



**Board of Trustees of the Anglican Church of Kenya, Diocese of Marsabit v  
THW (Suing through her father and guardian ad litem HWG) (Civil Appeal  
336 of 2019) [2024] KECA 1710 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1710 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 336 OF 2019  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
NOVEMBER 28, 2024**

**BETWEEN**

**BOARD OF TRUSTEES OF THE ANGLICAN CHURCH OF KENYA, DIOCESE  
OF MARSABIT ..... APPELLANT**

**AND**

**THW (SUING THROUGH HER FATHER AND GUARDIAN AD LITEM  
HWG) ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Marsabit  
(S. Chitembwe, J.) dated on 9th April 2019 in HCCA No. 7 of 2018)*

**JUDGMENT**

1. The Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit, the appellant, is before us on a second appeal in a matter where the respondent’s claim for damages resulting from a serious road accident was allowed and damages awarded under different heads. THW (suing through her father and guardian ad litem HWG) is the respondent.
2. At the trial before the Magistrate’s court, the case for the respondent, who was the plaintiff in the suit, was founded on the plaint dated 5<sup>th</sup> April 2017 filed at the Principal Magistrate’s Court at Marsabit. In the plaint, the respondent averred that on 11<sup>th</sup> April 2015, while aboard the appellant’s motor vehicle, registration number KBE 518P, while travelling along Marsabit- Moyale Road near Adhi Huka area, the appellant’s driver, agent, employee or servant negligently and/or recklessly managed/ controlled the appellant’s motor vehicle causing it to lose control and overturn thereby causing the respondent to sustain serious injuries. She prayed that the appellant be held vicariously or otherwise liable for the tortious acts/omissions committed on the respondent.



3. The respondent's case was that she sustained injuries accompanied by pain and suffering and had incurred consequential loss and damage. She gave the particulars of injuries as severe head injury with loss of consciousness; dislocation of right-hip; and deep laceration on the neck, glutes and hip region.
4. She also pleaded that due to the severe bodily injuries she sustained, she was admitted at Marsabit Referral Hospital and later transferred to Kenyatta National Hospital where she was admitted between 11<sup>th</sup> April 2015 and 14<sup>th</sup> July 2015 and was later taken to the general ward in Kiirua Hospital where she was admitted for one month from 14<sup>th</sup> July 2015 to 14<sup>th</sup> August 2016 for palliative care.
5. The respondent prayed for an award of special damages as pleaded and general damages. After the trial, the court found liability at the ratio of 80%:20% in favour of the respondent against the appellant for the injuries sustained by the respondent and awarded her Ksh.5,000,000 as general damages, Ksh.4,320,000 for costs of nursing care and 6,500 as special damages.
6. The appellant was dissatisfied with the decision of the trial court and challenged the judgment at the High Court on quantum. The High Court (S. Chitembwe, J.) after re-analyzing the evidence adduced before the trial court in a judgment delivered on 9<sup>th</sup> April 2019 in Marsabit HCCA No. 7 of 2018 found that the award of Ksh.5,000,000 as damages for pain and suffering and loss of amenities was not inordinately high or excessive. The learned Judge expressed himself as follows:-

“I do find that the award of Ksh. 5,000,000 as damages for pain, suffering and loss of amenities to be fair and not excessive. I see no good reason as to why this court should interrupt with that award (sic). Equally, I do find that Ksh.4,320,000 as damages for nursing care to be reasonable. The total award of Ksh.9,320,000 less 20% contribution can not be held as punishment to the appellant. The case involves someone whose life has totally changed. The possibility of recovering from the injuries are very narrow. She may not get married in her life. It is likely that she has lost all what life has to offer in form of enjoyment, work, play and having friends to move around with. She is confined to a bed where she takes her meals, takes her bath and sleeps. I do find that the trial court made a fair compensation. In the end, I do find that the appeal lacks merit and is hereby dismissed with costs to the respondent.”

