REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 173 OF 2016

HENRY MUSAU MULI.....APPELLANT

VERSUS

JULIUS KAMAU GAKINYA.....1ST RESPONDENT

PIUS AWEYO.....2ND RESPONDENT

(Being an appeal arising from the Judgment in Milimani Chief Magistrate'

civil suit No. 7742 of 2014 – M. Chesang (Mrs) R.M. dated 6th May, 2015)

JUDGMENT

1. **Henry Musai Muli** *(the appellant)* sued Julius Kamau Gakuiya and Pius Aweyo *(the 1st and 2nd respondents)* by filing a plaint in the Milimani Chief Magistrate's court civil suit No. 7742 of 2014. He sought the following prayers as a result of an accident which occurred on 11th July 2014 involving him and the motor vehicle registration No. KBP 691Q;

> *(i) General damages for pain and suffering.*
>
> *(ii) Special damages at Kshs 53,535/=.*
>
> *(iii) Interest at court rates.*
>
> *(iv) Any other or such further relief as this honourable court may deem fit to grant.*

2. The respondents filed a defence denying the claim. On a without prejudice basis they pleaded that if any accident occurred it was substantially contributed to by the negligence of the appellant.

3. The appellant testified and produced various documents (PEXB 1-11). Both counsel then filed submissions and later a judgment was delivered by the learned trial magistrate. In the judgment the appellant was awarded Kshs 500,000/= as general damages *(after apportionment of liability)* with special damages awarded as pleaded and proved. Also awarded was interest at court rates plus costs.

4. The appellant being aggrieved by the judgment filed this appeal through the firm of Kimathi Wanjohi Muli & Co. advocates. The grounds raised are as follows:

> *1. That the learned trial magistrate erred in law and in act in making an award for general damages for pain and suffering which was inordinately low.*
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> *2. That the learned trial magistrate erred in law and in fact in failing to appreciate the nature and extent of the Appellant's injuries and thereby made an award for pain and suffering which was inordinately low in the circumstances.*
>
> *3. That the learned trial magistrate erred in law and in fact in failing to appreciate the Appellant's submissions and case law attached thereto.*

5. Judgment on liability in the ratio of 80% to 20% in favour of the appellant was entered on 6th October 2015 by consent. Two medical reports by Dr. Okere dated 19th November 2014 and Dr. Leah Wainaina dated 19th June 2015 were also produced by consent.

6. The appellant in his evidence stated that he was knocked down by the motor vehicle KBP as he crossed the road on the material date. He produced the P3 form (PEXB1), police abstract (PEXB2), medical reports PEXB3 & 10(b), receipts (PEXB4, 5, 6, 7, 8, 9a, 10 (a), copy of records PEXB9, demand letter (PEXB11a) and certificate of postage (PEXB11b). He added that he cannot wear heeled shoes.

7. Parties agreed to dispose of the appeal by written submissions which were promptly filed.

8. The appellant's counsel filed submissions dated 25th March 2021. He submitted that the appellant sustained fractures on both legs (fracture of the right fibula and fracture of the left tibia). This was confirmed by the medical report (PEXB3) and the P3 form (PEXB1). The two documents also assessed the injury as grievous harm. Counsel further submitted that the report by Dr. Leah Wainaina for the respondent also confirms that the appellant suffered two fractures.

9. He therefore argues that the award of Kshs 500,000/= after contribution was too low for the nature of injuries suffered by the appellant. He relied on the cases of: **(i) Embu HCCA No. 58 of 2013 Dorcas Wangithi Nderi vs Samuel Kiburu Mwaura & anor [2015] eKLR (ii) Nrb HCCA No. 686 of 2013, Peter Karoka aka Ngige vs Mbaluka Malonza aka Eric & 2 others [2018] eKLR** where the courts dealt with similar injuries and awarded higher figures in form of damages.

10. In the **Dorcas Wangithi Nderi** case *(supra)* an award of Ksh 2,000,000/= was made for fractures on both legs and left radius/ulna plus soft tissue injuries. In the case of **Peter Karoka aka Ngige** *(supra)* an award of Kshs 900,000/= was on appeal reduced to Shs 800,000/= for a fracture on one leg *(fracture of the left femur).* He urged this court to enhance the award to Kshs 1,500,000/= as earlier suggested by them.

11. The respondent's submissions dated 28th April 2021 were filed by Kimondo, Gachoka & Co. advocates. It is counsel's submission that there is no evidence on record to show that he suffered any disability from the injuries. Further that this court can only interfere with the lower court exercise of discretion if any of the following is proved:

(i) The court took into account an irrelevant factor or,

(ii) The court left out of account a relevant factor or,

(iii) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

12. Counsel while referring to the cases of **(i) Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR (ii) Godfrey Wamalwa Wamba & anor v Kyalo Wambua [2018] eKLR** submitted that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. Counsel submitted that the respondent does not dispute that the appellant suffered tibia/fibula fractures and soft tissue injuries.

