IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 96 OF 2011

BETWEEN

MAQSOODA BEGUM SROYA…………………………………..APPELLANT

VERSUS

SUNMATT LIMITED………..…..……………………………….RESPONDENT

(Appeal from the Judgement and decree of the High Court of Kenya at Nairobi (Musinga J, - as he then was), dated 14th March, 2011in

HCCC No. 305 of 2008)

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JUDGMENT OF THE COURT

Maqsooda Begum Sroya who instituted a suit against the respondent seeking general and special damages for personal injuries sustained following a fall on 25th October, 2010 whilst shopping in the respondent's shopping mall known as Ukay Centre in Westlands, Nairobi County died on the 5th of January 2016, at Makkah in Saudi Arabia, almost 5 years after lodging this appeal. The cause of her death has not been disclosed. Her husband, Mohammed Yunis Sroya, has since been appointed her legal representative to prosecute the appeal and we shall refer to her in this appeal as the deceased.

Following the aforesaid fall as explained above, the deceased sustained a comminuted fracture of the left femur for which she was admitted at Aga Khan Hospital Nairobi for a surgery for its fixation. She was implanted with nails and screws which were to be removed after one year following which she would require a second surgery. Staple fixation of the fracture was achieved during the surgery and a post-operative x-ray check confirmed satisfactory position of the fracture and nail. The deceased was given injectable antibiotics and analgesics and was mobilized with the help of a walker over her left thigh.

A further re-examination by Dr. Modi revealed that there was gradual improvement and the fracture had healed. The deceased however had pain on and off over the operation site and was unable to sleep over her left side. Her left thigh had also shortened by 1.0cm and the range of movement on her left hip joint was reduced. The doctor noted that the metal was palpable over the lateral thigh and advised that it be removed since the fracture had healed.

At the request of the respondent, the deceased was further examined by Prof. Sande, a consultant

neurosurgeon who recommended that the metal used to fix the fracture needed to be removed because it was the cause of the pain that the deceased was experiencing. Yet another report was submitted by Prof Mulimba on 17th April 2009 to the effect that the limb had shortened further by 2cm and that this would result in limping and strain to the lumbar spine, eventually leading to osteroathritic changes and subsequent lower back pain. He recommended a shoe raise to minimize the effect of this shortening. He concluded that, in his opinion, the shortening would give a permanent disability of 20%.

On 20th June 2009, Prof Mulimba, upon re-examining the deceased to ascertain her body mass index (BMI) found it to be 33.5 which, according to World Health Organization standards, is classified as obese.

The importance of this background medical history will shortly become apparent as it central in this appeal.

On 1st October 2009, parties recorded a consent on liability on a ratio of 60:40 in favour of the appellant. A few months later, on 8th January 2010, Dr. Modi re-examined the appellant. The x-ray disclosed transverse fracture of the thigh. Since the fracture was not greatly displaced, he expected it to heal with some bed rest or it would require surgery if displaced further.

On 15th February, 2010, parties once more agreed on special damages at Kshs. 1,377,361 translating to Kshs.826,417 being 60% thereof. Parties then filed submission in respect of general damages under the head, pain, and suffering and loss of amenities. On behalf of the deceased a submission was made under this head for Kshs.4,000,000 and a further Kshs. 600,000 as cost of future surgery while the respondent on the other hand submitted for an award of Kshs. 700,000 and rejected the latter claim.

Instead of parties calling evidence on general damages, the deceased requested to file an additional report by Dr. Modi dated 15th March 2010. By consent, the report was admitted in evidence. Its effect was that a new x-ray had confirmed that the deceased had suffered a re-fracture of the same femur resulting in a gap at the fracture site. This, according to the doctor, would require a revision surgery and bone grafting. This was ultimately done, the doctor stated, at a cost of Kshs. 790,217. At the hearing, the deceased's husband produced receipts in proof.

The dispute turned on whether the re-fracture was related to the original fall or was a fresh one. The deceased did not testify and therefore the answer to this question was not directly answered. However, Dr. Modi testified, on her behalf that it was a proximal cause of the original fracture; that the second fracture had happened at the same site as the first one and that initially the deceased had sustained multiple fractures, but the second injury was only one fracture; that given the deceased age of 63½ years the doctor discovered that she was suffering from osteoporosis at the time he was removing the nail from the fracture; and that the initial fracture had nothing to do with osteoporosis. On the cause of the re-fracture, he opined that it could have been caused by another fall or walking. Although he denied that the re-fracture was caused by deceased's obesity, he however did not rule out the fact that obesity can be a remote factor to a recurrence of a fracture.