7. Unrelenting, the appellant is now before us challenging the quantum of damages on the following grounds that: the learned Judge erred in law by allowing the claim for nursing care in the sum of Kshs.4,320,000 whereas the same was neither pleaded nor proved as required in law; by upholding the award for general damages for pain, suffering and loss of amenities in the sum of Kshs.5 Million which award is excessive in the circumstances and that the judgment of the learned Judge is against the law and weight of evidence on record.
8. At the plenary hearing of the appeal, learned counsel Mr. Kiogora Ng'ang'a and Mr. Orayo appeared for the appellant and the respondents respectively. Mr. Orayo relied wholly on his submissions as filed and made no oral highlights. On the other hand, Mr. Kiogora made brief oral highlights and emphasised on the point that the special damages had not been proved and the amount awarded as general damages was inordinately high.
9. With regard to whether the claim for nursing care was properly pleaded and proved, it was submitted that the respondent pleaded for the costs of employing a nurse/maid at Kshs.18,000 per month under the heading of special damages. It was submitted that since the respondent chose to plead under special damages then she was required to specifically prove the same by way of documentary evidence in terms of receipts or payment bonds.



10. Counsel relied on the cases of Hahn -vs- Singh [1985] KLR and Peter Ndegwa Kiai t/a Pema Wines & Spirits -vs- Attorney General & 2 Others (Civil Appeal 243 of 2017) [2021] KECA 328 KLR on special damages.
11. It was submitted that the respondent failed to prove that he used the sum of Kshs.18,000 per month as the cost for employing a nurse since no documentary proof was produced and that it is trite law that special damages need not only to be pleaded but also proved. We were urged to find that the respondent failed to meet the standard of proving special damages and proceed to set aside the award on nursing care in its entirety.
12. As to whether the award of Kshs.5,000,000 was inordinately high, counsel relied on Emmanuel Wasike Wabukesa -vs- Muneria Ndiwa Burman [2019]eKLR. He submitted that the award of Kshs.5,000,000 is excessive in light of the injuries sustained by the respondent. Reliance was placed on Mbaka Nguru & Another -vs- James George Rakwar [1998]eKLR.
13. It was submitted that the court erred in awarding Kshs.5,000,000 and we were urged to replace the same with Kshs.2,000,000. Counsel urged us to consider comparable awards in Edward Mungai Waweru -vs- Samson Ochieng Kagunda [2017] eKLR and Board of Trustees Church of Kenya Diocese of Marsabit - vs- Chukulisa Roba Halakhe [2019]eKLR where the court awarded Kshs.3,500,000 and Kshs2,000,000 in general damages respectively.
14. For the respondent, counsel emphasised that the claim for nursing care was properly pleaded and proved and that even if the issue for nursing care could not have been pleaded the court would still validly determine the issue since evidence was led by the parties and from the course followed at trial it appears that the issue had been left to the court to decide. Counsel relied on Magnate Ventures Limited -vs- Alliance Media(K) Limited & others [2015]eKLR, Galaxy Paints Co Ltd -vs- Falcon Guards Ltd [2000]eKLR, and Christopher Orina Kenyariri t/a Kenyariri & Co Advocates -vs- Salama Beach Hotel Ltd & 3 others [2017]eKLR.
15. With regards to whether the award of Kshs.5,000,000 as general damages for pain, suffering and loss of amenities was inordinately high, counsel submitted that it was not high, for the reasons that the respondent sustained serious injuries which the doctor concluded were severe head injury with dislocation and requiring palliative care for life. Counsel relied on Ngure Edward Karega - vs- Yusuf Doran Nassir [2014]eKLR for justification of the award of Kshs.5,000,000 in general damages. Counsel consequently urged us to dismiss the appeal with costs.
16. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina -vs- Mugiria [1983] KLR 78, Kenya Breweries Ltd -vs- Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another -vs- Bernard Munene Ithiga [2016] eKLR, for the holdings, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin -vs- Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511.
17. Upon review of the record of appeal, the memorandum of appeal and the rival submissions by counsel, we decipher the issues raised for our determination as:-
  - i. whether the amount awarded as general damages for pain and suffering was reasonable and commensurate with the injuries sustained by the respondent; and
  - ii. whether the trial court erred in law in awarding the respondent nominal damages in respect of a nursing care when the same was not pleaded nor proved.



