**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 210 OF 2019**

**OMAR ATHUMANI MOHAMMED**

**T/A PAINT WORK AND GENERAL MAINTENANCE............APPELLANT**

**VERSUS**

**JUMWA KAINGU................................................................RESPONDENT**

**JUDGMENT**

1. By a judgment dated and delivered on the 27/9/2019, the lower court Hon. LESOATIA A SIITABANU (PM), entered judgment in favour of the respondent, adjudged liability at 100% and assessed damages in the aggregate sum of Kshs. 905,000/=. He also awarded interest on damages from the date of judgment and costs of the suit to the respondent.

2. That judgment aggrieved the appellant who has filed the current appeal by the memorandum of appeal dated 25/10/2019 which challenged the judgment on both limbs of liability and assessed Quantum of damages.

3. The only evidence led at trial was that of Respondent, as plaintiff then, and the doctor who examined him and prepared a medical report. There was no evidence lead on behalf of the defendant to support the defense filed and pleadings on very substantive issues including a plea of negligence on the part of the plaintiff. To that extent the defense filed was never supported by evidence and it then points that the evidence by the plaintiff was never controverted by any from the defendant.

4. The suit was one grounded upon the tort of negligence and breach of statutory duty of care. The brief facts were that on the 28/02/2018 the plaintiff/respondent was lawfully walking by the side of a building the defendant/appellant was renovating when part of the wall being demolished fell on him and occasioned to him bodily injuries. The particulars of the injuries were set out and at trial there were produced treatment chits as well as medical report by P.w 1 DR. Stephen K. Ndegwa.

5. The evidence of the respondent, as PW 2, regarding to the occurrence of the incident was never contested even upon cross examination and thus remained unshaken and uncontroverted. Even the extent of the injuries and their residue effects on the respondent was never shaken.

6. In his judgment the trial court took the view and held, at paragraph 3, page 108 of the record of appeal, that the appellant had a duty to erect warning signs and take necessary precautions to avoid injury to the public and that it was not the duty of the plaintiff to decipher her safety based on noises from the building. For that reason the court found no reason to apportion any blame upon the respondent and thus held the appellant wholly liable for the injuries.

7. On the damages sought, the court assessed general damages for pains and suffering at Kshs. 800,000, Kshs. 100,000 for future medical expenses and special damages in the sum of Kshs. 5,000/=. The claim for loss of earnings at Kshs. 7,000 per month was disallowed on account of paucity of evidence.

8. It is that finding the court is now invited to find to have been erroneous with a plea that the finding on liability be set aside and the court be pleased to re-assess the extent of liability and the quantum of damages awardable.

9. Being a first appeal the court proceeds by way of a retrial with full mandate to make own findings based on the evidence adduced but must be slow to freely overturn the findings of fact[1] and remembering that the duty to assess damages is in the realm of discretion and an appellate court can only intervene if the award meted out is too large or too small as to demonstrate a wholly erroneous estimate of damages[2].

10. On liability the appellant faults the trial court for having not taken into account the contradictory evidence given by the plaintiff. P.W 2 and the Doctor P.w 1 on the date of the injury and contended that on that basis the injury had not been proved to the requisite standards.

11. The burden of proof upon the respondent was within a balance of probability and no more. In the witness statement filed by the respondent, it was stated affirmatively, that the defendant/Appellant met his medical bills for some time before stopping and retaining some of the medical documents while demanding to be refunded the sums used in hospital. That evidence was never contradicted or upset by the appellant. In any event, in the entire record, there was never a challenge on the date of the accident. I do consider the date of the accident not to have been an issue for determination there having been no evidence tendered to controvert that by the respondent as plaintiff then.

12. In my assessment at the conclusion of production of evidence, there was sufficient evidence that the plaintiff had been injured on the 28/2/2018. That evidence to this court was sufficient for purposes of the burden upon the respondent. I find no reason to interfere with the findings of fact by the trial court. In the case of **Peters VsSunday post Ltd (1958) EA 424 it was held by the court of appeal** that –;

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."**

13. I come to the conclusion that the contradiction highlighted indeed exist but the said contradictions do not amount to the level that negates and overshadows the evidence led on the occurrence of the accident on the 28/2/2018. On those grounds, I find no merit on the first ground of the memorandum of appeal and the same fails.