It was the deceased's case that the additional expenditure of Kshs.790,217 arose from the treatment of the re-fracture, which was directly attributed to the original fall. Consequently, based on the opinion of Dr. Modi, on behalf of the deceased it was submitted that the sum be treated as general damages since it arose *ex post facto* and could not have been foreseen when special damages were agreed upon at Kshs. 1,377,361.60. That suggestion would enhance the award of general damages to Kshs. 5 Million.

The respondent, for its part, submitted that by failing to testify and to explain how the re-fracture recurred nearly 2½ years after the initial fall, the deceased denied herself the opportunity to link the re-fracture to the initial fall. It insisted that the re-fracture was not related to the initial injury, and urged the court to dismiss the claim for compensation in respect of this injury.

In the impugned judgment, the trial court (Musinga, J. as he then was), agreed that there was a break in

the chain of causation with regard to the second injury in the absence of the deceased's evidence on its cause; and that the latter injury could not be attributed to the respondent's negligence without proof of its proximate cause. The result, the respondent argued was that the deceased's additional claim was not established. The learned Judge also rejected the contention that the sum of Kshs.790,217 incurred on account of the last operation would constitute general damages; that having crystallized when the deceased's witnesses testified, it was not a prospective expense but an actual expenditure which ought to have been included in the claim, by an amendment, as special damage.

In the learned Judge's estimation, the deceased was only entitled to Kshs.1,426,417 made up of;

i General damages for pain, suffering and loss of amenities -Kshs. 1,000,000/= (Less 60% contribution)

= Kshs 600,000

ii. Special damages after contribution - Kshs. 826,417

Total - Kshs.1,426,417

He entered judgment in the above sum with costs in favour of the appellant. The court awarded interest on special damages from the date of filing the suit and on general damages, from the date of judgment until payment in full.

It is that decision that has provoked this appeal. The appellant complains that the assessment of Kshs.1,000,000 as general damages for pain, and suffering and loss of amenities was grossly low and not commensurate to the pain, and suffering, and loss of amenities and other losses suffered by the appellant; that the learned Judge, having correctly found that medical and related expenses incurred by the deceased after filing of the suit were to be treated as special damages, the learned Judge erred in not adding the sum of Kshs. 790,217/= to the amount of general damages in tandem with the decision in **Shearman v Folland** (1950) 1 ALL ER 1976; that it was erroneous to fault the deceased (a Muslim woman) for failing to give evidence in proof of pain, suffering and loss of amenities when there was ample evidence before the Judge from medical doctors on this; and finally that the learned Judge misconstrued the effect of expenses which were incurred after the date of the suit when in fact the parties had agreed that evidence of such damages be led.

In the result, the deceased prayed that the amount of Kshs. 1,000,000 awarded as general damages for pain, suffering and loss of amenities be revised upwards to such an amount as the Court may deem just, the sum of Kshs. 790,217 be added to the award and that the costs of this appeal be given to her.

Mr. Shah, learned counsel for the deceased urged us to find that, there was ample evidence of pain and suffering for 9 years and prayed that we award Kshs. 790,217. He submitted that the evidence of pain and suffering was presented by Dr. Modi; that in any case, the deceased did not have to testify because the issue of liability had been settled.

He cited the award of Kshs. 2,000,000 some 11 years ago in the case of **Edward Mzamili Katana V CMC Motors Group Ltd. & Another,** H.C.C.C. 70 of 1997 and proposed an award of Kshs. 3,000,000 in addition to Kshs. 790,217.

Learned Counsel for the Respondent, Ms. Njeri argued that there cannot be a substitute to a claimant who suffered injury and that the deceased ought to have testified to explain how she sustained the second fracture; that the claim of Kshs. 790,217 could not constitute general damages; and that the learned Judge was more than generous in the award of general damages; that in a case similar to the instant one, **Ali Abdalla Marak V Jagdish Dani,** Msa HCCC No. 3 of 2002, delivered in 2004, the court awarded Kshs. 450,000 for a fracture of the of the right femur, large contusion with deep haemotoma of the right upper thigh laterally and facial cuts. The plaintiff underwent surgery and the fracture fixed was with metal implants. For these reasons, counsel urged us to dismiss the appeal.

