REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 527 OF 2019

LOSAGI INSURANCE BROKERS LIMITED......1ST APPELLANT

NICOLE NDUTA MUCHENE................................2ND APPELLANT

-VERSUS-

JOSEPHAT ACHESA CHUMBALI..........................RESPONDENT

(Being an appeal from the judgment of Orenge, SRM. Delivered

on 8th August, 2019 in Nairobi CMCC No. 7955 of 2018.)

JUDGMENT

1. This appeal emanates from the judgment delivered on 8th August, 2019 in **Nairobi CMCC No. 7955 of 2018**. The suit was commenced by a plaint filed on 5th September, 2018 by **Josephat Achesa Chumbali**, the plaintiff in the lower court (hereafter the Respondent) against **Losagi Insurance Brokers Limited** and **Nicole Nduta Muchene**, the defendants in the lower court (hereafter the 1st and 2nd Appellants). The claim was for damages in respect of injuries allegedly sustained on 7th February, 2018. It was averred that the Respondent was lawfully riding on motor cycle registration number **32 CD 10K** along the junction of **Kabarsiran -/James Gichuru Road** on the material day; that the 2nd Appellant being the driver, agent and or servant of the 1st Appellant, the registered owner of the vehicle **KCF 105M ,** managed, controlled and drove the said vehicle so carelessly and/or negligently and at such a high speed that she lost control of the motor vehicle causing it to collide with the Respondent's motor cycle thereby causing the Respondent serious bodily injuries. The Respondent pleaded vicarious liability as against the 1st Appellant.

2. The Appellants filed a statement of defence denying the key averments in the plaint and any liability. Alternatively, the Appellants pleaded contributory negligence against the Respondent. On 31st July, 2019 when the matter came up for hearing parties hereto recorded a consent apportioning liability in the ratio of 75:25 in favour of the Respondent as against the Appellants and parties thus proceeded for oral assessment of damages. Only the Respondent gave evidence in the foregoing respect. In its judgment, the trial court awarded damages in the total sum of Kshs. 303,550/-, made up as follows:

a. General damages: Kshs. 300,000/-;

b. Special Damages: Kshs. 3,550/-.

Total Kshs. 303,550/-.

3. Aggrieved with the outcome, the Appellants preferred this appeal specifically challenging the finding on quantum of damages, based on the following grounds:-

> **"1.THAT the learned trial magistrate erred in law and in principle by failing to appreciate the injuries sustained by the Respondent which were in the nature of simple soft tissue injuries of lesser magnitude and were not commensurate with the amount of general damages awarded which award was manifestly and inordinately excessive in the circumstance.**
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> **2. THAT the learned magistrate erred in law and in fact in awarding general damages of Kshs. 300,000/= in total disregard of the Appellants evidence, submissions and existing court awards in similar cases.**

3. THAT the learned magistrate misdirected himself by failing to consider the Appellants submissions, not considering the initial treatment notes from Shalom Medical Centre and Discharge sheet plus the P3 form, medical reports on record as to the gravity and severity of the injuries sustained by the Respondent that would have reduced the award significantly thereby arriving at erroneous decision of quantum.

3. THAT the learned trial magistrate erred in law and in principle by ignoring the evidence tendered at the trial of the suit in regard to the injuries of the Respondent more specifically that the Respondent did not suffer deep cut wound in the frontal head exposing the skull in unconsciousness, brain concussion bang to the right upper and lower jaw loosening the right lower incisor teeth, injury to the right shoulder with bruises etc., contrary to and or as opposed to what is pleaded and contained in the medical reports dated 31st July, 2018 and 2nd April, 2019 on record and tendered by both parties thereby arriving at an excessive award.

5. THAT the honorable trial magistrate misdirected himself by awarding a figure that is inordinately too high in the circumstance of the case and deviating from existing and established judicial principles on accident claims.

6. THAT the learned trial magistrate erred in law and in principle by failing to consider the injuries as per the medical reports and the pleadings on record thus arrived at an erroneous decision in regard to injuries suffered by the Respondent." (Sic)

4. The appeal was canvassed by way of written submissions. The Appellants relied on the decision of the Court of Appeal in **Peter v Sunday Post Limited (1958) EA 424,** the dicta in **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR** and **Kenfro Africa Limited T/a Meru Express Services Gathogo Kanini v A.M Lubia and Olive Lubia (1982-88) 1 KAR 727** concerning the principles to be observed by an appellate court in deciding whether it is justified to disturb an award of damages by the trial court. Counsel contended that whereas the trial magistrate had the advantage of seeing and hearing the witnesses' evidence, he ought to have been guided by settled principles of law and the evidence in assessing damages. It was further argued the trial court erred in its assessment of damages by relying only on the medical report by Respondent's doctor, while ignoring the medical report by **Dr. Joab Bodo** which was the latest medical assessment of the Respondent's injuries, and the initial treatment notes on record.

5. Counsel therefore argued that award on general damages was inordinately high, inconsistent with established principles governing assessment of damages, and ought to be disturbed. He urged that it be reviewed downwards to an award of Kshs. 80,000/- or such reasonable figure as the court may deem fit. Consequently, the court was urged to allow the appeal.

6. The Respondent naturally defended the trial court's finding on quantum of damages. Counsel based his submissions on the decision of **Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company** concerning the principles to be observed by an appellate court in deciding whether it is justified to disturb an award of damages. Referring to the injuries sustained by the Respondent and the decision in **Savanna Saw Mills Ltd v George Mwale Mudomo (2005) eKLR** counsel argued that the governing principle is that comparable injuries should attract comparable awards. Urging the court to maintain the award by the trial court, counsel cited several decisions, including **Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014]** to submit that the learned trial magistrate did not misdirect himself and that there was no basis for this court interfering with the award.

7. The court has considered the evidence and submissions at the trial and the submissions made by the respective parties on this appeal. 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; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123** and **Williams Diamonds Limited v Brown (1970) EA 1.** The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 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 alter on wrong principles in reaching the findings he did"**

8. The main contention on this appeal is the quantum of damages awarded by the lower court, viewed by the Appellants as inordinately high or unjustified. In considering the appeal, 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, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30.** 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."**

9. The same court stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** 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 so arrived at a figure which was either inordinately high or low".**

(See also **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) e KLR.)**

10. 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".**

11. In **Tayab v Kinany (1983) KLR 14,** the Court exhorted inter alia that:

> **"By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."**

12. Liability having already been agreed, the Respondent's evidence was that he sustained injuries particularized to be a deep cut wound on the left knee and as documented in the medical report by **Dr. G.K Mwaura (P. Exh. 1)** dated 31st July, 2018 and treatment notes from **Shallon Medical Center (P. Exh. 2)** and a P3 form - **(P. Exh. 7)**. The Appellant's medical report by **Dr. Joab Bodo (P. Exh. 9)** dated 2nd April, 2019 was prepared about nine (9) months after the accident. The report stated that the Respondent was treated for a cut wound over the left ankle. Dr Bodo stated that:

> "**All documents he had including the previous medical report for Dr. G.K Mwaura, Police Surgeon and Shallon Medical Centre where he was treated point to the cut wound being over the left knee joint. The scar over the left ankle which he indicated as the site of the injury is well healed with no permanent disability**".

13. In his judgment, the trial magistrate observed that:

> **"I have considered the injuries sustained by the plaintiff, as per the reports by the report by Dr. Mwaura G.K dated 31st July, 2018 the plaintiff sustained deep cut wound on the knee and pain and bleeding. I have perused the authorities cited by both the parties the court is of the view that considering the nature of the injuries and the fact that the plaintiff injuries were grievous harm. I am guided by the case of Gusii Deluxe Limited & 2 Others v Janet Atieno [2012] eKLR in which an award of Kshs. 500,000/- was upheld for deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right –upper and lower jaw loosening the right – lower incisor teeth, injury to the right shoulder with bruises over it, deep cut wound in the right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest and the case of Kiru Tea Factory & Another v Peterson Watheka Wanjohi [2008] eKLR where Kshs. 800,000/- was awarded for degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest but without ant fractures, indicating soft tissue injuries. I award the plaintiff Kshs. 300,000/= (three hundred thousand only) for general damages. I took into account the severity of injuries, lapse of time and inflationary tendencies, the Plaintiff pleaded and proved Kshs. 3,550/= as special damages the court awards**." (sic).

14. The Respondent had urged an award of general damages by the trial court based on three authorities. Namely, **Michael Njagi Karimi v Gideon Ndungu Nguribu [2013] eKLR** wherein the claimant sustained a b*ruise on the right parental region, 2 loose lower incisors, dislocation of right shoulder, cut on the left leg and bruise on the right leg, bruise on the dorsum of right hand*, **Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR** wherein the claimant sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left sub-axilliary area), and several limb fractures and **Loise Njoki Kariuki v Bendricon Wamboka Waswa & Another [2013] eKLR** wherein the claimant suffered multiple fractures of the right upper arm and forearm. The injuries are severe and barely compare with those suffered by the Respondent herein.

15. On the part of the Appellants, they relied on two authorities before the lower court, namely, **Sokoro Plywood Limited v Moses Mburu Mutua [2007] eKLR** and **Theresia Mukhayi Inji v Solo Plant (K) Limited [2016] eKLR**. In the former the plaintiff sustained a cut on the ring finger which healed with some scarring while in the former, the plaintiff suffered blunt injuries to the shoulders and trunk. In both instances, an award of Ksh.70,000/- was found adequate on appeal. In this case, the trial court cited extra authorities captured in the extract of the judgment above, in its assessment. The extract reveals that the injuries sustained by the claimants in those extra cases were also rather severe as compared to those by the Respondent herein.

16. The only injury suffered by the Respondent herein was cut wound, although the location thereof is none too clear- whether above the left knee or at the left ankle. According to the medical report by **Dr. Mwaura**, the Respondent's injuries healed well. The prognosis in the medical report by **Dr. Bodo** appears more recent and therefore more accurate. It puts to doubt the alleged presence of the residual scar on the left knee in the former medical report. The trial court appears to have paid no attention to the contents of the said medical report by **Dr. Joab Bodo** in the judgment, while accepting wholesale the Respondent's medical report. Whatever the case, the Respondent's injuries were minor and had resolved within 6 months, per **P. Exh.1**, and without any adverse consequences.

17. Reviewing all relevant evidence, and authorities before the Court, it is patent that the award on general damages by the trial court was so high as to be an erroneous estimate. The injuries of the Respondent in this case compare well to those of the plaintiff in **Sokoro Plywood Limited** (above). Considering inflationary factors since the decision, this Court is of the view that an award of **Kshs. 95,000/- (Ninety-Five Thousand)** is adequate as general damages. Consequently, the appeal is merited and is allowed. The award of general damages in the lower Court is hereby set aside and the Court substitutes therefor an award of **Kshs. 95,000/- (Ninety-Five Thousand)** subject to the agreed liability ratio. The costs of the appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST MARCH 2022.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Tindi h/b for Ms. Ochieng

For the Respondent: Ms. Kisiangani

C/A: Carol