REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 167 OF 2020

PESTONY LIMITED..1ST APPELLANT

CHARLES KARIUKI KATIVO...2ND APPELLANT

-VERSUS-

SAMUEL ITONYE KAGOKO...RESPONDENT

(Being an appeal from the judgment of Orenge , SRM delivered on 27th February, 2019

in Nairobi Milimani CMCC No. 657 of 2017.)

JUDGMENT

1. This appeal emanates from the judgment delivered on 27th February, 2019 in **Nairobi Milimani CMCC No. 657 of 2017**. The suit was commenced by a plaint filed on 6th February, 2017 by **Samuel Itonge Kagoko**, the plaintiff in the lower court (hereafter the Respondent) against **Pestony Limited** and **Charles Kariuki Kativo**, the defendants in the lower court (hereafter the 1st and 2nd Appellants, respectively). The Respondent brought the suit to recover damages in respect of injuries he allegedly sustained on 12th July, 2016, allegedly while lawfully riding on motor cycle registration number **KMCW 506V** (hereafter the suit motor cycle) as a pillion passenger along Kangundo Road. He averred that the 2nd Appellant managed, controlled and drove the motor vehicle registration number **KCG 767J** (hereafter the suit motor vehicle) so carelessly and/or negligently and at a such high speed that he lost control and caused the suit motor vehicle to ram into the suit motor cycle, as a result of which the Respondent sustained injuries. The Respondent pleaded vicarious liability as against the 1 st Appellant, the registered owner of the motor vehicle at whose instance the 2nd Appellant was driving the motor vehicle as agent, driver and or servant.

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. The suit proceeded to full hearing during which only the Respondent gave evidence in support of his case. In his judgment, the learned magistrate found in the Respondent's favour and held both the Appellants jointly and severally liable. The court thereafter proceeded to award damages in the total sum of Kshs. 1,805,578/-, made up as follows:

a. General damages: Shs. 1,400,000/-;

b. Special Damages: Shs. 225,578/-;

c. Future medical expenses: Shs. 180,000/-

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

> **"1. That the learned trial magistrate erred in law and fact and thereby awarding the manifestly excessive quantum of damages payable by the Appellants to the Respondent.**
>
> **2. The learned trial magistrate erred in law and in fact by basing his decision on irrelevant matters and failing to base his said decision on the facts and evidence on record and thereby making an award in general damages that is not supported by the law."** (sic)

4. The appeal was canvassed by way of written submissions. Concerning the applicable principles, the Appellants relied on the famous decision of the Court of Appeal in **Kemfro Africa Limited t/a Meru Services Gathogo Kanini v A.M Lubia & Olive Lubia (1982-1988) 1 KAR 727** and on High Court case of **David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR**. Counsel contended that the injuries suffered by the claimants in the authorities relied upon at the trial by the Respondent were far more serious and not comparable to the injuries sustained by the Respondent herein. Referring to the 2nd medical report on the Respondent, by **Dr. P.M Wambugu** dated 28th August, 2017, and admitted by consent during the trial, and decisions in **David Kimathi Kaburu** (supra) and **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** counsel argued that, given the nature of injuries sustained by the Respondent, the award on general damages was so high as to be an erroneous estimate and ought to be disturbed. He urged that it be reviewed downwards to an award of Kshs. 700,000/-.

5. Concerning special damages, it was submitted that these must not only be specifically pleaded but also specifically proved. Counsel pointed out that the Respondent had produced at the trial an invoice from Kenyatta National Hospital for Kshs. 197,078/- but no evidence of payment by way of receipts was proffered, and as such the Respondent is only entitled to a sum of Kshs. 28,550/- specifically proved by way of receipts. Concerning future medical expenses, it was submitted that the trial court failed to take into account the evidence on record in making a determination on future medical expenses.

6. Counsel asserted the medical report by **Dr. G. K Mwaura** dated 5th December, 2016 estimated that the cost of removal of the metal implant would be Kshs. 180,000/- without specifying the kind of hospital envisaged. Whereas **Dr. P.M Wambugu's** medical report dated 28th August, 2017 estimated the cost of removal at Kshs. 75,000/- at Kenyatta National Hospital where the Respondent was admitted after the accident. Thus, it was the Appellant's complaint that the award of the trial court under the said head was excessive and erroneous. In the circumstance, counsel urged the court to review the award downwards to Kshs. 100,000/-. The court was thus implored to allow the appeal.

7. The Respondent naturally defended the trial court's findings on quantum of damages. Counsel cited the dicta in **Butt v Khan (1981) KLR** and **Robert Msioki Kitavi v Coastal Bottlers Limited (1982-88) 1 KAR 891** concerning the principles to be observed by an appellate court in deciding whether it is justified to disturb an award of damages. Referring to **Dr. G.K Mwaura's** medical report dated 5th December, 2016, counsel asserted that the Appellants have not demonstrated that the trial court proceeded on wrong principles or misapprehended the evidence thereby arriving at an erroneous estimate on damages.