18. On whether the amount awarded as general damages for pain and suffering were reasonable and commensurate with the injuries sustained by the respondent, the parameters under which an appellate court will interfere with an award in general damages were set out in *Butt -vs- Khan* [1978]eKLR thus:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

19. Similarly, in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -vs- AM Lubia and Olive Lubia* [1982 – 88] 1 KAR 727 at P.730 Kneller, JA stated thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be 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 the damage.” [Emphasis added].

See also *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co Ltd* [2013] eKLR).

20. From the above case law, it is clear that in assessing general damages in respect of pain and suffering, the court is guided by, inter alia, the gravity of the injuries sustained by a claimant and the awards made in the past in respect of the same or comparable injuries.
21. In the present case, the appellant suffered injuries that culminated in serious disability, she suffered a head injury with inability to walk and as noted by Dr. Mwanzia who produced the medical report, the respondent will require palliative care for life. This condition, as observed by the trial court in its judgment was that the respondent could not get out of the car or talk, and her course of life had completely changed for the worse.
22. Was the sum of Kshs.5,000,000 awarded to the respondent by the trial court commensurate with the injuries she sustained and in tandem with past decisions of the Court? We have analysed a few decisions where the claimants/plaintiffs suffered almost similar or comparable injuries as the respondent. The gravity of the injuries sustained by the respondent, the pain and suffering she underwent, the degree of incapacity as well as her young age called for the award of Kshs.5,000,000 as awarded to her by the trial court and affirmed by the High Court.
23. We are persuaded that the award was fair and not excessive. The two courts below made concurrent findings of fact on the issue of damages. There is no evidence that either court considered irrelevant matters or failed to consider some relevant matters in reaching at the decision they made on the issue of general damages. In view of the injuries suffered by the respondent, we are not persuaded that the damages were excessive. Accordingly, we affirm the concurrent findings of the two courts below.
24. On the second issue as to whether the award in respect of the respondent’s plea for “nursing care” was pleaded and proved, we advert to the respondent’s plaint dated 5<sup>th</sup> April 2017 where at paragraph 5b she averred that:

“...She will also need a caretaker for the rest of her life which will affect her future earning capacity.



c] Particulars of special damages.... Cost of employing a nurse/maid at kshs. 18,000 per month (revisable]”.

25. It is clear from the above, that the amount for nursing care was pleaded. The respondent claimed a sum of Ksh.18,000 monthly with a rider that the amount was revisable. There was evidence adduced to the effect that PW2 and PW3 were taking care of the respondent. The respondent was brought to court and the trial court observed that she could not come out of the vehicle and testify. Three years after the accident she was bed ridden.
26. We note that in the village and informal settings where the respondent lives, it would not be expected that PW1 was to prepare payslips for PW2 and PW3, or cause them to sign acknowledgments after receiving their wages like it happens in the formal sector. The two courts below believed the two witnesses and we have no reason to doubt the veracity of their evidence. In the case of Ngure Edward Karega (Supra), the Court awarded Ksh.3,091,200 as damages for Nurse Aide. The Court further awarded Ksh.5,133,600 for specialized needs such as diapers, catheter, bed pads and urine bags. Given the evidence on record, we find that sufficient basis was laid for the award of damages for nursing care.
27. On the amount awarded, the respondent was only 22 years old when she was examined by the doctor and according to Dr. Mwanzia, the respondent requires palliative care for life. We are of the view that the life expectancy period of 20 years proposed by the respondent is reasonable and as stated above the same was pleaded and proved. Using a multiplier of 20 years cannot be said to be unreasonable.
28. In conclusion, we find no reason whatsoever to interfere with the findings of the two courts below. We find this appeal to be without merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

