REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CIVIL APPEAL NO. 52 OF 2018

FREDRICK MAGERIA GITHINJI.....APPELLANT

VERSUS

CHARLES MWANGI MURIITHI.....RESPONDENT

(Being an Appeal from the Judgement and Decree

of Honourable P. Mutua Senior Principal Magistrate

in Nyeri CMCC No. 95 of 2018, delivered on 28th August 2018)

JUDGEMENT

1. This appeal arises from Judgement of Nyeri Senior Resident Magistrate in CMCC No. 95 of 2018 in a claim seeking damages for injuries resulting from a road traffic accident which occurred on 3/12/2016 along Naromoru-Kiganjo road . Consent judgement in favour of the respondent on liability at the ration of 80:20 was entered. The court awarded general damages of

Kshs. 900,000/-, future medical expenses and special damages of Kshs.170,000/-.

2. Being aggrieved by the decision of the magistrate in regard to the quantum of damages, the appellant lodged the instant appeal citing 6 grounds of appeal in its Memorandum of Appeal which can be summarized thus:

a) That the learned magistrate misdirected himself in awarding excessive damages to the respondent and that the claim for future medical expenses was not proved.

3. The parties filed written submissions to support their arguments in this appeal.

Appellant's Submissions

4. The appellant submitted that according to the pleadings, the respondent sustained an open fracture on the left distal tibia/fibula and a bruise on his left elbow and that the award of Kshs.900,000/- was excessive and not in line with the injuries sustained. The appellant relies on the case of **Boniface Waiti & Another Vs. Michael Kariuki Kamau(2007) eKLR** which outlines the principles t be taken into consideration when assessing damages in a personal injury case. The appellant further submitted that the trial court relied on the factor of inflation to award an inordinately high figure in general damages which is contrary to the principle in law that an award of damages ought to compensate a victim for injuries sustained and not to enrich him/her.

5. The appellant while making reference to the case of **Catholic Diocese of Kisume Vs. Tete[2004] eKLR, Sumaria & Another Vs. Allied Industrial Limited [2007] 2 KLR and Selle & Another Vs. Associated Motor Boat Co. Limited & Others [1968] EA, 123** submitted that an appellate court ought not to interfere with the quantum of damages awarded by the trial court unless it is satisfied that the trial court applied wrong principles. In this regard, the trial court erred by not giving an award similar to other comparable awards of the same injuries.

6. According to the appellant, the trial court did not take account of his submissions citing the cases relied on as old and outdated. The appellant further argued that he had proved his case on a balance of probabilities. The appellant further submitted that the trial court relied on oral evidence to award future medical expenses contrary to the law, which provides that medical expenses as special damages ought to be specifically pleaded and strictly proved.

Respondent's submissions

7. The respondent began by making reference to the case of **Kapsiran Clan vs. Kasagur Clan [2018] eKLR** which sets out the principles to guide the court sitting on the first appeal. The respondent further confirmed the injuries sustained by himself and added that he was still using clutches and could not do any work due to the injuries sustained. He further added that he still attends hospital and that the award of Kshs.900,00/- as general damages and Kshs.100.00/- as future medical expenses was correct and reasonable. The Respondent relied on the case **of Easy coach Limited Vs. Emily Nyangasi[2017]eKLR** whereas the court declined to set aside and award of Kshs.700,000/- for soft tissue injuries.

8. The respondent further submitted that inflation is a factor to be taken into consideration when a court is awarding damages adding that the authorities cited by the appellant were delivered 10 years before the case was determined. As such, the court was correct in stating the cases were outdated and irrelevant.

9. The respondent further submitted that it was enough evidence for the doctor in his opinion as an expert to make a finding that the future medical expense would amount to Kshs.150,000/- . Additionally, that future medical expenses is determined by proof on a balance of probability which the respondent discharged. The respondent relied on the cases of **Techard Steam & Power Limited Vs. Mutio Muli & Mutua Ngao [2019]eKLR and Palace Investments Limited Vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR.**

Issues for determination

10. The issues for determination are as follows:-

a) Whether the learned magistrate awarded excessive damages in view of the injuries sustained.

b) Whether the claim for future medical expenses was proved

c) Who between the parties meets the cost of the suit.

The law

11. Being a first appeal this court relies on a number of principles as set out in the case of **Selle and Another Vs. Associated Motor Boat Company Ltd. & Others [1968] 1EA 123:**

> **"…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."**

12. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

13. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

> **"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."**

14. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the learned magistrate awarded excessive damages in view of the injuries sustained.

15. In this Appeal, only contention is on the quantum of damages.

16. It is trite law is money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general methods of approach. 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 it still must be that amounts, which are awarded, are at a considerable extent be conventional.

17. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages**

awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

18. It was therefore held by the same court in **Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:-

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect….A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

19. In the case of **Joseph Musee Mua vs Julius Mbogo Mugi & 3 Others [2013] eKLR** where the Plaintiff sustained a fracture of the tibia fibular, cuts on the forehead, a broken tooth and pain in his right shoulder and chest. The court awarded Kshs. 1,300,000/- being general damages.

