REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 47 OF 2019

DAVID OGOL ALWAR.....APPELLANT

VERSUS

MARY ATIENO ADWERA.....1ST RESPONDENT

DAVID M. KITUI.....2ND RESPONDENT

(Appeal from the Judgment and decree of Hon James Ong'ondo, Principal Magistrate

at Siaya in Siaya PM's Court Civil Suit No 1 of 2015 delivered on 26th September, 2019)

JUDGMENT

Introduction

1. The appeal herein is against the judgement, decree and order of the learned Principal Magistrate Hon. James Ong'ondo delivered on 26/9/2019 at Siaya in Siaya Principal Magistrate's Court Civil Suit No. 1 of 2015.

2. The appellant herein **DAVID OGOL ALWAR** filed suit against the respondents and another, seeking orders for general damages, special damages and costs as a result of a road traffic accident involving his motor cycle registration No. KMDD 3361 and a motor vehicle registration number KBG 466L. It was the appellant's case that the 1st respondent employed an incompetent driver, the 2nd respondent, who managed the motor vehicle registration number KBG 466L in a manner that caused the accident that occasioned the appellant severe bodily injuries.

3. The 2nd respondent who was the driver of the accident motor vehicle in his defence contended that the appellant was the one who caused the material accident as he rode his motorcycle at a very high speed and knocked the respondents' motor vehicle from behind thus occasioning the accident.

4. The trial court found in favour of the respondents holding that the appellant was negligent and grossly reckless for failing to slow down as he rode his motorcycle and as such was responsible for causing the accident. The trial magistrate further held that the appellant failed to prove his case on a balance of probabilities and dismissed the suit with costs to the respondents.

5. Being dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 25th October 2019 setting out following grounds of appeal:

a) That the learned magistrate misdirected himself in finding that there was no evidence to establish the 2nd and 3rd defendant's contribution to liability hence wholly blaming the appellant for causing the accident.

b) That the learned trial magistrate erred in law and in fact in failing to rely on rules and the Highway code before finding the plaintiff/appellant wholly liable for the occurrence of the accident.

c) That the learned magistrate erred in law and in fact in failing to consider the police and the plaintiff's evidence before holding the appellant as being fully liable for the accident.

d) That the learned trial magistrate failed to find that the defendant/respondent had not proved their case on a balance of probability as required in civil matters.

e) That the learned magistrate misdirected himself on the assessment of quantum on general damages which he would have awarded in the event that the plaintiff would have succeeded in the subordinate court's case.

6. The parties agreed to canvass the appeal by way of written submissions.

Appellant's Submissions

7. It was submitted on the role of this first appellate court with several authorities being cited. Secondly, it was submitted at length that it was strange that the trial court dismissed the suit against the 1st defendant in the lower court, Al Husnain Motors Ltd whereas there were no records produced by the 1st respondent showing that the suit vehicle was transferred from Al Husnain Motors Ltd to the 1st respondent herein and this amounted to an error on the part of the trial court.

8. The appellant further submitted that his evidence and that of the police confirmed that the 2nd respondent was charged for the offence of careless driving, facts which were never considered by the trial court leading to its arriving at a wrong decision.

9. On quantum, the appellant submitted that the learned magistrate's opinion that an award of Kshs. 350,000 would have been adequate was on the lower side considering the account of injuries sustained by the appellant. The appellant opined that an award of Kshs. 2,000,000 as proposed in the lower court would have been adequate compensation.

The Respondents' Submissions

10. The respondents submitted that the trial magistrate was right in finding that the appellant had failed to prove his allegations of negligence on their part on a balance of probabilities. The respondents relied on the case of **Eastern Produce (K) Limited v Christopher Atiado Osiro (2006) eKLR** where it was held that there was *"no liability without fault in the legal system of Kenya thus it was incumbent upon the plaintiff to prove some negligence against the defendant if she was to be awarded any damages by the Court."*

11. The respondents further submitted that in the absence of proof on the appellant's part, the court ought to determine that liability cannot be apportioned without fault and as such the appellant's claim ought to have been dismissed. Reliance was placed on the case of **Muthuku v Kenya Cargo Services Limited (1991) eKLR 464.**

12. The respondents submitted that the learned magistrate misdirected himself in assessing damages of Kshs. 350,000 that he would have awarded the appellant had he proved his case. It was their case that the appellant failed to tender evidence in support of his claims for fractures and internal injuries sustained as pleaded in the plaint and as such an award of Kshs. 200,000 would have sufficed. They relied on the cases of **HCCS No. 2 of 2015; Rose Makombo Masanju v Night Flora & Another** and the case of **HCCA No. 21 of 2015 Akamba Public Road Services v Abdikadir Adan Galgalo.**

Analysis & Determination

13. I have considered the grounds of appeal, the submissions and the evidence adduced before the trial magistrate. This is a 1st appeal and as such the role of the court is to re-evaluate, re-assess and re-analyze the evidence which was tendered before the trial court and arrive at its own independent conclusions. This has been stated in various authorities and in **Abok James Odera Trading as Odera & Associates v John Patrick Muchira & Company Advocates (2013) e KLR,** the Court of Appeal re-stated the duty of the first appellate court which is that Court has to re-evaluate the evidence and come up with its own finding and also determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way.

