



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, LAKHA & PALL, JJ.A.)**

**CIVIL APPEAL NO. 46 OF 1997**

**BETWEEN**

**JANE WANGUI OBWOGLI.....APPELLANT**

**AND**

**LAWRENCE JOHN ABURI.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Nairobi**

**(Justice Juma) delivered on the 13th day of March, 1997**

**in**

**H.C.C.C. NO. 233 OF 1994)**

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**JUDGMENT OF THE COURT**

This is an appeal against the quantum of damages awarded by the superior court (Juma, J.) to the appellant involved in a motor accident. There is no appeal before us against liability as interlocutory judgment was entered and the suit proceeded only on assessment of damages.

On or about October 3, 1993 the respondent was injured in a motor accident. She sustained fracture dislocation of the left hip joint, fracture of left fibula, lacerations on the face, the left lower limb and the left arm and blunt injury to the chest. In the conclusion of the trial the learned judge awarded Shs.70,000/= as cost of future surgery and Shs.300,000/= by way of general damages against both of which awards the appellant has appealed.

As for damages for the cost of the operation, the learned judge allowed Shs.70,000/=. This was in accordance with the evidence of Professor Mbindyo who was the only medical expert called as witness by the plaintiff. He, however, deponed that the fracture dislocation of the left hip was missed during the initial hospitalisation and he was now of the opinion that the sum of Shs.500,000/= would be required for the operation. The whole hip joint is now to be replaced.

In these circumstances, the respondent contends that he should not be held liable for the increased damages of Shs.500,000/= because this loss of damage is a remote result of his conduct. Upon a careful

consideration of the material before us, we are satisfied that there was a break in the chain of causation and the respondent's negligence was not the effective or proximate cause of this further damage. Clearly, the operation of the original cause ceased and the chain of causation was broken by the intervention of the acts of the medical team and such intervention is not a kind of fact which may reasonably have been anticipated. To render the respondent liable in an action for negligence, it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precautions would have been inoperative, the respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it. In the instant case the negligence on the part of the medical team in failing to notice the fracture dislocation of the left hip during the initial hospitalisation was not something that the respondent could have reasonably foreseen or provided against it.

Accordingly, we are satisfied that the respondent cannot be held liable for this increased cost. The appeal against this aspect of the learned judge's decision calls for no interference on our part.

The learned judge dealt very briefly with the issues of general damages. i.e. pain and suffering. He stated:-

"As regards general damages for pain and suffering, counsel for the plaintiff has submitted that an award of Shs.700,000/= would be appropriate while counsel for the Defendant reckons that Shs.200,000/= would be in order. I assess general damages for pain suffering and loss of amenities at Kshs.300,000/=."

As an appeal court we are not entitled to review this finding merely because it is possible that had we been sitting in first instance we should have awarded a larger sum. If we are to review, we must first be satisfied that the trial Judge acted upon a wrong principle of law or that the amount awarded as damages is so high or so very small as to make it an entirely erroneous estimate of the damages to which the appellant is entitled. Moreover, where an award of general damages differs widely from the awards given in comparable cases it might be right for an appellate court to alter it.

With the above consideration in mind, we considered the awards made in the cited authorities as being those of comparable cases. Of course, each case depends on its own facts. But we found that the injuries were more serious. We will not go over in detail the exact nature of the injuries. It is sufficient to say that the appellant is able to walk albeit perhaps with a pronounced limp.

Giving the best consideration to this aspect of the case we are satisfied that it has not been shown that the trial judge acted on a wrong principle of law or otherwise erred. Nor are we persuaded that the award is so very small as to be an erroneous estimate of the damages to which the appellant is entitled. We on our part would not disturb this award of general damages.

In the result, the appeal fails on both the limbs and is dismissed with costs.

We are constrained to note that during the course of his judgment the learned trial judge considered the inadvisability to replace a hip joint in a patient below 60 years according to the current medical thinking. This was neither canvassed nor argued before the trial judge. With respect, he erred in introducing this in his judgment without it having been raised or argued.

**Dated and delivered at Nairobi this 29th day of July 1997.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**G.S. PALL**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**