20. The appellant in his submissions proposed a figure of Kshs. 200,000/- for general damages making reference to the case of **Jane Wambui Kamau & 4 Others vs Douglas Njue Kuria [1999] eKLR** in which the 4th Plaintiff sustained a cut wound on the left hand, a fracture of the left tibia and a fracture of the right tibia malleolus. The court awarded Kshs. 300,000/- as general damages. The 5th plaintiff in that case sustained a fracture of the lower end of the right tibia and injuries to both forearms. The court awarded Kshs. 200,000/- as general damages.

21. In the case of **Valley Bakery Ltd & Another vs Mathew Musyoki [2005] eKLR** was cited the plaintiff sustained a fracture of the left tibia (leg bone) in the middle one third , a fracture of the fibula bone in the left side upper one third area and soft tissue injuries on the shoulders, arms chest, forehead and back. The court awarded Kshs. 300,000/- as general damages. In that of **Mary Adhiambo Ramogi vs Julius Birundu Mokaya [2014] eKLR** where the plaintiff suffered a compression fracture of the 7th thoracic vertebra. The court awarded Kshs. 200,000/- as general damages.

22. In **Channan Agricultural Contractors Ltd vs Fred Barasa Mutayi [2013] eKLR** where the plaintiff sustained blunt injury to the chest, cut wounds to the head and left leg. Dr Andaye summarised the injuries as moderate soft tissue injuries that were expected to heal in a period of 8 months.

In this case, the respondent sustained an open fracture on the left distal tibia/fibula and a 4cm bruise on his left elbow. Dr. Kagema examined the respondent on 20/01/2017 which was about one and ahalf months after the accident and found that he was progressing well save that he had some pain. This was still early in the recovery period and no permanent disability was noted. The fracture was managed in hospital where the respondent was admitted for less than three(3) weeks.

The authorities relied on by the respondent had more serious injuries but it was in order for the learned magistrate to take into consideration the inflation factor. On the other hand the authorities of the appellant were indeed older ones, that if relied on would have resulted in an inadequate award. The proposal of Kshs.200,000/= for general damages by the respondent was definitely on the lower side.

Having looked at Comparative decisions and considered inflation factors, I reach a conclusion that the award of Kshs.900,000/- was excessive and that this court ought to interfere with it

Whether the claim for future medical expenses was proved?

23. As regards the award for future medical expenses, authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. Ringera J (as he then was) in **Jackson Wanyoike vs Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC No. 297 of 2002** held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of appeal in **Sheikh Omar Dahman t/a Malindi Bus vs Dennis Jones Kisomo Civil Appeal No. 154 of 1993** held that cost of future medical operation is special damages, which must be pleaded.

24. Similarly in the **Court of Appeal case of Tracom Limited and Another vs Hassan Mohammed Adan [2009] eKLR** in the following words:-

"We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Limited vs Gituma (2004) 1 EA 91, this court stated:-

"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded.

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future

medical expenses will be necessary, the plaintiff may not need to specifically state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya, currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

25. Looking to the pleadings herein, it is not in dispute that the Respondent specifically pleaded for the claim of future medical expenses and quoted a sum of Kshs.150,000/-. Having stated that the claim for future medical expenses was specifically pleaded to be Kshs. 150,000/- the next question is whether it was proved.

26. The medical report by Dr. Kagema provides that the respondent will need surgery to remove the intramedullary nail upon the healing of the fracture which will cost him on average, Kshs. 100,000-150,000/. The respondent produced the medical report in evidence calling the maker, which the appellant had no objection to. Thus the appellant forfeited his chance to cross-examine the doctor on the aspect of the future medical expense. In addition, since the medical report was produced with no objection from the appellant, the contents of the medical report remain uncontroverted. The trial court awarded the sum of Kshs.100,000/- which the appellant had proposed as appropriate in his submissions. Consequently, I am of the opinion that the claim for future medical expenses was not only pleaded but supported by medical evidence and was therefore proved accordingly. Furthermore, that since the cost of future medical expenses as awarded fell within the range suggested by the doctor, this court ought not to interfere with it. It was in my view proved and is reasonable given the nature of the operation as described by Dr. Kagema.

Conclusion

27. In view of the foregoing, I find that the sum of Kshs. 600,000/- for general damages for pain and suffering. The award of Kshs. 900,000/- is hereby set aside and substituted with Kshs.600,000/-.

Consequently, the award in favour of the respondent is as follows:-

a) General damages	Kshs 600,000/-
b) Future Medical expenses	Kshs. 100,000/-
c) **TOTAL**	Kshs. 700,000/-
Less 20% contribution	Kshs. 140,000/-
	560,000/-

The appeal is hereby allowed in part. As such each party will meet their own costs for this appeal.

It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 18TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 18th day of March 2021.