8. The Respondent's contention was that the Appellants had an opportunity to argue their case before the trial court but failed to file their submissions. He urged the court to uphold the award of Kshs. 1,400,000/- as general damages. Counsel reiterated the decisions in **Michael Njagi Karimi v Gideon Ndungu Nguribu [2013] eKLR, Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR** and **Loise Njoki Kariuki v Bendricon Wamboka Waswa & Another [2013] eKLR** which were cited by the Respondent before the trial court. Concerning the award on future medical expenses and special damages counsel submitted that these were not the subject of the appeal herein. The Respondent prayed that the appeal be dismissed with costs.

9. 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, Williams Diamonds Limited v Brown (1970) EA 1.** 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 alter on wrong principles in reaching the findings he did"**

10. The point of contention in this appeal is the quantum of damages awarded by the subordinate 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."**

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) e KLR.**

11. 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".**

12. The sentiments of the English Court in **Lim Poh Choo v Health Authority (1978)1 ALL ER 332** were echoed by **Potter JA** in **Tayab v Kinany (1983) KLR14,** quoting dicta by **Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326,** at page 345 as follows:

> **"But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with**

moderation. <u>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." </u>(Emphasis added**).**

13. There is no dispute that following the accident, the Respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh as pleaded in the Respondent's plaint. These injuries are documented in the Respondent's medical report prepared by **Dr. G.K Mwaura** and dated 5th December 2016 and confirmed by the Appellants' medical report by **Dr. P. M Wambugu** dated 28th August, 2017 tendered by consent of both parties during the hearing on 13th August, 2018.

14. At the trial, the Respondent adopted his witness statement and went on to testify that he was admitted at Kenyatta National Hospital for about 3 months. He produced treatment notes from the said hospital as they appear in his Respondents list of documents dated 25th January, 2017. These included the discharge summary from Kenyatta National Hospital (**P. Exh. 4)** and the medical report by **Dr. G.K Mwaura** dated 5th December, 2016 **(P. Exh. 5).** According to the latter, healing was incomplete as evidenced by continuing treatment and scars on the left thigh. Permanent incapacity was assessed at t 5% (left lower limb). It was estimated that removal of metal implant at fracture site would cost of Kshs. 180,000/-.

15. The medical report by **Dr. P. M Wambugu** dated 28th August, was prepared about one year since the accident. Apart from confirming the Respondent's injury to consist of fracture of the mid-shaft left femur and soft tissue injuries, his view was that the Respondent had made adequate recovery as the fracture had united. He estimated the cost of removal of metal implants at Kshs. 75,000/- at Kenyatta National Hospital. By way of prognosis, it was stated that the Respondent was predisposed to early onset of osteoarthritis and assessed permanent incapacity at 4%.

16. The Appellants did not file submissions before the judgment of the lower Court. The trial court therefore relied on the Respondent's submissions in arriving at the award on general damages. Although it is a truism that it is virtually impossible to find authorities whose exact injuries and sequela match this or any other case, the trial Court was bound to consider whether the injuries of the plaintiffs in the Respondent's authorities were generally comparable with those of the Respondent herein. In an ideal case, a party is excluded from presenting submissions and authorities on appeal, that were not canvassed in the trial. However, this court in exercise of its appellate jurisdiction is entitled to consider the entire evidence and submissions at the trial, as well as the Appellant's submissions on appeal, pursuant to the provisions of section 78 (1) (a) and 2 of the Civil Procedure Act, the latter which states:

> **"Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein".**

17. Equally, Order 42 Rule 32 of the Civil Procedure Rules provides that:

> **"The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."**

18. In **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** the Court of Appeal stated *inter alia* that:

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally…Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions…"**

19. In his judgment, the trial magistrate stated inter alia that:

> **……"On the issue of quantum, the plaintiff medical report by Dr. Mwaura G.K dated 5th December, 2016 indicated that the plaintiff sustained fracture of the left femur shaft and swollen tender thigh. The injuries were classified as grievous harm and was awarded 5% permanent incapacity. The plaintiff needs Kshs. 180,000/= for removal of the metal implants. I have relied on the case of In <u>*James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & Another [2015] eKLR*</u> the plaintiff suffered compound comminuted fracture of the right tibia Compound Comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological/ re-fracture of the right leg. Court awarded Kshs. 1,500,000/= and the case in <u>*Denshire Muteti Wambua vs Kenya Power and Lighting Co. Ltd [2013] eKLR*</u> the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of the left lunate bone and bruises parietal scalp. The Court of Appeal awarded Kshs. 1,500,000 general damages when in fact the fracture in the case were much more serious. Guided by these cases with comparable injuries to those suffered by the plaintiff in this case, I award the plaintiff Kshs. 1,400,000/= (one million four hundred thousand only) for general damages. Special damages pleaded and proved of Kshs. 225,578/= is awarded, the plaintiff is awarded further Kshs. 180,000/= as the cost of future medical expenses**." (sic).