14. Revisiting the evidence before the trial court, the appellant testified as PW1 and stated that on 4/8/2014 he was from Busia heading to Luanda riding his motor cycle when a saloon car which was ahead of him slowed down and parked on the left side of the road. He testified that as he approached the vehicle, at the stage, the vehicle started moving back on to the road and ended up knocking him. The appellant testified that the driver of the motor vehicle failed to indicate that he was moving back to the road. The appellant stated that he was injured and with the help of other boda boda riders, he was assisted to hospital where he was admitted on 7/5/2015 and discharged on 18/5/2015.

15. The appellant produced as exhibits several documents being:

a) Referral letter from Inuka to Siaya Referral Hospital

b) Discharge summary from Siaya Referral Hospital

c) Receipt from Bama Hospital

d) Police Abstract

e) P3 Form

f) Discharge summary from Nakuru

g) Copy of records

h) Medical report by Dr. Onyimbo.

16. In cross-examination, the appellant stated that the suit motor vehicle had parked on the left side of the road and that there was another motor vehicle ahead of the suit vehicle. It was his testimony that upon the accident occurring, he lost consciousness and gained it later prior to being taken to hospital.

17. PW2 Milka Otuma, a clinical officer at Inuka Hospital testified that she received the appellant at 4.30pm and treated him before referring him to Siaya County Referral Hospital. It was her testimony that the appellant had sustained a fracture of mid shaft femur of left inner limb. In cross-examination she stated that she was not physically present when the appellant was brought in and further that the appellant was attended to by one Francis Aduol. In re-examination she stated that her facility only conducted first aid on the appellant before referring him to the County Referral Hospital.

18. PW3 Silas Oluoch examined the appellant 7 weeks after the accident occurred and recorded his findings in the P3 form. It was his testimony that as at the time of his examination, the appellant was still in pain and was on crutches and further that on his upper limbs, he had a healed scar that arose out of bruises on the left hand whereas on the inner limbs, the appellant had a deformed, shortened left leg at the thigh and could thus not use the affected limb. He stated that an x-ray on the said leg confirmed that the appellant had sustained a fracture proximal 3rd of the left femur. PW3 reiterated his testimony in chief during cross-examination and in re-examination he stated that the scars on the appellant were still visible 7 weeks after the accident when he examined him.

19. PW4 Dr. Kisaki Mwambu testified and produced the receipt for Kshs. 216,180 for the treatment received by the appellant at Bama Hospital.

20. PW5 P.C. David Warutumo from Ugunja police station testified and produced the police abstract. It was his testimony that the driver of the suit motor vehicle was to blame for the accident. PW5 further stated that the motor cycle avoided hitting a vehicle by swerving to the side of the driver of the suit vehicle and hit it on the right door. In cross-examination, PW5 testified that he did not investigate the accident and neither did he have the police file. PW5 was also unable to confirm if the 2nd respondent was charged.

21. In their defence, the 2nd respondent testified as DW2 stating that the suit vehicle belonged to his wife, the 1st respondent. It was his testimony that he did not knock the appellant's motor cycle but that it was the appellant who collided with his vehicle. It was his testimony that he was driving at a speed of 40km/hr and as he stopped to turn from the main road to a feeder road, the appellant knocked him from the rear.

22. DW1 further testified that the appellant was riding at a very high speed and as such failed to see that DW1 had indicated that he was turning to the right and thus failed to slow down thus causing the accident. DW1 blamed the appellant for the accident. In cross-examination, DW1 stated that it was the appellant who knocked him from the rear.