Liability, having been apportioned by consent, we are only concerned in this appeal with the question of quantum. In **George Kirianki Laichena V Michael Mutwiri**, Civil Appeal No. 162 0f 2011, this Court expressed its jurisdiction regarding award of damages as follows:-

> **"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case…"**

Some of those principles are that an appellate court will not disturb an award of 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 as a result arrived at a figure which was either inordinately high or low. The court in awarding damages must always bear in mind that money cannot renew a physical frame that has been battered and shattered and that the courts' only concern is to award sums, which must be regarded as giving reasonable compensation. In the process, there must be an endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards which to the extent possible ought to be conventional. See **Butt V Khan** [1981] KLR 349 and **Rahima Tayab & Others vs. Anna Mary Kinanu** Civil Appeal No. 29 of 1982 [1983] KLR 114.

We start with the second fracture. The deceased was first injured on 25th October 2007 as a result of a fall within the premises owned by the respondent. The fall was attributed partially to her and the respondent's negligence. Between that date and the year 2010, she was in and out of hospital. She underwent surgery and was seen and examined by several surgeons, Dr. Modi, Dr. Ayman, Dr. Chabeda,

Dr. Wanjohi, Prof. Mulimba and Prof. Sande. While her condition was said on 17th October 2008 to have improved and the fracture healing well despite the pain she experienced as a result of the implanted metal and the shortened thigh, some 2 years later, on 8th January 2010, she had a second fracture. The question that preoccupied the trial court was how she sustained the second fracture. According to the respondent and ultimately the learned Judge, this question could only be answered by the appellant herself; that the failure to testify denied her the opportunity to discharge that burden.

It is established that whoever wishes the court to decide as to any right or liability whose proof depends on the existence of a set of facts must prove the existence of those facts. See **section 107(1)** of the Evidence Act. That burden is discharged by the party upon whom it is placed calling evidence. This Court explained how the plaintiff can discharge the burden of proof as follows in the case of **Julianne Ulrike Stamm V Tiwi Beach Hotel,** (1995-98) 2 EA 378.

> **"There is no reference in this rule to plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel….."**

The appellant, through her husband and legal representative, Mohamed Yunis Sroya, produced evidence in the form of receipts in proof of the expenses incurred in treating the re-fracture. Dr. Modi examined the deceased following the second injury and advised that it be fixed with an interlocutory nail. But of significance, he explained that;

"The proximate cause of the re-fracture was the injury. It was connected to the initial fracture ….the first injury was the cause of the re-fracture. The fracture was comminuted, which means there were 2 fracture lines. The second fracture happened at the same place and same site. Initially she sustained multiple fractures but during the second injury it was one fracture at the same site."

With respect, in view of this uncontroverted opinion, we do not think it was necessary or material for the deceased to explain how the second fracture occurred. As a matter of fact, the learned Judge (Khamoni, J) who initially was seized of the matter appreciated the nature of evidence that was pending in respect of the second injury and directed that the only oral medical evidence to be called would relate to the second fracture and from an employee of Nairobi Hospital to prove the expenditure relating to the treatment of the second fracture. He specifically directed the summoning of Dr. Modi and Dr. Mulimba. The latter had been engaged by the respondent to confirm the contents of Dr. Modi's report. The Judge added a rider that in case there was unanimity in the reports of the two doctors, it would not be necessary to call Dr. Mulimba. In his estimation, the deceased did not have to prove anything.

In our view, therefore, it was sufficient to locate the actual position on thigh where the re-fracture had occurred. Dr. Modi professionally did so. He repeatedly stated that it was on the same area as the first one. Although he ruled out osteoporosis and obesity as the possible cause of the second fracture, he explained that another fall or even walking could cause the injury. He was however categorical that the deceased did not have weak bones.

In the case of **Edward Mzamili Katana V CMC Motors Group Ltd & Another** (supra) that learned counsel for the deceased heavily relied on, Maraga J, as he then was, noted as follows:

"A problem, however, arises where the injury or further injury suffered does not appear to all as an immediate and obvious consequence of the defendant's wrongful act or omission. In such case the plaintiff has a greater burden of proving that his injury or further injury, though not appearing as an immediate and obvious consequence of the defendant's wrongful act, is nonetheless attributable to the defendants act and that there was no *novus actus* interveniens. He has to prove that there was no break in the chain of causation and that the defendant's negligence was the effective or proximate cause of his injury."

The original injury made the bone on the spot delicate bearing in mind her age. We hold that the second injury was directly linked to the first injury, which in turn was attributed to the negligence of the respondent to a large extent.

When the plaint was filed on 9th July, 2009, it was averred in it that the nails and screws on the fractured thigh would have to be removed at some stage in the future. It was also prayed that the deceased would seek **"such further special damages as may be suffered after the filing of this suit."**

Although we have no difficulty in accepting that there was proximate cause between the second and first injuries, we note the insistence by the appellant that the expenditure be treated as general damages, yet the claim relates to a future medical expense. We cite a decision of this Court **Kenya Bus Services Ltd. v Gituma,** (2004) EA 91, on the place of future medical expenses where it was opined:

"And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded".

A claim for future medical expenses must be pleaded and proved as it is essentially a special damage claim. See also **Mbaka Nguru & Another - v- James George Rakwar**, Civil Appeal No. 133 of 1998.

Though we have noted that there was a plea and a subsequent proof of Kshs. 747,418 and not Kshs.790,217 we ask again why counsel for the deceased prayed that the award be treated as general damages. We find the answer in a consent recorded on 15th February, 2010 in which parties settled the question of special damages at Kshs. 1,377,361.60. Having also compromised the apportionment of liability, the only issue that remained for the trial court's determination was the quantum of general damages. What the deceased was asking the trial court to do was to vary the terms of the consent order. That course was not open to her. Nothing prevented the deceased from intimating about this claim in the consent. We cannot find fault in the learned Judge' treatment of that claim; that Kshs. 826,417 being 60% of Kshs. 1,377,361.60 in terms of the consent was the correct award under special damages. Regarding the complaint that the award of Kshs. 1,000,000 under the head pain, suffering and loss of amenities was too low as to represent an entirely erroneous estimate, it must be remembered that the purpose for awarding damages under this head is to compensate the injured party for the physical and mental distress caused to him or her, both before the trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the resultant disability or disfigurement, if any, or suffering caused by anxiety that the party's condition may deteriorate. See HALSBURY'S LAWS OF ENGLAND, 4th Ed, vol. 12 (1) page 348 at para. 883.

If her medical history is any guide, then the story of the deceased from 25th October, 2007, when she suffered the injury, to 5th January, 2016, when she passed on, is one of anguish and pain. This is a period of nine years. She underwent a total of three operations, some of which involved excruciating painful insertion, removal and again insertion of metals in the thigh with screws to fix the fracture. She ended up with the shortening of her left thigh by 2.0 cm, which left her with a permanent disability of 20% on that thigh. As a result, her mobility was drastically affected and she was unable to undertake those daily activities she was used to before the accident, like going to the mosque for prayers.

We reiterate by citing the decision of this Court in **Simon Taveta v Mercy Mutitu Njeru**, Civil Appeal No. 26 of 2013, that the principle that must guide the court in an award of damages, and the context in which the compensation must be evaluated, is determined by the nature and extent of injuries and comparable awards made in the past.

Relying on the case of **Edward Katana V CMC** (supra), decided 11 years ago, where the court awarded Kshs. 2,000,000 in respect of similar injuries to those suffered by the deceased, her counsel proposed an award of Kshs.3,000,000. In this authority, we note, the injuries suffered by the plaintiff were by far more serious compared to those suffered by the appellant.

In the case of **Mary Pamela Oyioma v Yess Holdings Limited NKR HCCC No. 186 of 2008**, decided in 2011, where the plaintiff sustained a comminuted fracture of the right femur; compound fracture of right tibia, fracture of left tibia; soft injuries to the right shoulder and multiple cut wounds over the whole body, the court awarded Kshs.900,000/- in general damages.

In the case of **Florence Njoki Mwangi vs Chege Mbitiru**, Civil Appeal No. 102 of 2011, on appeal, Wakiaga, J. allowed a sum of Kshs 700,000 in 2014, as general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

In **Boniface Njiru v Tohel Agencies and Another** NRB HCC No. 555 of 2007, the plaintiff sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries and was awarded Kshs. 1,000,000 in 2011.

All we are saying here is that, from these authorities, that the learned Judge did not misdirect himself in awarding Kshs. 1,000,000. It may even be said, as suggested by the respondent, that it was somewhat generous.

In the result, we find no merit in the appeal. We accordingly dismiss it with no orders as to costs.

Dated and delivered at Nairobi this 28th day of July, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR