IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 26 OF 2013

BETWEEN

SIMON TAVETA ……...APPELLANT

AND

MERCY MUTITU NJERU …….....…….RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Embu (Ong'undi J.) dated 26th September 2012

in

H.C.C.C NO. 192B OF 2010)

JUDGMENT OF THE COURT

1. On or about 10th December, 2009, the respondent was lawfully travelling as a passenger in motor vehicle registration No. KAS 815X Toyota Station wagon along Embu-Runyeyes Road at Kairungu when the defendant as the owner and driver of motor vehicle registration No. KBE 159U drove the said vehicle negligently and or carelessly that he knocked motor vehicle registration No. KAS 815X from the rear causing it to overturn and thereby occasioning serious injuries to the respondent.
2. From the medical report tendered and admitted in evidence, the respondent suffered complete paralysis of the limbs. She was completely paralyzed from the waist downwards. The limbs cannot support her. She was examined on 11th May, 2011, by Dr. R.P. Shah when she was in a wheel chair. The Doctor found the following:

i. ***Lower limbs totally paralyed and she had no voluntary movement of any part of the lower limbs.***

ii. ***She will never be able to walk or use her lower limbs.***

iii. ***The injury to the spinal cord had disturbed the bladder and bowel function so she has to wear***

diapers which need to be changed twice daily.

iv. ***Cost of a good wheel chair was Ksh. 50,000/=.***

(v) Assessed degree of permanent disability was given as 100%.

3. On 19th June, 2012, the parties recorded a consent whereby judgment on liability was entered in the ratio of 85:15 in favour of the respondent. Special damages was agreed at Ksh. 601,620/=. The pending issue for trial was the quantum to be awarded as general damages.
4. The trial judge *(Ongundi, J.)* upon considering the submission by the parties determined the quantum and awarded the sum of Ksh. 4,000,000/= as general damages for pain, suffering and loss of amenities and subtracted 15% contribution by the respondent. Costs of the suit were awarded to the respondent.
5. Aggrieved by the determination and award of Ksh. 4,000,000/= as the quantum for general damages for pain, suffering and loss of amenities, the appellant has lodged this appeal. There is no cross-appeal by the respondent.
6. In the memorandum of appeal dated 18th January, 2013, the appellant raises three grounds of appeal *to wit:*

i. ***The learned trial judge erred in law in taking into consideration matters that were not pleaded and therefore irrelevant and thereby made an award of Ksh. 4,000,000/= which sum is inordinately excessive.***

ii. ***The learned trial judge erred in law in failing to consider the relevant authorities cited by the appellant thereby arriving at an award that is inordinately excessive.***

(iii) That the award by the learned judge is against the law and evidence on record.

7. At the hearing of the appeal, learned counsel Mr. Kariuki appeared for the appellant while learned counsel Mr. Njeru Ithiga appeared for the respondent.
8. The appellant in his written submissions stated that the trial judge erred in taking into account future medical expenses in arriving at the quantum of Ksh. 4,000,000/=. The contention is that the claim for future medical expenses was not pleaded and neither was evidence led to justify a consideration of the same. Counsel submitted that there is no mention of the claim for future medical expenses in the plaint. Citing the case of ***Nguru & Others –v – Rakwar***, ***[1995-1998] 1 EA 246***, it was submitted that the learned judge erred in considering the aspect of future medical expenses which was never pleaded nor proved. The appellant submitted that the trial court erred in failing to consider the judicial authorities cited by the appellant and thereby arrived at an award that was inordinately excessive. It is contended that the appellant urged the High Court to award a sum of Ksh. 1,500,000/= as general damages and cited the cases of ***Alexander Kipkoech Kosgey – v- Fredrick Towet & 4 Others, (2005) eKLR*** where Ksh 2,000,000/= was awarded and ***Patrrick Mwangi Irungu – v- Charles Macharia Mwangi & Another, Nakuru HCCC No. 188 of 2005***, where Ksh. 1,500,000/= was awarded. In the present appeal, the appellant referred this Court to the case of ***William Wagura Maigua – v- Elbur Flora Limited Nakuru HCCC No. 248 of 2011*** where an award of Ksh. 3,000,000/= was awarded for similar injuries on 5th October, 2012. Based on the cited authorities, the appellant urged this Court to find that the award of Ksh. 4,000,000/= by the trial court was inordinately excessive.
9. The respondent opposed the appeal and supported the award of Ksh. 4,000,000/= by the trial court. Counsel submitted that in the submission made before the High Court, a sum of Ksh. 7,000,000/= was sought by the respondent as general damages. The respondent cited the cases of ***Pius Arere Mitei – v- Leonard Kissongochi & Another, (Eldoret HCCC No. 220 of 2001)*** and ***Agatha Wanjiru Njuguna –v – Mary Wanjiku Ikiki & 3 Others*** were a sum of Ksh, 4,100,000/= and 5,372,530/= were awarded for similar injuries in the years 2008 and 2006 respectively. Counsel submitted that the award of Ksh. 4,000,000/= by the trial court is inordinately low despite the fact that no-cross appeal has been filed. On the issue of future medical, it was submitted that the trial court was asked to consider that the respondent shall need nursing care and assistance for

