REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 162 OF 2018

EVANS MURURIA KARANI.....APPELLANT

VERSUS

NTHENYA MUINE MUKENYA.....RESPONDENT

(Being an Appeal from the original Judgment and Decree of Hon. B. Koech,

Resident Magistrate delivered on 2nd December 2015 in Kwale CMCC No.67 of 2017)

J U D G E M E N T

1. This appeal arises from a judgment of the trial court Hon. Betty Koech in which the Respondent was awarded special and general damages in the total sum of Kshs.875, 550 together with costs of the suit and interest.

2. The Judgment arose from a suit instituted by the Respondent against the appellant for personal injuries sustained in a road traffic accident which occurred on **7th September, 2016**.

3. The trial court's record shows that on **6th June, 2016**, the parties recorded a consent whereby liability was apportioned in the ratio of 75:25 in favor of the Respondent as against the Appellants.

4. Thereafter, the case proceeded for hearing for assessment of damages whereby the parties agreed and produced all the documents they had filed in support of their respective cases as exhibits without calling any witnesses.

After considering all the documentary evidence adduced by both parties, the trial Magistrate entered Judgment in which she awarded the Respondents Kshs.875,550/= as general and special damages together with costs of future treatment plus costs of the suit and interest.

5. Aggrieved, the Appellant filed an appeal vide a **Memorandum of Appeal** on **23rd August, 2018** in which he faulted the trial court's decision principally on ground that it was not supported by the evidence on record. He complained that the learned trial Magistrate failed to consider his submissions on quantum and that the award of general damages was so inordinately high as to constitute a miscarriage of justice given the circumstances of the case.

6. On **18th September, 2020**, the court directed the parties to dispose of the appeal by way of written submissions. The Appellant filed his written submissions on **29th June, 2021** while the Respondent filed his on **29th September 2021.**

7. In his submissions, the Appellant stated that as deciphered in the provisions of **Order 21** of the **Civil Procedure Rules**, a Judgment ought to have a specific format wherein it must contain; a concise statement of the case; issues for determination, a decision itself and the reasons for such decision. He stated that the impugned Judgment does not conform to this threshold, hence a wrong decision was arrived at. According to the Appellant, the learned Magistrate agreed with their submissions with regard to the authorities they had cited and noted that the medical report produced by **Dr. Udayan Seth**, the Appellant's witness conformed with the P3 form and treatment notes produced by the Respondent. He argues that the trial Magistrate also ought to have considered the value of the shilling and state of the economy by considering the authorities they had cited in support of their proposed award so as to arrive at an award that is sensible and fairly compensates the claimant but not astronomical.

Respondent's Submissions

8. In his submissions, the Respondent's counsel stated that the appeal has not raised any arguable issue vis-à-vis that the trial Magistrate's

Judgment and decree on quantum of damages delivered on **25th July, 2018**. It was submitted that the award of damages is discretionary and an Appellant can only interfere with an award if it is shown the court acted on some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, an entirely erroneous estimate of damages to which a party is entitled. To justify the award by the trial court, the Respondent took the court through the evidence on how he sustained the injuries and their nature, then cited the authorities (case law) with comparable injuries as a guide. The Respondent submitted that the trial Magistrate considered and appreciated all the facts and evidence placed before her and therefore arrived at the decision and awarded upon consideration of all the relevant facts and evidence. He urged the court to find the appeal unmerited and dismiss the same with costs.

Analysis and determination

9. Indeed, it is well settled that the duty of the first appellate court is to re-evaluate the evidence on record in order to reach its own conclusion bearing in mind that it did not have the benefit of seeing or hearing the witness (See the case of **Selle –vs- Associated Motor Boat Co. Ltd [1968]EA 123).**

10. I have considered the grounds of appeal, the rival written submissions filed by the parties and the authorities cited. I have also read through the trial court's record including the Judgment rendered by the learned trial Magistrate.

11. This being an appeal on quantum only, it is important to consider the principles that guide an appellate court in deciding whether or not to interfere with an award of damages made by the trial court.

12. As a general rule, an appellate court is required to be slow in interfering with awards made by a trial court and should only do so if it is satisfied that in making the award, the trial court either misapprehended the evidence adduced in the case or applied the wrong legal principles or that it abused its discretion. This is so because it is trite that the assessment of damages is dependent on the trial court's discretion which discretion must be exercised judiciously not whimsically or capriciously.

13. In the case of **Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No.2, [1987] KLR 30**, the court held that;

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be 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 damage."**

14. Additionally, in the case of **Mariga –vs- Musila, (1984) KLR 251**, the Court of Appeal expressed itself as follows:

> **"The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles."**

15. Guided by the above principles, I proceed to deal with the main issue of the appeal being that the learned trial magistrate erred in awarding the Respondent general damages in the sum of Kshs.800,000. In the appellant's view, the award was too high and was not comparable with awards made in the authorities cited.