14. The second ground which challenges apportionment of liability cannot fall far from the fate of the first. In it, the appellant asserts that the apportionment of liability at 100% was made without assigning any sufficient reason.From the record I do find this to be the basis of those findings on apportionment by the trial court-:

> ***"The testimony of the plaintiff that the defendant failed to put up warning signs or otherwise divert a possible passerby is not controverted. I dismiss the defense that the plaintiff should have been warned by sound or dust emanating from the building. The defendant had a duty to erect warning signs and take all necessary precaution to avoid injury to the public. The defense cannot be heard to say that it was the responsibility of the plaintiff to decipher her safety based on noise and dust emanating from the building.***
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> ***I have no reason to blame the accident on the plaintiff, I hold the defendant 100% liable for negligence and injuries sustained by the plaintiff sustained."***

15. I read the trial court to say that the evidence by the plaintiff on how the accident occurred revealed that there was construction work going on without the area being boarded out to protect the public from harm or injury and that such evidence was not controverted.

16. In deed that is another finding of fact by the trier of facts against which no valid reason has been advanced to justify any interference. I equally find no merit on the ground and the same is dismissed thus upholding the findings by then trial court.

**Challenge on the damages awarded**

17. It remains the law that the duty and task to assess damages is not only a discretionary is one issue on which valid reasons must be proffered to justify interference by the appellate court, but is equally a difficult task that once undertaken by the trial court ought not to be interfered with readily[3]

18. An appellate court can only interfere with the sum awarded where the appellant demonstrates that the award is too high or so low to amount to an outright error in assessment of damages, or that in coming to that assessment the court took into account an irrelevant matter or that it failed to take into account a relevant matter. These principles have been reiterated innumerable times and I can only cite the words of the Court of Appeal In **Ken Odondi& two others vs James OkothOmburah t/a OkothOmburah& Company Advocates** where it was held: -

> ***"We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled…*** This principle was adopted with approval by this Court in **Butt v Khan [1981] KLR 349** where it was held per Law, JA:
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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..."***

19. In this appeal, the limbs of the award challenged is the sum of Kshs. 800,000 being damages for pain and suffering. In making the challenge, the trial court is not accused of taking into account irrelevant issues or failing to take into account relevant issues. Rather, the position taken by the appellant is that when juxtaposed against a past award made in the case of **Akamba Public Road Services VSAbdikadirAdaganGalgalo (2016)** in which Ksh. 200,000 was awarded, it was on the higher side.

20. As said before, the test is not that the award must be that in the past cases. No. It is that it need to be comparable with the post awards so that comparable injuries attract comparable awards. But the answer to the appellant's complaint is actually found in the appellants own submissions and the citied case of **Elizabeth BosiruriVsDamarisMoraaNyamache (2017) eKLR**citing **Sofia Yusuf Kanyorevs Ali Badi**

**Sabre HCC No. 478/2017 (unreported)** in which it was underscored that reliance on past decisions is merely for guidance.

21. To that extent, the decision in Akamba Public Road Services (supra) was merely a guide and not the yardstick. In any event, the dates of the two awards must be appreciated so as to factor in the incidence of inflation and the attendant erosion of the value of money.

22. Based on the material availed to the trial court including cited decisions when looked at against the decision arrived at, I do find no valid reason to interfere with the sum awarded.

23. In sum, I find no merit in the entire appeal and I order it dismissed with costs.

**Dated, signed and delivered this 22nd day of January, 2021**

**P.J. OTIENO**

**JUDGE**

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[1]**Mwanasokoni v Kenya Bus Services Ltd [1985] KLR**

[2]***hild Welfare Society of Kenya Vs Republic, Exparte Child in Focus Kenya & AG & Others [2017]eKLR***

[3] **H West & Sons vs Shepherd [1964] AC 364 and Ugenya Bus Service vsGichui [1976 – 1985] EA 575**