



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 83 OF 2017

GABRIEL MAINA MUNGAI.....APPELLANT

VS

JANE WANJIKU MWAURA.....RESPONDENT

(Being an appeal from the Judgment of the Hon. V. Kachuodho (RM)

delivered on 5th May, 2017 in Thika CMCC No. 386 of 2015)

J U D G M E N T

1. This appeal emanates from the judgment of Kachuodho, Resident Magistrate in Thika CMCC No. 386 of 2015. By the plaint filed on 10/04/2015, the Plaintiff in the lower court and now the Respondent herein, sued the Defendant, now the Appellant, claiming compensation for the severe injuries she sustained on 13th July, 2014, while she was lawfully travelling along Kiganjo Estate Road as a passenger in “Tuk Tuk” (three-wheeled vehicle) registration number **KTWA 132D**. She averred that the Defendant so negligently drove motor vehicle registration number **KYV 818** that he caused the same to collide onto the rear of the said Tuk Tuk , causing an accident as a result of which she sustained injury.

2. The Appellant filed his Defence dated 20th May, 2015, denying any liability for the accident. In particular, the Appellant denied being the beneficial owner of motor vehicle registration number **KYV 818**.

3. The matter proceeded to a full hearing. Liability was found against the Appellant at 100% . On quantum, the trial Magistrate entered judgment as follows:

| | | |
|-----------------------------|-------|-------------|
| a. General damages | Kshs. | 1,000,000/= |
| b. Loss of earning capacity | Kshs. | 600,000/= |
| c. Special damages | Kshs. | 7,465/= |

4. The Appellant is dissatisfied with the lower Court’s judgment and has preferred the present appeal based on the following grounds:-

“a. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.

b. The Learned Magistrate erred in Law and in fact in failing to consider conventional awards for general damages in similar cases.

c. The Learned Magistrate erred in fact and law in awarding the Respondent loss of earnings of Kshs. 600,000/= that was against the height of the evidence on record.”

5. The Court directed that the appeal be canvassed by way of written submissions. Through his counsel, the Appellant submitted regarding quantum that the award of Kshs. 1 million was based on a misapprehension of the facts and evidence and a total disregard of the Appellant’s submissions and authorities on quantum. The Appellant took issue with the apparent dearth of medical evidence in proof of injuries, in particular the alleged loss of a pregnancy. It was contended that awards must be within consistent limits and take into account comparable injuries as held in the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd (2013) eKLR**. He urged the court to

substitute the award with Kshs. 500,000/=.

6. It was also submitted on behalf of the Appellant that the award in respect of loss of earning capacity was not justified, as the Respondent did not adduce evidence that the injuries directly affected her earning capacity, but if awarded, a sum of Kshs. 100,000/= was sufficient. Reliance was placed in the case of **Joyce Moraa Oyaro vs Hussein Dairy Ltd (2016) eKLR** among other cases. The court was urged to re-examine the award on quantum based on actual and current trends as held in the case of **Oluoch Eric Gogo vs Universal Corporation Ltd (2015) eKLR**. The award of Kshs. 1 million as general damages was attacked as excessive especially given that the Respondent suffered a single fracture of the left clavicle. An award of Kshs. 500,000/= was proposed as reasonable

7. In conclusion, counsel contended that though the assessment of quantum of damages is a discretionary exercise, the same should be exercised judicially and upon established legal principles. He cited the case of **Millicent Atieno Ochuonyo v Katola Richard (2015) eKLR** where it was held that comparable injuries should be compensated by comparable awards.

8. The Respondent filed her written submissions through her counsel. Counsel submitted relying on the case of **Ben Ocharo & Others vs Kenya Farmers Co-operative Society, Kisii HCCA No. 91 of 2006 (UR)** that there are various sources of evidence in respect of injuries; that the primary source is the victim himself, then witnesses, treatment notes and medical reports. It was contended that the Respondent indeed suffered a miscarriage after the accident.

9. Counsel faulted the Appellant's contention that the trial court gave weight to the alleged miscarriage in arriving at its award. The Respondent asserted that authorities cited by the Appellant were not comparable to the instant case and that while no two cases could reflect similarity in injuries, the Appellant has failed to show any reason why the court should interfere with the trial court's award. In that regard, the principles enunciated in the case of **Kemfro Africa Ltd & Another vs Lubia & Another were reiterated**.

10. As regards the award in respect of diminished earning capacity, it was submitted that there was evidence that the injuries sustained directly affected the Respondent's earning capacity. Counsel cited several cases to justify the award under this head stating that the quantification of the award for loss of future earning capacity is a notoriously difficult task as expressed in **S J v Francesco Di Nello and Another [2015] e KLR**. That courts have discretion to either adopt the global award approach or the multiplier approach. In the instant case a global award was made. The court was urged not to interfere with the same and the same should be affirmed.

11. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I**.

12. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88 IKAR 278** stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

13. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by the Appellant while the Respondent defends the awards. I propose to deal separately with each head of damages in contention. While doing so, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathoga Kanini v A.M Lubia and Olive Lubia (1987)KLR 30**.

14. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.” see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR**.

15. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *“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 different figure if it had tried the case in the first instance”*.

General damages for pain and suffering

16. There is a great deal of contention regarding the award under this head, much of which relates to the nature of injuries sustained by the Respondent. At paragraph 6 of her plaint, the Respondent pleaded the following injuries as resulting from the accident.

- a) Head injury with loss of consciousness for almost 3 weeks
- b) Fracture of left clavicle bone
- c) Cut wound on the head

- d) Soft tissue injury to abdomen
- e) Termination of a six – month pregnancy
- f) Permanent incapacity assessed at 15%

17. During her testimony, the Respondent adopted her witness statement as her evidence in chief. In the said statements she had asserted inter alia that:

“As a result of the accident I sustained severe injuries on my head, fracture on my left shoulder, a big cut on my left arm, bruises on the back and I had a miscarriage of six (6) months pregnancy. I could hardly speak or move. I was in a corner (sic) for about two (2) weeks. Since the accident my ears doesn’t hear properly, my whole body feels weak and I don’t walk stable ... I feel dizzy ... I also started stammering and before I was speaking fluently.” (sic).

18. The statement is dated 28th April 2015. The Respondent produced treatment notes from Thika Level Five Hospital and CT Scan Results (Exh 2a-b), P3 forms [Exh 4). Under cross-examination, she stated regarding the alleged pregnancy that:

“I don’t know if medical reports show I was pregnant or not.”

19. She called Dr. Karanja Kimiri as PW3. He produced the medical report dated 30th January 2015. In addition to injuries in his report he stated that the Respondent sustained brain injury as a consequence of the head injury. During cross-examination he confirmed that he had relied on the previous medical reports including the P3 form to prepare his report tendered as Exhibit 5B. He admitted that the treatment notes relied on did not include the loss of a pregnancy and that this information was given by the Respondent herself and further explaining in re-examination that there is no treatment for miscarriage.

20. The injuries listed in the medical report Exh 5B are in tandem with the particulars in the plaint. PW3’s report indicates the source of information to be the Discharge summary from Thika Level Five Hospital, the completed P3 form and Xrays films. The earliest record of the Respondent’s injuries is the discharge summary dated 14th August 2014. Admission diagnosis is stated in medical jargon – “SAH(subarachnoid haemorrhage per CT scan results)in HTN P+left #clavicle” Discharge diagnosis reads – “Left # clavicle/scalp injury”

21. On 23rd January 2015 the Respondent was examined by the government doctor who completed the P3 form tendered as Exh. 4. Included in the P3 form are the following injuries:

- a) Scalp injury, with swelling and tenderness. Traumatic subarachnoid hemorrhage
- b) Fracture of left clavicle

22. The above medical reports appear consistent with the report in respect of the CT scan to the head, dated 14th July 2014 and produced as Exh. 2B. The results indicate that there was evidence of scalp injury accompanied by traumatic subarachnoid haemorrhage which refers to the rupturing and bleeding of a blood vessel on the brain surface as a result of the head injury. Thus there is no mention in these initial reports of the loss of a six months old foetus, itself a serious matter. Nor evidence of brain injury as alleged by the Respondent’s doctor.

23. The report by PW3 purported that the miscarriage occurred two days after the accident. The source of the information was the Respondent and as the examining doctor, PW3 made no effort to confirm this allegation. It would be nothing but surprising that such a major event involving a patient allegedly lying comatose in hospital were missed or ignored by the caregivers at the Thika Level Five Hospital. Besides, the Respondent herself did not tendered any tangible evidence such as the pre-natal clinic card to prove that she carried a six months pregnancy at the time of the accident and that she lost it subsequently.

24. Section 107 of the Evidence Act provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

25. I do not see any analysis of the medical reports in the lower court’s judgment despite the contention accompanying the question of the alleged loss of a pregnancy at the trial. The trial court appeared to accept in a mechanical fashion, the Respondent’s injuries as pleaded in the plaint. The trial court therefore misapprehended the evidence. The injuries proved through the Respondent’s evidence were the head fracture with attendant injury and swelling to the scalp and SAH (subarachnoid haemorrhage), fracture to the left clavicle and possibly related soft tissue injuries. No loss of pregnancy was proved.

26. The trial court examined in some detail three of the authorities cited by the parties in urging their proposed awards in damages, and concluded that the Respondent’s authorities represented more severe injuries. These authorities were first, **John Katanga Mulonzi v Murgian Transport (K) Ltd; HCCC 112 of 1989 (MACHAKOS)** secondly **Joseph Kitheka v Stephen Mathuka PLUS (2009) e KLR**, and finally **Joel Motanya v Swan Carriers Ltd [2015] e KLR**.

27. In this case, brain damage was not pleaded and PW3’s attempt to include the injury had no basis. A close analysis of the medical reports

including **PW3**'s leaves no doubt that the Respondent did not suffer brain damage. The first authority is very old and the exact degree of the injury to the head, right arm and left arm is not well spelt out even though the plaintiff therein was rendered unconscious for three weeks. But judging from the authorities considered in the case and the award, it seems that the injuries may have been severe.

28. The plaintiff in the second authority suffered two fractures to the radius/ulna and tibia/fibula bones in addition to blunt head injury, contusion and bruises on the scalp. Based on the awards made separately therein, the fracture to the tibia/fibula represented the most severe injury. For these reasons, the authority can perhaps be said to represent more injuries than in the instant case. The injuries in the 3rd authority are decidedly more severe, as the head injury resulted in brain damage, poor memory, difficulty in speech, poor balance and changed personality. Ditto for the plaintiff in **Gerald Musungu Otwani v Kulsum Alibhai and Another [2006]** cited in the lower court.

29. Turning to the Appellant's submissions on quantum in respect of damages for pain and suffering made at the trial, two authorities were cited to urge an award of KShs.350,000. These are **Absalom Ogany Onyilla v Mount Elgon Orchards Ltd and Another [2004] e KLR** where the Plaintiff suffered serious head injury with bleeding accompanied by unconsciousness for 7 weeks, and was awarded KShs.250,000/=; and **Sila Tiren and Another v Simon Ombati Omiambo [2014] e KLR** where a plaintiff who had sustained head injury with concussion, swollen & tender scalp and fractures to base of skull and temporal bone was awarded KShs.360,000/=.

30. As happened in the latter case, the Appellants have attempted on this appeal to introduce new authorities in urging the reduction of the award in damages to KShs.500,000/= .

31. I am in full agreement with the sentiments of Ochieng J in his judgment in **Tiren's** case wherein took exception to the introduction of new authorities on the appeal stating inter alia that:

“None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”

32. It is too late for the Appellants to bring in new decisions on this appeal to support their proposal for damages and the court will not consider the said new authorities. Returning to the judgment of the lower court, I note that no express finding was made as to the comparability of the decisions cited by the Appellant and the present case. The most serious injury sustained by the present plaintiff was the head injury. Her prognosis was fair even though she complained of impaired hearing and slurred speech during her evidence. No adverse sequela was attributed to the fracture of the clavicle bone. Her residual disability was assessed at 15%. In assessing general damages for pain and suffering the trial court took into account in addition to the above, the loss of a six-month pregnancy, which this court has found to be unproven.

33. In the circumstances, and considering the authorities tendered before the trial, the proposal by the Appellants appears somewhat low while the sum of KShs.1million defended by the Respondent is not tenable. Doing my best, I think an award of KShs.750,000/= (Seven Hundred and Fifty Thousand) is reasonable compensation for the Plaintiff's injuries. The award of KShs.1million is therefore set aside.

Loss of Future Earning Capacity

34. In the **Mumias Sugar Company Ltd v Francis Wanalo (2007) eKLR** case, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in **Butler v Butler (1984) KLR 225**, where, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity.

35. The Court of Appeal stated:

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

36. The Respondent had averred in her pleadings and testified that the permanent incapacity resulting from her injuries had an adverse effect on her occupation as a trader earning KShs.30,000/= p.m. The trial court was persuaded and on the basis of the **Mumias** case awarded the sum of KShs.600,000/= under the head. The Appellants' view the award as an erroneous estimate. In the lower court the Appellants appeared to take the position that the claim under this head was a special damage claim and must be specifically pleaded and proved.

37. Their submissions through citing the decision in **Butler v Butler (1984) KLR 225** appears to conflate damages for lost earnings [actual and assessable] and damages for lost earning capacity which comprise general damages. see **S J v Francesco Di Nello and Another [2015] e KLR**. The Respondent herein sought was the latter. And though her evidence at the trial was scanty, that was not reason enough to disqualify the claim – see **Kimatu Mbuvi v Augustine Munyao Kioko [2001] e KLR; Wambua v Patel [1986] KLR 336 and Jacob**

Ayiga Maruga and Another v Simeon Obayo [2005] e KLR. Undoubtedly, the impaired hearing and slurred speech arising from the injuries would adversely affect the Respondent's trade, whatever its nature.

38. That said, the trial court was not justified to apply the **Mumias** case without examination of relevant facts. The plaintiff therein was a mechanic and had lost the fifth finger on the right hand in an accident. The result being that he lost 15% of the function of the said right hand. The court stated that there was minimal possibility that due to the disability he would not be able to find employment.

39. In the present case, the Respondent claims to have been a trader. Although she did not elaborate how the resultant 15% disability could affect her business, it is reasonable to expect that the slurred speech and impaired hearing if it persisted, would be somewhat of an obstacle in dealing with clients or even other people. Nevertheless the fact that the Respondent was able to give her evidence at the trial without any recorded difficulty could well mean that the condition was not so severe and in my own view, the disability is not quite as serious as in the case of **Mumias** which involved a hand. Or rather, the disability therein was different and distinguishable from that in this case. It is not enough as the trial court appears to have concluded, that the degree of disability was 15% in both cases. 39. In the circumstances of this case, an award of KShs.600,000/= was not justifiable on the **Mumias** case. On this appeal, the Appellants have introduced authorities not availed to the lower court, to support their proposal for an award of KShs.100,000/= under this head. On the face of it such an award would be too low.

40. Based on the foregoing, this court is of the view that an award amounting to half of the sum awarded in the **Mumias** case was commensurate to the Respondent's disability. That the award in this case was excessive becomes clear when one considers the award in **S.J. v Francesco Di Nello** cited by the Respondent at the trial. In that case, a 15 year old who suffered 100% permanent disability was awarded KShs.1500,000 by the Court of Appeal in 2015. In the circumstances this court sets aside the award of KShs.600,000 as general damages for loss of earning capacity.

41. The appeal has therefore succeeded. The court therefore substitutes the awards in the lower court as follows:

- a) General damages for pain and suffering KShs.750,000/= (Seventy Hundred and Fifty Thousand]
- b) General damages for loss of future earning capacity KShs.250,000/= [Two Hundred and Fifty Thousand].

42. These awards will be in addition to special damages amounting to

KShs.7,465/= allowed in the lower court. The costs of this appeal will be borne equally by the parties. Orders accordingly.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the presence of:

Mr. Mwangi holding brief for Mr. Murage for the Appellant

Mr. Olaka holding brief for Mr. Ngari for the Respondent

C/A Nancy