16. Before addressing the above issue, I wish to first deal with the appellant's claim that the learned trial magistrate erred by failing to consider his evidence and submissions. I believe it is the duty of the advocates on record to avail relevant and recent authorities to guide courts in arriving at fair and just awards of a course while bearing in mind the peculiar circumstances of each case. Be that as it may, having read through the trial court's record, I have found nothing to dispute the trial Magistrate's claim that she had given due consideration of the Appellant's submissions and authorities. I find that although the Plaintiff in those authorities sustained comparable injuries, the authorities cited by the Appellant were very old having been decided in the early **1990**s. Notably, the learned trial magistrate adopted the global sum approach in awarding damages which was the approach taken in most of the authorities cited by the Appellant. Nothing therefore turns on that ground of appeal.

17. As a general rule, the assessment of damages should be based on the nature and extent of the injuries suffered by a party of previous awards made for comparable injuries must be taken into account. In this case, it is not disputed that as a result of the accident, the Respondent sustained the following injuries;

- **Fracture of the left humerus arm bone (proximal);**
- **Broken upper left incisor teeth;**
- **Deep degloving tissue loss lacerations on the head (scalp);**
- **Blunt injury to the left arm;**
- **Bruises on the nasal bridge;**

18. Thus although both **Dr. Ajoni** and **Udayan** were in agreement that the fracture exposed the Respondent to some permanent disability, **Dr. Ajoni** opined that the Respondent suffered permanent disability assessed at 8% while **Dr. Udayan** assessed permanent disability at 5%. Relying on the medical report produced by the appellant from **Dr. Uduyan**, the learned trial magistrate awarded the Respondent Kshs.800,000/= as general damages for pain and suffering.

19. In his submissions, the appellant relying on several authorities including **Jenife Yoto –vs- Francis Njoroge Ng'ungu & Another, HCCC No.4664 of 1990** and **Beatrice M. Theuri V Usham Singh & Another HCCC 3297 of 1982,** urged this court to find that an award of KShs.200,000/= was sufficient compensation for the Respondent's injuries.

20. The Respondent on her part implored the court to uphold the trial court's decision relying on the authority of **Bayusuf Freighters Limited –vs- Patrick Mbatha Kyengo (2014)eKLR** in which the court held that in awarding damages a court ought to be guided by recent awards in comparable cases.

21. In the case of **Butt –vs- Khan (1977) 1 KAR,** the Court of Appeal held as follows;

> **"An appellate court will not disturb an award of damages unless it is 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…."**

22. Having taken into account the nature and extent of the injuries sustained by the Respondent in this case, I have also considered the fact that the Respondent was admitted in hospital for four days during which time she underwent some operations which must have caused her great pain and suffering. In my view, the award of Khs.800,000/= was sufficient compensation for the Respondent's pain and suffering at the time the trial court made its decision bearing in mind that the medical evidence on record shows that the injuries left her with some permanent disability.

23. Regarding the costs of future medical expenses, the claim is in the nature of special damages which must be specifically pleaded and proved. In this case, the Respondent at **Paragraph 9** of the **Plaint** specifically claimed Kshs.75,000/= as cost for future medical expenses. Both **Dr. Ajoni** and **Dr. Udayan** in their reports agreed that the implants will need to be removed in future but were not in agreement on the cost of such removal. **Dr. Ajoni** opined that the operation would cost Kshs.90,000/= but did not specify whether the cost was applicable to public or private hospitals while **Dr. Udayan** was of the view that the operation would cost around Kshs.75,000/= at Mewa Hospital.

24. In the circumstances, I am of the view that the trial court's award of Kshs.75,000/= for future medical expenses was proper as the claim was specifically pleaded and supported by the evidence on record.

25. In regard to special damages, the law is quite clear on this head. Special Damages must not only be **pleaded but must be proved,** before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in the case of **Hahn –vs- Singh, Civil Appeal No.42 of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

> **"Special damages must not only be specifically claimed (pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."**

26. Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. I have carefully perused and evaluated the evidence presented in support of special damages by the Respondent. The learned trial Magistrate found that apart from the medical rep.210,000/= and cost of motor vehicle search were supported by receipts of Kshs.500/=. The trial Magistrate awarded special damages of Kshs.200,000/= which had been pleaded and was not challenged, hence the same will not be disturbed.

27. The upshot of my findings is that the appeal lacks merit and the same is dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 19TH DAY

OF NOVEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ajingo counsel for Appellant

M/S Owiti counsel for Respondent

Court Assistant – Gitonga