20. The most severe injury suffered by the Respondent was a fracture of the left femur mid-shaft with **Dr. G.K Mwaura** assessing permanent degree of incapacity assessed at 5% (left lower limb) as of 2016. **Dr. P.M Wambugu** upon examining him in August 2017 confirmed the fracture of the mid-shaft left femur noted to have adequately recovered by union. However, he also noted that the Respondent

was predisposed to early onset osteoarthritis hence assessing 4% permanent incapacitation.

21. The Respondent's authorities in submissions before the lower court, and reiterated on this appeal, namely, **Michael Njagi Karimi v Gideon Ndungu Nguribu [2013] eKLR, Loise Njoki v Bendricon Waswa & Another (2013) eKLR** and **Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR** all involved severe injuries such as multiple fractures, in the first case, at least six, and extensive medical interventions and periods of morbidity. In the latter case, a significant portion of the affected limb was amputated and in **Mwaura Muiruri**, there was shortening of the affected limb**.** The trial Court correctly avoided relying on these authorities in assessing damages. However, the injuries of the plaintiffs described in the two decisions used by the Court to guide assessment, namely, **James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & Another [2015] eKLR** and **Denshire Muteti Wambua vs Kenya Power and Lighting Co. Ltd [2013] eKLR** were also severe.

22. In the former, the plaintiff "***suffered compound comminuted fracture of the right tibia Compound Comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological/ re-fracture of the right leg*"** per the trial court's judgment. While in the latter authority the plaintiff 's injuries were described in the lower court judgment to comprise "***multiple fractures involving the right femur, left femur, and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of the left lunate bone and bruises parietal scalp*.**"

23. The trial court, despite correctly observing that these injuries were more severe and the awards therein of Sh.1,500,000/- in damages, nevertheless proceeded to award Sh.1,400,000/- in the instant case. In this instance, the Respondent suffered a single fracture to the femur which healed well. And despite the long period of hospitalization and predisposition to arthritis, the award is patently excessive. It appears that the trial Court overlooked the differences in the severity of injuries involved in the three matters and sequela, and ultimately the principle restated in **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd (2013) eKLR,** that comparable injuries ought to attract comparable damages. In my opinion, therefore the Appellants' complaint in this regard are justified: the award of Kshs.1,400,00/- in this instance was so high as to represent an erroneous estimate. The next question is, what level of damages would be appropriate in this case?

24. The Appellants referred this Court to two authorities, namely **David Kimathi Kaburu v Dionisius Mburugu Itirai** and **Florence Njoki Mwangi v Peter Chege Mbitiru** (supra) to urge an award of Kshs. 700,000/-. In the former case, the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Kss. 630,0000/- in 2017. The plaintiff in the latter case had sustained fractures of the right and left mid-shaft femur, degloving wound on right tibia and amputation of right foot and multiple cuts. She was awarded Kshs. 700,000/- in 2017. The injuries in these authorities are slightly more severe than those of the present Respondent. Adjusting for inflation and considering the Respondent's pain and suffering in the extended period of morbidity, and the likely sequela relating to osteoarthritis, despite the healing of the fracture, this Court is satisfied that an award of Kshs. 800,000/- (Eight Hundred Thousand) would be adequate compensation.

25. Turning to future medical expenses, the Respondent's answer to the Appellants' complaints on this appeal was that the same are not specifically challenged on this appeal. In my view ground 1 of the appeal is wide enough to accommodate the challenge, and in any event, under Order 42 Rule 32 of the Civil Procedure Rules, this Court is entitled to examine the award. More so, as a perusal of the lower Court record shows that this claim was not pleaded as required, in the plaint filed on 6th February 2017. A motion dated 3rd November 2017 seeking to amend the plaint to include the claim was dismissed on 4th December 2017. The record of appeal contains a purported amended plaint. This was the draft amended plaint attached to the dismissed motion. The plaint not having been amended, the claim for future medical expenses could not be awarded, and the said award cannot stand.

26. Equally, the Court has examined the Respondent's evidence in support of special damages. Although the document proffered in evidence, **P.Exh. 7** was not a receipt as described in the List of Documents filed on 6th February 2016, but what is entitled as a *"final invoice"*, the Appellants could have, but did not challenge this evidence at all during the trial. *Ex facie*, the invoice appears to indicate that the Respondent who was admittedly treated at the issuing hospital for three months, had settled his hospital charges. The award is therefore sustained.

27. The appeal has therefore succeeded in part, and this Court hereby sets aside the judgment of the lower Court and substitutes therefor judgment for the Respondent against the Appellants jointly and severally, in the following terms:

a) General damages for pain and suffering- Kshs. 800,000/-

b) Special damages – Kshs. 225,578/-

Total - Kshs. 1,025,578/- (One million, twenty-five thousand, five hundred and seventy-eight shillings), with costs and interest from the date of the lower Court's judgment.

28. Each party will bear its own costs on this appeal. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF MARCH 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellants: N/A

For the Respondent: Ms Misiko h/b for Mr Nyongesa

C/A: Carol