DETERMINATION

23. I have considered the evidence as adduced in the lower court, the grounds of appeal and the submissions for and against the appeal and in my humble view, the main issues for determination are:

(a) Whether the trial magistrate erred in law and fact by discharging the 1st Defendant Al Husnain Motors Limited from the proceedings;

(b) whether the appellant proved that the respondents were 100% liable for the accident or whether the trial court should have apportioned liability between the appellant and the respondents;

(c) Whether general damages that the trial court would have awarded the appellant had he proved liability was inordinately low;

(d) What orders should this court make

24. It is noteworthy that the burden of proof always lie with he who alleges and therefore in this case, the burden of proof lay with the appellant/plaintiff to proof any of the acts of negligence attributed to the respondents/defendants. One can only prove that another is liable by adducing evidence to that effect or unless the defendant admits liability or the pleaded acts of negligence. The fact of an accident having occurred is not in itself proof of liability. In Civil cases, proof is that of on a balance of probabilities or preponderance. S **ection 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides:

"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

25. There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence (See ***Isca Adhiambo Okayo v Kenya Women's Finance Trust*** **KSM CA Civil Appeal No. 19 of 2015 [2016]eKLR** and ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi*** **NYR CA Civil Appeal No. 342 of 2010[2013]eKLR**).

26. The standard of proof in civil cases as this case is on the balance of *probabilities*. This means that the Court will assess all the evidence adduced by each party and decide which case is more probable. In ***Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another*** **NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR**, the Court of Appeal adopted the dictum of Denning J., in ***Miller v Minister of Pensions*** **[1947] 2 All ER 372** discussing that burden of proof as follows, as cited by Majanja J in **JRS Group Limited v Kennedy Odhiambo**

Andwak [2016] eKLR:

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.***
>
> ***Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

27. The learned Judge in the above case added that when a court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

28. In **Kiema Mutuku v Kenya Hauliers Service Limited** cited with approval in **Dharmagma Patel & Another v T.A (minor) suing through his mother and next friend HH 9 (2014) eKLR,** it was held that there is no liability without fault and there must be prove of negligence where the claim is based on negligence. The court stated;

> ***"There is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence:"***

29. On the first issue, the the appellant's Counsel asserted and submitted that the trial court wrongly discharged the 1st defendant, Al Husnain Motors Ltd, in the trial court without any evidence that it had transferred the accident motor vehicle to the 1st respondent herein. The evidence of DW1 Alfred Kaiya and vide the sale agreement dated 14/6/2009 and produced in court as an exhibit, the suit motor vehicle had been sold by Al Husnain Motors Ltd to the 1st respondent herein. Further, the 2nd respondent herein in his testimony stated that indeed the car belonged to his wife, the 1st respondent.

30. Proof of ownership of a motor vehicle is not just by way of a registration of such ownership in the logbook. Other forms of ownership of motor vehicles are recognized in law. Section 8 of the Traffic Act (Chapter 405 of the Laws of Kenya) provides that ***the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.*** That section which is couched in terms of a rebuttable presumption does not restrict a party from proving ownership of the motor vehicle by means other than by the copy of records or log book. The provision leaves room for proof of ownership by other evidence as was stated by Emukule J.in **Charles Nyambuto Mageto v Peter Njuguna Njathi NKU HCCA No. 4 of 2009 [2013]** eKLR thus:

> ***"From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuranira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership."***

31. Faced with a similar situation, Warsame J., (as he then was) in **Jotham Mugalo v Telkom (K) Ltd Kisumu HCCC No. 166 of 2001[2005]eKLR** held:

> ***"Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act.***

32. Similarly, Okwengu J., (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru Nyeri HCCA No. 34 of 2002[2005]eKLR** expressed the view that:

> ***"It is true that a certificate of search from registrar of motor vehicles would have shown who was registered owner of the motor vehicle according to the records held by the registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended.".***

33. As stated in the case of **Charles Nyambuto Mageto & Another v Peter Njuguna Njathi [2013] eKLR**

> ***"The courts recognize that there are various forms of ownership ..... actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence...."***

34. The evidence by the respondents that the 1st respondent was the owner of the motor vehicle as demonstrated by the sale agreement proved on a balance of probabilities that she was the owner of the motor vehicle.

35. Accordingly, it is my humble view that the trial court properly discharged Al Husnain Motors Ltd from any liability as they had already sold the suit vehicle to the 1st respondent.

36. Having determined the question of proof of ownership of the accident motor vehicle, the other question for determination is whether the appellant proved on a balance of probabilities that the Respondents were negligent 100% and therefore liable for the accident involving him riding a motor cycle and the Respondents' motor vehicle or whether there should have been apportionment of liability between the appellant and the respondents herein and in what prportions.

37. The evidence adduced in the trial court placed the appellant riding his motor cycle behind the motor vehicle being driven by the 2nd respondent driver and in addition, it is also clear that both the appellant and the 2nd respondent were heading the same general direction of Kisumu, the appellant riding from Busia heading to Luanda whereas the 2nd respondent similarly driving from the Busia direction heading towards Kisumu.

38. The testimony of the 2nd respondent was that he had reached a spot where he was to turn to the right and thus stopped while indicating his intention to turn to the right. This evidence was corroborated by the appellant himself who testified that the saloon car ahead of him (the 2nd respondent's vehicle) slowed down and parked on the side then entered the road.

39. Iam alive to the fact that the trial court had the advantage of seeing and hearing the witnesses which opportunity is not open to this court as a first appellate court.

40. It must however be borne in mind that it is the duty of every motorist to drive carefully having regard to the condition of the road and other road users. The trial magistrate was clear that the appellant herein having seen the respondent's vehicle ahead of him slow down, it was incumbent upon the appellant to similarly slow down. I agree. There was evidence from the appellant himself that he saw the 2nd respondent slow down and that another vehicle was ahead of him. That being the case, the appellant was under a duty to equally slow down, for his own safety, and only to proceed on after ensuring that it was safe to do so.

41. In my view, the impact of the appellant hitting the Respondents' vehicle from behind leading to such serious injuries as sustained by him are indicative, in my view, of the speed the appellant was riding and the lack of concern he had for his own safety and that of other road users specifically the 2nd respondent herein.

42. It is not lost on this court that the 2nd respondent testified that he was turning to the right and indicated so, which indication must have been ignored by the appellant or not seen at all on account of the speed that he was riding at hence the ramming into the motor vehicle from the rear by the appellant.

43. In my humble view, a motorist or rider who is driving or riding behind other motorists/riders is tasked with much more duty of care to ensure that he does not collide with cars that are ahead of him as he has a full view of that which is ahead of him. Such care involves the keeping of adequate distance from the car ahead and driving at reasonable speed so as to avoid ramming into the vehicles ahead.

44. Although the Police officer who produced the Police Abstract testified that the 2nd respondent was charged with careless driving, there was no such evidence that the driver of the motor vehicle was charged with any offence.

45. Nonetheless, failure to charge the 2nd respondent with a traffic offence in itself could not absolve him from being negligent in a civil suit. This is because the standard of proof required in traffic offences is that beyond reasonable doubt unlike in civil cases which is on a balance of probabilities. However, that statement by the police officer who was not even a traffic police officer or an eye witness or an investigating officer who did not produce any sketch plans or inspection reports on the respondents' motor vehicle or motorcycle to demonstrate the extent of the damage or to disapprove what the 2nd respondent stated in evidence that the appellant hit his vehicle at the rear tyre and that there were no other notable damages to show that the motorist hit the appellant, weighed against the evidence of the motorcycle rider, I find that the motor cycle rider was wholly to blame for the accident. This is so because the appellant rammed into the rear tyre of the respondents' vehicle which was ahead of him and which had slowed down and given indication that it was turning into the right side of the road.

46. The witness police officer who testified for the appellant could not even tell which traffic case number and in cross examination, he stated that he could not tell the court where the 2nd respondent was charged and neither could he confirm if the driver of the said vehicle was charged. The police abstract shows that results of investigations are unknown. The OB report entry at 2100hrs also states clearly that the 2nd respondent on reaching the scene of accident turned right facing Kisumu direction into a junction and as the vehicle turned, the motor cycle rider avoided knocking the vehicle which had already turned and hit the right door.

47. Nothing prevented the appellant from giving evidence on whether he had even been bonded to attend court and testify against the driver of the motor vehicle as the civil case was proceeding to hearing over one year after the material accident.

48. This court is inclined to believe the evidence that the 2nd respondent was turning to the right so he slowed down as stated by the appellant, and therefore the appellant too had a duty to slow down and ensure that it was safe for him to proceed on. Furthermore, the police abstract states that witnesses are as per the police records which police records were never produced. Such evidence by witnesses to the accident and especially the investigating officer, in my humble view, was key to determining who was to blame and to what extent, for the accident in question. This court is aware that in traffic accidents, the police issue the drivers with Notice of intended prosecution as stipulated in section 50 of the Traffic Act which provides:

> ***"Warning to be given before prosecution***

Where a person is prosecuted for an offence under any of the sections of this Act, other than section 46, relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving or to careless driving, he shall not be convicted unless—

(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under someone or other of the sections aforesaid would be considered; or

(b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(c) within fourteen days a notice of the intended prosecution, specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was served on or sent by registered post to him or to the person registered as the owner of the vehicle at the time of the commission of the offence:

Provided that—

(i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—

(ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.

49. Givng a warning or Notice of intended prosecution in itself is not evidence of any [prosecution. Moreover, there was no evidence that the 2nd respondent was given such Notice of intended prosecution and my conclusion is because there was no such intention to prosecute him for a causing an accident as the facts were clear that it was the motor cyclist who was entirely to blame for the accident. The fact that the 2 nd respondent was to be found on the road and another road user collided with him in itself is not evidence of negligence on his part.

50. In the instant case, I find that the appellant failed to discharge the burden of proof on the allegations of negligence against the respondents. On the other hand, I find that the respondents discharged the burden of disproving the allegations of contributory negligence against them. The appellant failed to prove his case on a balance of probabilities and as such, he was liable for the accident that led to the injuries that he sustained.

51. On the third issue, the appellant claimed and submitted that the trial magistrate misdirected himself on the assessment of quantum on general damages which he would have awarded in the event that the plaintiff would have succeeded in the subordinate court's case. The trial magistrate opined that he would have awarded Kshs. 350,000 in general damages had the plaintiff proved his case. The appellant submitted that an award of Kshs. 2,000,000 would have been sufficient whereas the respondents responded by proposing an award of Kshs200,000 general damages had the appellant proved negligence.

52. This court is guided by the well-worn principle articulated by the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987)] KLR 30** that:

"[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

53. Earlier on in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** it was held 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…"

54. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47,** the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

55. In **Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR** the court said that –

"On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at

wrong decision. (See Butler vs Butler (1984) KLR 225."

56. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike this is what the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** that:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

57. From the evidence adduced by the appellant in the trial court, the appellant suffered ***a fracture of mid shaft femur of left inner limb***. The appellant testified that as part of his treatment, a metal was inserted in his leg. PW3 who examined the appellant after 7 weeks testified that as at the time of his examination, the appellant was still in pain and was on crutches and further that on his upper limbs he had a healed scar that arose out of bruises on the left hand whereas on the inner limbs, the appellant had a deformed, shortened left leg at the thigh and could thus not use the affected limb. It was PW3's testimony that the appellant's treatment notes indicated that the appellant had been admitted for 8 days from 4/8/14 to 12/8/14.

58. The assessment of damages in personal injury case by court is guided by the following principles:

> ***"1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***
>
> ***2) The award should be commensurable with the injuries sustained.***
>
> ***3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***
>
> ***4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.***
>
> ***5) The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR."***

59. In **T. Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR**, the respondent was admitted to the Hospital on 29th December 2015 and was discharged on 9th February 2016 after 43 days. She had a degloving injury on the posterior of the left thigh and an open knee and femur fracture. The wound was washed and skin was grafted while the fracture was treated with external fixations. The injuries were grievous and the respondent nearly lost her limb. The respondent sustained a single compound fracture for which disability had been assessed at 40% as a result of malunion and serious soft tissue injuries. The High Court on appeal (Majanja J) reduced the award to Kshs. 700,000/- as general damages from the initial award of Kshs.2, 000,000.

60. In **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR**, the Plaintiff therein sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxilliary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula. The court awarded a sum of Kshs 1,750,000/= general damages for pain and suffering and loss of amenities in 2014.

61. In **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR**, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the 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 fracturing of the right leg. In that case that was decided in 2015, Ougo J. assessed damages at Kshs 1,500,000/= for pain and suffering and loss of amenities.

62. In **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR**, the Plaintiff therein sustained extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fracture collar bone. The treatment included internal fixation of the fracture with a metallic plate and subsequent amputation of the left leg. In 2014, HPG Waweru assessed general damages for pain, suffering and loss of amenities at Kshs 2,000,000/=.

63. Having had regard to the aforesaid cases and the inflationary trends as well as the fact that PW3 who subsequently examined the appellant stated that the appellant had a deformed, shortened left leg at the thigh and could thus not use the affected limb, I find that a sum of award of Kshs 800,000/= general would have been reasonable and adequate had the appellant proved negligence on the part of the respondents.

64. To that extent only, had the appellant proved negligence against the respondents. He would have deserved an award of Kshs 800,000 general damages for pain, suffering and loss of amenities and proven special damages, together with costs and interest at court rates. However, as this court has found that liability against the respondents was not established, the appellant gets nothing.

65. The appeal against the trial courts finding on liability is dismissed. I uphold the judgment on liability as determined by the trial court. The appeal against general damages is allowed to the extent stated above.

66. Each party to bear their own costs of this appeal.

67. Orders accordingly.

Dated, Signed and Delivered at Siaya this 19th Day of April, 2021 virtually

R.E.ABURILI

JUDGE

In the presence of:

Mr. Ondego advocate for the appellant

Mr. Odero Advocate for the respondents

CA: Modestar and Mboya