



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:TUNOI, O’KUBASU & GITHINJI JJ A)

CIVIL APPEAL NO 284 OF 2001

BETWEEN

CATHOLIC DIOCESE OF KISUMU.....APPELLANT

AND

TETE.....RESPONDENT

(An Appeal from the judgment and decree of the High Court of Kenya Kisii (Wambilyangah, J) dated 11th June, 2001

in

HCCC No 287 of 1997)

JUDGEMENT OF THE COURT

This an appeal from the judgement and decree of the Superior Court (Wambilyanga, J) by which the learned judge of the Superior Court awarded Shs 1,300,000/-as general damages to the respondent. There is only one ground of appeal which states:

“That the award of Kshs 1, 300,000 as general damages is manifestly excessive and based on wrong principles in view of the injuries sustained by the respondent and so amounts to an erroneous estimate and award.”

On 28th April, 1994 the respondent was traveling in a motor vehicle registration No KZU 932 pick-up belonging to the appellant which motor vehicle overturned as a result of which the respondent sustained injuries.

The respondent who was about 38 years old at the time of the accident was a widow with five children the youngest being 9 years old. She was examined by four doctors namely Dr Gideon Nyachaki; Dr Badia, Dr Odondi and Mr Gaya. According to the medical report prepared by Dr Badia who examined her 16/2/95, the respondent sustained the following injuries:

1. Head injury –moderate to severe conclusion.
2. Fractures of both superior and inferior rami with associated dislocation of the left hip joint.
3. Comminuted fracture mid-shaft of the left femur.

4. Contusion to the left knee.
5. Deep cut wound to the left foot 8cm 1.5 cm.
6. Cut wound on the scalp –17cm.
7. Soft tissue injuries to the chest.

She lost consciousness for one day and was admitted in hospital for a total of 3 1/2 months .The fracture of the femur healed with mal-apposition causing the shortening of the left limb by 5 cm. She was limping and walking with the help of crutches at the time of examination. Dr Badia concluded that the injuries were serious and that the respondent suffered permanent physical disability to the extent of 45%. He predicted that osteo –arthritits in the left hip joint in future was imminent. Dr Odondi and Mr Gaya examined the respondent in April 1999, almost four years later and almost five years after the accident. By then the prediction of Dr Badia that osteo- arthritits would set in in the hip joint had come true for Dr Odondi found severe osteo-arthritits of the hip with severe reduction of joint space while Dr Gaya found osteo- arthritits changes in the left hip joint with trophy of the femoral head of the left femur. According to the medical report of Dr Gaya the respondent had still a limping gait and there was shortening of the left lower limb by 7 cm. which could be corrected by the hip replacement. Both assessed the respondent’s permanent disability as 50%. According to the medical report of Mr Gaya, the respondent had not been able to resume her nursing duties at the time of examination (5 years after the accident). According to the evidence of Dr Gideon Nyachaki Ragira the fracture of the left femur was treated by open reduction and a plate was fixed. He also formed the opinion that the respondent needed hip replacement.

The learned judge considered the injuries that the respondent sustained and concluded that they were of utmost severity. He also took into account the fact that the respondent had suffered severe disability at a considerably early age thereby suffering curtailment of enjoyment of life for a long time to come and concluded thus:

“I have considered the authorities referred to by the advocates in the submissions as to the quantum. It must be understood that each case must be decided on the basis of its own particular and perculiar facts and that there are no two cases of identical circumstances. I also bear in mind that no amount of damages can replace a battered body and that for the general good of the country’s economy awards must be fixed with some moderation. I also take into account the element of inflation which has eroded the purchasing power of money in this country but in that regard I bear in mind that this plaintiff may require to undergo the surgery of hip replacement....”

Mr Otieno for the appellant submitted before us among other things, that the fracture of the left leg was the most serious injury that the respondent suffered; that the respondent had not gone for treatment for four years before the trial commenced thereby showing that the injuries were not severe; that the injuries had healed and that the learned judge erred in a warding costs of future medical treatment which item was not pleaded. He asked the Court to reduce the award of Kshs 1,300,000 to Shs 650,000 already paid to the respondent pursuant to the Court order as a condition for an order of stay of execution of the decree, which sum, according to him, is sufficient compensation. Mr Ochilo for the respondent, on the other hand, submitted that the appellant has not shown that the learned judge erred in principle in making the award or that the award is manifestly excessive as to lead to an erroneous estimate.

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles,

As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v*

Coast Bottlers Limited [1985]KLR 470).

In *Kitavi v Coast Bottlers Ltd* (*Supra*) Kneller JA said at page 477 para10:

“It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidily” classify them will be in vain and wrong...”

It is clear from the judgement of Wambilyanga, J that he applied the principle stated by Kneller JA in assessing general damages.

We have considered the totality of the medical evidence which was before the trial judge and like the learned judge-we are satisfied that the respondent sustained serious injuries which have greatly incapacitated her. It is not correct as submitted by the appellant’s counsel that the trial judge awarded future medical expenses for the replacement of the hip. The learned judge in assessing general damages merely took into account that the respondent “may require” to undergo surgery without making any distinct award. Indeed, the respondent’s counsel in his submissions had asked for a distinct award of Shs 200,000 for future medical treatment, which amount that court did not award.

In our view, the learned judge applied the correct principle in assessing the general damages and the award of Shs 1, 3000,000 as general damages is not so inordinately high as to be wholly erroneous estimate of the damages in the circumstances of this case.

For these reasons this appeal is dismissed with costs to the respondent.

Dated and delivered at Kisumu this June 2004

P.K TUNOI

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JUDGE OF APPEAL

O’KUBASU

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JUDGE OF APPEAL

E.M GITHINJI

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JUDGE OF APPEAL