the rest of her life; that diapers are changed twice daily and the degree of disability is 100%. Counsel for the respondent urged this Court not to interfere with the award of general damages by the trial court.

10. We have considered the written submissions by learned counsel for the appellant and respondent. We have also analyzed the High Court judgment and examined the record of appeal as well as the relevant law on quantum of damages in cases of personal injury. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

> "***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".***

This court further stated in ***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."***

11. There are two issues for determination in this appeal. The first is whether the claim for future medical treatment was pleaded and properly taken into account by the trial court in arriving at the award of Ksh. 4,000,000/= as general damages for pain and suffering and loss of amenities. Second, whether the award of Ksh. 4,000,000/= was excessively high given the injuries sustained by the respondent and the 100% total disability.

12. In paragraph 7 of the plaint, the respondent averred that she suffered serious injuries for which the appellant was held liable. One of the prayers in the plaint is for general damages for pain, suffering and loss of amenities. The issue for our consideration is whether the pleadings as stated above in the plaint include a claim for future medical expenses. In the case of ***Kenya Bus Services Ltd. - v Gituma, (2004) EA 91***, this Court stated:

> ***"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".***

13. We observe that the trial judge correctly held that the plaint did not contain a pleading for future earnings or the need for employment of a house help and nurse and that these ought to have been pleaded and proved as special damages. In ***Bonham Carter – v- Hyde Park hotel Ltd.*** (1948) 64 T.R. 177, it was stated:

> ***"The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these***

damages. They have to provide it. (See Ouma – v- Nairobi City Council (1976) KLR 297, 304)".

14. In the instant case, our reading of the plaint shows that there is no pleading for future medical attention as part of the special damages claimed by the respondent. The trial judge in awarding the sum of Ksh. 4,000,000/= stated as follows:

> ***"Upon considering the serious injuries suffered by the plaintiff, the impact of these injuries on her life, <u>any future medical expenses and/or eventualities</u> and the authorities cited, I do find a global award of Ksh. 4,000,000/= as adequate general damages".***

15. The appellant submitted that the trial judge in considering future medical expenses which was not pleaded in the plaint took an irrelevant factor into account in awarding the sum of Ksh. 4,000,000/=. In ***<u>Mbaka Nguru & Another - v- James George Rakwar</u>***, ***<u>Court of Appeal Civil Appeal No. 133 of 1998</u>***, it was stated that claims for future medical expenses must be pleaded and proved as a special damage claim. The trial judge awarded a global sum that includes award for the item *<u>any future medical expenses and/or eventualities</u>*. This item required pleading and proof as special damages. In the absence of a specific plea for future medical expenses and/or eventualities, it is our considered view that the trial judge erred in considering a fact and matter that was not pleaded. What is the legal consequence of this finding on the award of Ksh. 4,000,000/= as general damages for pain and suffering? Having found that the trial judge considered a matter that was not pleaded, and that this is a first appeal, it is our duty to examine the injuries sustained and do assessment of the appropriate general damages taking into account the principle of comparable award for comparable injuries. We note that the trial judge did not itemize or desegregate the amount awarded for future medical expenses and/or eventualities. Consequently, no fixed amount can be deducted from the global award of Ksh. 4,000,000/=. It follows that we must set aside, as we hereby do, the entire award of Ksh. 4,000,000/= and re-assess and determine the quantum of general damages to be awarded to the respondent based on the pleadings in the plaint.

16. In the case of ***<u>Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – v- A.M.M. Lubia & Another,</u> (1982-88) 1 KAR 777,*** it was stated:

> ***"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 were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either 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 a wholly erroneous estimate of the damage. (See Ilango – v- Mayoka (1961) EA 705,709-713)"***.

17. In ***<u>Denshire Muteti Wambua – v- Kenya Power & Lighting Co,Ltd</u>. Civil Appeal No. 60 of 2004***, this Court differently constituted ***(G.B.M. Kariuki, Kiage and Murgor JJ.A.)*** reiterated the principles under which this Court would interfere with the award of damages as stated and applied in the ***<u>Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – v- A.M.M. Lubia & Another</u>, (1982-88) 1 KAR 777*** . In the case of ***<u>Arrow Car Limited – v- Bimomo & 2 Others</u>, (2004) 2 KLR 101***, it was stated that comparable injuries should as far as possible be compensated by comparable awards. In ***<u>Denshire Muteti Wambua – v- Kenya Power & Lighting Co,Ltd</u>. Civil Appeal No. 60 of 2004***, it was stated that awards have to make sense and have to have regard to the context in which they are made; they have to strike a chord of fairness. As was stated by Lord Denning in ***<u>Kim Pho Choo – v – Camden & Islingtom Area Health Authority</u>, (1979) 1 All ER 332***, in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant.

18. In the instant case, the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. There is no dispute as to the critical nature and extent of injuries suffered by the respondent. There is complete paralysis of the limbs and a 100% disability. Bowel and bladder movement have been

affected and there is incontinence. This Court needs to strike a chord of fairness in the quantum of damages awarded. Looking at the comparable authorities cited by the appellant and respondent, we are guided by the cases of ***William Wagura Maigua – v- Elbur Flora Limited, Nakuru HCCC No. 248 of 2011,*** where an award of Ksh. 3,000,000/= was awarded on 5th October, 2012 for quardriplegia. We also take cognizance of the cases of ***Pius Arere Mitei – v- Leonard Kissongochi & Another*** ***(Eldoret HCCC No. 220 of 2001)*** and ***Agatha Wanjiru Njuguna –v – Mary Wanjiku Ikiki & 3 Others,*** **(2006) eKLR.** In the case of ***Pius Arere Mitei – v- Leonard Kissongochi & Another, (Eldoret HCCC No. 220 of 2001),*** the sum awarded for pain and suffering was Ksh. 2,000,000/= and not Ksh. 4,100,000/= as submitted by the respondent. In the ***Pius case***, a sum of Ksh. 300,000/= was awarded for future medical expenses. In the case of ***Agatha Wanjiru Njuguna –v – Mary Wanjiku Ikiki & 3 Others,*** **(2006) eKLR** the sum of Ksh. 2,500,000/= was awarded for pain and suffering and not the sum of Ksh. 5,372,530/= as submitted by the respondent. We take this opportunity to advice counsel to be candid and not to make misrepresentations or misdirect the Court when citing judicial authorities. Counsel ought to have disclosed that the total sum as submitted by counsel as having been awarded in the two cases cited above included loss of future earning and special damages.

19. On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries. The appellant in this case cited the case of ***William Wagura Maigua – v- Elbur Flora Limited, Nakuru HCCC No. 248 of 2011,*** where an award of Ksh. 3,000,000/= was awarded on 5th October, 2012. In the case of ***Joseph Maganga Kasha – v- Kenya Power & Lighting Company***, ***Mombasa High Court Civil Suit No. 188 of 2005***, the plaintiff suffered total paralysis in the limbs, urine and stool incontinence and erectile dysfunction. General damages was awarded at Ksh. 3,000,000/= on 12th October, 2012. In the case of ***Eva Mueni Wambugu – v- Simon Peter Githae & Another, (Machakos HCC Case No. 202 of 2009)***, where the plaintiff suffered paralysis of limbs, loss of urine and stool control and the prospects of having a family in future was diminished. General damages was awarded at Ksh. 3,500,000/= on 22nd November, 2012. In all the above cases, additional sums for loss of future earnings and future medical care was granted since the same had been pleaded. In the instant case, guided by the case of ***Eva Mueni Wambugu – v - Simon Peter Githae & Another, (Machakos HCC Case No. 202 of 2009),*** we are of the view that taking into account the 100% disability on the part of the respondent and the injuries sustained, we make an award of Ksh. 3,500,000/= which we consider is not inordinately excessive as general damages for pain and suffering and loss of amenities. No award is made for future medical care as the same was neither pleaded nor proved as special damages.

20. Based on the reasons given we allow the appeal, set aside in entirety the award of Ksh.4,000,000/= decreed in the judgment of the High Court dated 26th September 2012 and substitute in its place an award of Ksh. 3,500,000/= in favour of the respondent as the quantum for general damages for pain, suffering and loss of amenities. The award of Ksh. 3,500,000/= shall bear interest at court rates from 26th September 2012 being the date of judgment of the High Court. The parties having agreed on liability, it is ordered that 15% shall be deducted from the award of Ksh. 3,500,000/= being the respondent's portion of liability. Taking into account the injuries sustained by the respondent and considering that this appeal has partially succeeded in reducing the award of the High Court, we hereby order that the appellant shall bear the costs of proceedings in the High Court and each party shall bear the costs of this appeal.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR