REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E022 OF 2021

DANEVA HEAVY TRUCKS.....1ST APPELLANT

RASHID K. MUGONZA.....2ND APPELLANT

VERSUS

CHRISPINE OTIENO.....RESPONDENT

(Appeal against judgment and decree in Ukwala Principal Magistrate's Court civil case No. 28 of 2019 delivered by Hon C.N. Sindani on 10/3/2021)

JUDGMENT

1. The respondent herein Chrispine Otieno was the plaintiff in the lower court whereas the appellants Daneva Heavy Trucks and Rashid Mugonza were the defendants. The Respondent filed suit against the Appellants vide a plaint dated 23.4.2019 and which was filed on the 14.5.2019 arose out of a road traffic accident that occurred on the 24.6.2018 along the Kisumu –Busia road when a motor vehicle registration number KBR 669L/ZD 8037 owned by the 1st appellant and driven by the 2nd appellant caused an accident which occasioned injuries on the respondent who was a pedestrian.

2. The parties agreed on liability and judgment on liability was entered by consent by the parties' advocates on 18.11.2020 where judgment was entered on liability at 70% against the defendants/appellants herein and 30% contribution by the Plaintiff/Respondent herein.

3. As parties could not reach consensus, what remained was the quantum of damages payable hence the plaintiff testified and called no witnesses. The defendants also did not call any witnesses.

4. In his judgment delivered on 10.3.2021, Hon. C.N. Sindani awarded the plaintiff/Respondent herein Kshs. 1,000,000/= as general damages plus special damages of Kshs. 11,700/= less 30% contribution plus costs of the suit.

5. It is that judgement which is subject of this appeal filed vide the amended memorandum of appeal amended on the 24.9.2021 and filed on the same day on the following grounds:

> *a) The learned trial judge grossly misdirected himself in ignoring the principles and tenets of law applicable and the relevant authorities sited in the written submissions presented and filed by the appellant thus arriving at an award that was excessive in the circumstance.*
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> *b) That learned trial judge erred in law and in fact when he made an award of Kshs. 1,000,000 to the respondent as general damages which award was so manifestly high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's injuries.*
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> *c) That the learned trial judge erred in law and fact when he made an award of Kshs. 11,700/= to the respondent as special damages, when the respondent had not strictly proven his claim to warrant to the extent of amount awarded.*
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> *d) The learned trial judge grossly erred and misdirected himself when he made a find that the plaintiff had proved that injuries as alleged to have been sustained, in complete disregard to the numerous and visible discrepancies in the evidentiary documents presented by the plaintiff.*
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> *e) The learned trial magistrate erred in treating the evidence tendered before him on quantum of damages superficially thereby arriving at a wrong conclusion on the same.*

f) The learned trial magistrate erred in fact and in law in disregarding the written submissions and supporting authorities which were tendered by the appellant thereby awarding damages which were excessive in view of the nature and degree of injuries sustained by the respondent.

g) The Honourable Trial Magistrate erred in law and fact when he pronounced himself that the application has no merit.

6. The appellant prayed that the finding and/or assessment of the trial magistrate on damages be set aside and substituted with one commensurate to the injuries sustained vis-à-vis the documents tendered in support.

7. The parties agreed to dispose of the matter by way of written submissions.

The Appellants' Submissions

8. It was submitted that at trial, the appellants submitted that an amount of Kshs. 450,000/= would adequately compensate the Plaintiff taking into account the injuries sustained. They in turn cited the cases of: **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** where Justice D.S. Majanja in a judgment delivered on the 12/10/2018 reduced an award of Kshs. 1,000,000/= to Kshs. 450,000/= for a Respondent who had sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and where a permanent disability was anticipated and the case of **Civicon Limited v Richard Njomo Omwancha & 2 others [2019] eKLR** where the High court awarded Kshs, 500,000 to the 3rd a party who sustained the injuries of fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability as she was unable to walk without support.

9. It was submitted that the trial court should have in the least properly considered the Appellant's submissions and/or given reasons for why only the Plaintiff's submissions ad authorities could be believed in light of the facts of the case and applicable law. Reliance was placed on the case of **Stephen Mbugua Ikigu v Peter M. Mbugua & 2 others [2014] eKLR,** where the court addressed the need to have a concise judgement and stated that a judgment must be clear and demonstrate a reasoned thought process, it must at least set out the nature of the claim, the defence, the arguments, and the issues for determination, the reasons for the decision and the decision.

10. It was submitted that the award made by the Honourable trial magistrate was not commensurate with the injuries sustained as the learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the Appellants but instead relied on the authorities quoted by the Respondent.

11. The appellants submitted that the injuries sustained in the case of **Alphonza Wothaya Warutu & another v Joseph Muema [2017] eKLR** which was relied on by the respondents as well as the trial magistrate were more complex especially given the fact that the doctors adjudged a leading 10% disability whereas no disability level was indicated for the Respondent in the instant case.

12. The appellants also faulted the trial magistrate for relying on the case of **Bethwel Mutai v China Road & Bridge Corporation [2008] eKLR** where the Plaintiff sustained a Fracture of the Left Clavicle, Fracture of the Right Humerus and two Fractures of the Right Femur injuries that the appellants submitted were more serious in comparison to those sustained by the Respondent in the instant suit and as such it was unfair for the trial Magistrate to rely on them without even considering whether the injuries sustained by the Respondent were near if not similar to those sustained by the Plaintiffs in the cited authorities.

13. The appellant submitted that the Respondent's only complaint at the time of trial was that his leg still had a wound on the surface which wound was not among the injuries sustained following the accident in 2018.

14. It was submitted that in making an award of Kshs. 1,000,000/= the trial court ignored the cardinal principle in assessment of damages that comparable injuries should as far as possible be compensated by comparable awards as was held in the cases of **Simon Taveta v Mercy Mutitu Njeri (2014) eKLR** and thus arrived at an award that was inordinately high and which was unjust and unfair.

15. The appellants further relied on the case of **Kigaraari v Aya (1982-88) 1 KAR 768** where it was held that:

"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford as large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

16. It was submitted that that an award between Kshs. 500,000/= to Kshs. 800,000/= would have been reasonable compensation in light of the injuries sustained, their residual effect on the Respondent and taking into account the inflationary trends since the time of injury to the time of the judgment. Reliance was based on the case of **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** where the respondent sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. In that case, a medical report was produced where the doctor noted that the Plaintiff complained severe headache, severe pains on the chest, back, right hand and right leg. The Plaintiff could also not walk without crutches and was still on plaster of paris. The Court set aside the trial court's award of Kshs. 1,000,000/- and substituted the same with an award of Kshs. 450,000/-

17. The appellant also relied on the case of **Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR** where Justice C. Kariuki increased an award of Kshs. 100,000/= to Kshs. 700,000/= as General Damages where the Appellant had sustained injuries in the nature of fractures to the

right femur, Compound fracture (r) tibia, Compound fracture right fibula, shortening right leg and Episodic pain (r) thigh with inability to walk without support. The appellant further noted that in this case, the trial court's decision and the date of the accident happened three years before the decision by the appellate court.

18. The appellant noted this court's jurisdiction as enshrined in Article 165 (3(e) of the Constitution of Kenya, 2010 as read together with Section 65 (1(b) of the Civil Procedure Act, CAP 21 and urged the court that this being a first appeal, the Court was under a duty to reconsider the evidence, evaluate itself and draw its own conclusions while bearing in mind the fact that it has neither seen nor heard the witnesses and proceed to interfere with the conclusions of the learned trial Magistrate and therewith reassess the award for general damages for pain and suffering downward, subject to the 30% contributory negligence.

19. On the issue of costs, the appellants submitted that they had ably demonstrated that their Appeal was merited and would warrant an interference from the court and as such were entitled to the costs of this Appeal. Reliance was placed on the case of **Margret Ncekei Thuranira v Mary Mpinda & another [2015] eKLR** where the court stated interalia that *notwithstanding, the provision of section 27 of Civil Procedure Act, costs are generally a matter within the discretion of the Court and further that costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order.*

The Respondent's Submissions

20. The respondent submitted that at the trial court he relied on the case of **Alphonza Wothaya** (supra) where the plaintiff sustained injuries of deep cut wound on the forehead, compound fracture on the midshaft of the right Humerus, compound fracture of the right tibia and deep cut wound on the right lower leg and the court upheld an award of Kshs. 800,000 as general damages. He further stated that he relied on the case of **Bethwel Mutai** (supra) where the Plaintiff sustained a Fracture of the Left Clavicle, Fracture of the Right Humerus and two Fractures of the Right Femur and the court awarded general damages of Kshs. 800,000 on 25th April 2008.

21. The respondent submitted that the trial magistrate was justified in awarding the same considering the effect of inflation and as such the magistrate was within his discretion. On special damages of Kshs. 11,000 awarded, the respondent submitted that he produced a receipt of Kshs. 4,000 from Lubinu medical clinic as well as treatment notes and a discharge summary from Siaya County Referral Hospital as well as a medical report from Dr. Andai which were sufficient proof that he was injured and treated.

22. It was submitted that the appellants had failed to demonstrate to court how the wrong principles were applied or evidence misapprehended and as such their appeal lacked merit and ought to be dismissed.

Analysis & Determination

23. Having considered the grounds of appeal, the rival submissions and entire evidence adduced before the trial court, it is clear, as earlier stated that this appeal is purely on the issue of quantum of damages. Accordingly, the only issue for determination is whether the quantum of damages should be disturbed.

24. The principles to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of **Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia (1982-88) 1 KAR 727** and restated by the Court of Appeal in the case of **Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others (2004) eKLR** that:

> ***"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. …"***

25. The same was reiterated in the case of **Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR**, where the Court of Appeal held that:

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
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> ***'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 so arrived at a figure which was either inordinately high or low."***

26. In the present appeal, the Appellants contend that the award was inordinately high and that the trial court disregarded authorities on comparable injuries and compensation and based its assessment on cases where the Plaintiff had suffered more severe injuries.

27. From the plaint dated 23.4.2019 and filed on the 14.5.2019, the plaintiff/respondent pleaded that as a result of the road traffic accident occasioned by the appellants that, he suffered the following injuries:

a) *Fracture of the pelvis*

b) *Fractures of the left tibia and fibula*

28. The averments on injuries suffered were supported by the treatment notes produced by the plaintiff/respondent as PEx 1, the discharge summary form produced as PEx 2 as well as the P3 form produced as PEx 3.

29. The plaintiff/respondent also produced a medical report by Dr. Charles Andai as PEx 6 which confirmed the injuries that the plaintiff/respondent suffered as those averred in his plaint and further stated that upon examination, almost 5 months after the accident occurred, the plaintiff/respondent walked with a limping gait supporting himself on crutches and was still in the process of recovery but was expected to recover fully within a year from the date of examination.

30. In his testimony before court, the plaintiff/respondent reiterated the averments in his plaint on the occurrence of the accident and injuries sustained and further stated that at Siaya Hospital he paid Kshs. 7,700 as the Hospital waived Kshs. 16,000. In cross-examination he admitted that he was admitted for 2 weeks. He produced PEx 2B, the waiver application form which showed that he had paid Kshs. 7,700 and had a total amount of Kshs. 16,060 waived. In re-examination, the plaintiff/respondent reiterated that he left the hospital after being granted a waiver.

31. On their part, the appellants filed a defence dated 23.7.2019 and filed on the same date in which they denied the respondent's averments in his plaint and put him to strict proof. The appellants further pleaded negligence on the part of the respondent that resulted in him getting the injuries alleged. At hearing, the appellants did not call any witness but instead sought to put in a second medical report attached to the submissions however the same seems not to be in the record.

32. I have considered the authorities relied on by both parties herein. On appeal, the appellants in addition to the authorities cited before the trial court also relied on the cases of **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** and that of **Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR.** On his part, the respondent cited the same authorities that he placed before the trial court.

33. From the evidence on record, I note that the respondent suffered the injuries as pleaded before the trial court. The medical report by Dr. Andai produced by the respondent as PEx 6 indicated that the respondent was to recover fully within a year of examination.

34. I have examined other relevant decisions. In the case of **Godfrey Wamalwa Wamba & another vs. Kyalo Wambua [2018] eKLR**, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs. 700, 000.00, which the appellate court upheld. I note though that the injuries sustained by the appellant in that case were more grave that in the case before me. In **Wakim Sodas Limited vs. Sammy Aritos [2017] eKLR**, the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400, 000.00, which was upheld on appeal. In **Vincent Mbogholi vs. Harrison Tunje Chilyalya [2017] eKLR**, the appellate court declined to disturb an award of Kshs. 500, 000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. In the case of **David Mutembei v Maurice Ochieng Odoyo [2019] eKLR**, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1, 600, 000.00 had the same reduced on appeal to Kshs. Kshs. 800, 000.00

35. Taking into consideration the more recent decisions on similar injuries cited above, it is my view that the award by the trial court was on the higher side. I find that an award of Kshs. 800,000 would suffice as general damages.

36. Regarding special damages, it is trite that they *must be specifically pleaded and proved with a degree of certainty and particularity though, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of*. See the Court of Appeal decision in the case of **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR.**

37. In this case the respondent pleaded for special damages as follows;

a) Medical Report.…….....Kshs. 4,000

b) *Costs of treatment and drugs.……Kshs. 7,700*

38. In support of the plea above, the respondent produced a receipt from Lubinu Medical Clinic for Kshs. 4,000 for the medical report and PEx 2B, the waiver application form which showed that he had paid Kshs. 7,700 at Siaya Hospital and had Kshs. 16,000 waived.

39. The above are sufficient prove of the special damages as claimed by the respondent.

40. In the end, I find this appeal partially successful. I set aside the award of general damages of Kshs. 1,000,000 and substitute the same with an award of Kshs. 800,000 general damages which is subject to the percentage on liability as agreed by the parties herein. The award of special damages is sustained. The award as reduced shall be less contribution of 30% and shall earn interest from date of judgment in the lower court until payment in full. Special damages shall earn interest from date of filing suit in the lower court until payment in full.

41. The respondent shall have costs of the suit in the lower court. Each party shall bear their own costs of this appeal.

42. File closed.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM MOMBASA THIS 17TH DAY OF JANUARY 2022

R.E. ABURILI

JUDGE

In the presence of

Ms Achieng Advocate for the appellant-virtually

Mr. Onyango h/b for Mr. Okeyo advocate for the Respondent- Virtually

CA: Mboya and Akidah- virtually from Siaya High Court