13. He referred to several other high court decisions which had dealt with similar injuries and reduced the awards by the lower courts. He urged the court to dismiss the appeal and award the respondent the costs of the appeal in line with section 27(1) & (2) of the Civil Procedure Act which provides as follows:

> ***(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***
>
> ***(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.***

14. He also referred to the supreme court decision in the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR** where the court explained that:

> "[10] The foregoing provision of the Civil Procedure Act has featured in judicial deliberations; and in ***Joseph Oduor Anode v. Kenya Red Cross Society,*** Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:
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> *"…whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words,* ***where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.*** *In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion …"*

Analysis and determination

15. This is a first appeal and this court has a duty to reconsider and reevaluate the evidence on record and arrive at its own conclusion. In

doing this the court must remember that unlike the trial court it did not see or hear the witnesses. *See* (i) **Abok James Odera T/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. advocates [2013] eKLR.**

16. I have considered the grounds of appeal, the evidence on record, both submissions and the authorities cited. There is no dispute that the appellant was involved in an accident and suffered injuries. There was a consent judgment on liability in the ratio of 80:20 in favour of the appellant. The only issue for determination in this appeal is whether the award of damages was too low as claimed by the appellant.

17. The principles upon which an appellate court can interfere with the award of general damages made by the trial court have been laid down by the courts. In **Peter Kahungu & Kentmere Flora Ltd v Sarah Norah Ongaro HCC Application 676 of 2000,** the court relied on the Court of Appeal decision in **Kivati vs Coastal Bottlers Ltd C.O.A. No. 69 of 1984** where the court said:

> ***"The Court of appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."***

18. This principle was restated in the case of **Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR** where the C.O.A. held:

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
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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. Bearing these principles in mind I will now move to evaluate the evidence on record.

20. In his evidence the appellant stated that he sustained fractures on both legs. Three medical reports were produced. These were:

(i) Report by Dr. P. Wangeci of Avenue Health care dated 6th November 2014 (PEXB 3)

(ii) Report by Dr. C. Okoth Okere dated 19th November 2014 (PEXB 10a).

(iii) Report by Dr Leah Wainaina dated 19th June 2015 *(produced by consent on 9th November 2015).*

21. PEXB 3 showed that healing was progressing well but there had to be a follow up. PEXB10a indicated the degree of permanent incapacity of the left distal tibia as 5% and that of the neck of the right fibula as 2%. The report dated 19th June 2015 which was by the respondent's doctor indicated the following:

- No physical disability resulting from the injuries.
- No future treatment required.
- Complete healing expected.
- Permanent disability is at 0%.

No further report was produced to counter the latest one dated 19th June 2015. It is therefore considered as stating the current state of the appellant.

22. The learned trial magistrate stated in the judgment that after considering the authorities cited, submissions on record plus the present trends, she awarded the appellant Kshs 500,000/= as general damages after apportionment. It means the actual award is Kshs 625,000/= less 20% contribution.

23. The learned trial magistrate did not point out which authority or authorities had guided her in arriving at the award but she did state that she had considered the authorities on record and submissions. I find no error in this.

24. I have considered a few cases which involved similar injuries and the awards made by the courts namely;

(i) In **Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] eKLR** where Justice Wakiaga reduced an award of Kshs 800,000/= by the trial magistrate to Kshs 400,000/= on 27th June 2014.

(ii) In **Francis Maina Kahura vs Nahashon Wanjau Muriithi [2015] eKLR** Justice Majanja reduced the award of Kshs 850,000/= by the trial magistrate to Kshs 500,000/= on 23rd April 2015.

(iii) In FA *(minor suing through next friend and father* **AFWK vs Kariuki Jane & anor [2018] eKLR** Justice Thuranira upheld the award of kshs 500,000/= made by the trial magistrate.

(iv) In **Peter Karoka aka Ngige vs Mbaluka Malonza aka Eric & 2 other [2018] eKLR** Justice Sergon reduced the award of Kshs 900,000/= by the trial magistrate to Kshs 800,000/= on 2nd November 2018.

25. From the documents produced in this case its clear that the fractures suffered by the appellant were already healed by the time the matter was being set down for judgment. Had there been any issue counsel would have raised it when the last medical report was produced on 9th November 2015. Furthermore a request would have been made for another medical examination to be done by the appellant's doctor. Failure to do so confirms that the said report was a true picture of the said injuries, meaning the appellant was fully recovered.

26. After due consideration of all the above I find no reason to make me interfere with the award of Kshs 500,000/= *(after apportionment of liability)* by the learned trial magistrate on 11th March 2015. The upshot is that the appeal lacks merit and is dismissed with costs. The judgment by the learned trial magistrate is upheld.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 24TH DAY OF JUNE, 2021 AT NAIROBI.

H. I. ONG'UDI

JUDGE