general damages at Ksh. 3.2 million and F.G v JOHN MWANGI NDUNGU & ANOTHER MERU HIGH COURT CIVIL CASE NO. 53 OF 2002 wherein justice M. Kasango on 10th February 2011 assessed general damages at Ksh. 1,800,000/- the appellant

deserved an award of the sum of Ksh. 2,500,000/=.

3. On cost of future medical expenses it was submitted that the appellant had pleaded at paragraph 8 of the plaint that she was fitted with metal plates which required removal at a cost assessed at Ksh. 60,000/- by Dr. Macharia and Ksh. 100,000/- by Dr. Nderitu. That the appellant had submitted for an award of Ksh. 200,000/- while the respondent did not address the court on the same. It was therefore submitted that the magistrate erred in holding that it was not pleaded nor proved. It was further submitted that an inadequacy in the pleadings is curable if evidence is available before the trial court.
4. On loss of earning and earning capacity it was submitted that the appellant pleaded that as a result of the injuries she lost her job as a sales girl and has lost any prospects of resuming work and therefore the magistrate was wrong in dismissing this claim.
5. On behalf of the respondent it was submitted that the appellant denied having an amputated foot at the trial and that her own doctors did not mention incapacitation and that loss of amenities were nerve pleaded. It was further submitted that the medical report produced only stated that the laceration injuries and bruises on the left leg were not documented on the treatment note and P3 form.
6. It was submitted that in the plaint the appellant only particularized special damages but never mentioned future medical expenses, it was further submitted that the appellant suffered femur fracture and soft tissue injuries, it was submitted that the appellant had failed to discharge her duty of proving that she was entitled to loss of amenities and future earning and in support thereof the case of TIMESALES LTD v STEPHEN GACIE NAKURU CA NO. 74 OF 2000 was submitted.

From the pleadings, proceedings and submissions herein the court has identified the following issue for determination.

**a. Whether an award of Ksh. 700,000/- was excessively low so as to be interfered with by the appellate court.**

**b. Whether the appellant is entitled to damages for cost of future medical expenses and loss of earning capability**

**4. What order should this court make.**

1. On the issue of quantum in respect of general damages the particulars of injuries sustained by the appellant were pleaded in paragraph 6 and stated herein above in paragraph 2. At the trial the plaintiff called Dr. Benson Macharia as P.W.1 who produced a medical report in which he concluded that the appellant suffered broken femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screws.

2. The said injuries were also confirmed by D.W.1 Dr. ISACK NDERITU who also produced the medical report. In arriving at an award of Ksh. 700,000/- the trial magistrate had this to say.

***“The severity of the injuries were disputed by the defence and rightfully so there was no amputation of the right foot as stated in (d)”***

3. The appellant before the trial court had submitted the case of ISABEL NYAMBURA v SANRIC SUPPLIES LTD HIGH COURT AT NYERI CIVIL CASE NO. 349 OF 1996 wherein the plaintiff who sustained crushed compound fracture of the left tibia and fibula bone and closed fracture of the right tibia was awarded Ksh. 1,250,000/- in general damages on 18th April 2005 and DONALD DEWANYE ENOCH v JOSIAH KARANJA WAWERU HIGH COURT AT MERU COURT OF APPEAL NO. 21 OF 2009 in which the court confirmed an award of Ksh. 850,000/- in respect of similar injuries.

4. The respondent on the other hand submitted the case of MULWA MUSYOKA v WADIA CONSTRUCTION NAIROBI HIGH COURT CIVIL CASE NO. 1321 OF 1997 where justice MA.

Ang'awa awarded Ksh. 150,000/- in respect of similar injuries.

5. From these authorities and the injuries sustained by the appellant this court is called upon to determine whether the award was manifestly lower so as to be interfered with by this court. It is a legal principal that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the level of awards in similar cases as was stated in court of appeal at NAIROBI CIVIL APPEAL NO. 138 OF 2002 MORRIS MUGAMBI & ANOTHER VS ISAAH GITIRU

6. The principle to be considered by the appellate court were stated in KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICES v AM LUBIA & ANOTHER [1987] KLR 27 where Kneller J.A held

***“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge... be that it must be satisfied that either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages.”***

7. I have looked at the authorities presented to the trial court and the case of THOMAS MUENDO KIMILU v ANNE MAINA & OTHERS MACHAKOS HIGH COURT CIVIL CASE NO. 6 OF 2007 wherein Justice I. Lenaola on 9th July 2008 assessed general damages at Ksh. 700,000/- in respect of more severe injuries and since the award of damages is a matter of the courts discretion I find that the award of Kshs. 700,000/- was not inordinately low so as to be interfered with by the appellate court and would therefore dismiss this ground of appeal.

8. On the issue of cost of future medical expenses it is clear that the plaintiff had pleaded the same and tendered in evidence by the two doctors who confirmed that the cost will be between Kshs. 60,000/- - 100,000/- at a government hospital and having noted that the appellant was admitted at Thika district Hospital where the K nail and plate were inserted I would allow this ground of appeal and award Ksh. 100,000/-.

9. On the issue of loss of earning capability it is part of general damages as such need not be pleaded as was stated in the case of BUTLER v BUTLER [1984]KLR 225 AT PAGE 237 where Kneller J said

***“It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained this way***

***..... compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages” LORD DENNING MR in FAIRLEY VS JOHN THOMPSON (design and contracting Division )Ltd [1937] 2Lloyd's Rep 42 Court of Appeal***

***Chesoni Ag. JA. had this to say “what a victim whose earning capacity is diminished through an accident loses is an interest which if not sellable in the labour market, has an assessable value, it is therefore, an economic loss as the “lost years” for which the wrong doer should fairly compensate the victim” page 235***

***Nyarangi Ag JA (as he then was) stated 'I would liken loss of earning capacity to the doctrine of 'lost years' whereby a victim whose capacity is lessened by the negligence of the defendant is entitled to be compensated for lost years.”***

10. In the case herein both medical reports tendered in evidence did not support the plaintiffs claim under this head and would therefore dismiss the same. As regards lost earning this is a special damage which should have been specifically pleaded and proved, it is clear from the court record that the same was not pleaded nor proved and would therefore dismiss the claim under this head.

11. In the final analysis the appeal is partially allowed as follows:

a) general damages - Ksh. 700,000/-

b) cost of future medical - Ksh. 100,000/-

c) special damages - Ksh. 12,680/-

Total Ksh. **812,680/-**

12. The appellant will be entitled to cost of this appeal.

Dated, signed and delivered at Nyeri this 11th day of July 2014.

J. WAKIAGA

JUDGE

Court: The Judgment is read in open court in the presence of the advocates for the parties and the absence of the appellant and the respondent.

J. WAKIAGA

JUDGE

11/7/2014