REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO. 14 OF 2019

JOHN MUCHIRI NDERITU.....1ST APPELLANT

JAMES NJOROGE KANANGA.....2ND APPELLANT

VERSUS

HILLARY KARIUKI WACEKE.....RESPONDENT

JUDGEMENT

1. The Appellants herein filed a Memorandum of Appeal dated 6th February 2019, against the judgement of Hon S.N. Mwangi, Senior Resident Magistrate, Nyahururu delivered on 15th January 2019 in **Nyahururu C.M.C.C No. 271 of 2013.** The Appellant appealed against the said judgement in its entirety on the following grounds interalia:

> **i. That the learned trial magistrate erred in law and in fact and misdirected herself in finding that the Respondents had proved their case to the required standard.**
>
> **ii. That the learned magistrate erred in law and in fact in misapprehending and failing to properly deal with the evidence adduced in court by the Appellant and thus making assumptions and a finding that is incongruent with applicable principles, authorities and evidence.**
>
> **iii. That the learned magistrate erred in law and misdirected herself on the principles of law and evidence applicable to the case before her consequently arriving at a wrong decision.**
>
> **iv. That the learned magistrate erred in both law and fact by not considering the submissions and authorities tendered on behalf of the Appellants on quantum and thereby, making an award of general damages that is clearly nit compensatory but enriching to the Respondent**
>
> **v. That the judgement of the trial court is unreasonable and contrary to law, principles and facts of the case presented by the trial court.**

2. The brief backdrop to this appeal is that the Appellants herein were the Defendants in the trial court proceedings in which the Respondent instituted a suit against them seeking compensation he sustained as a result of a road traffic accident. The Respondent alleged in the primary suit that on the 23rd day of November 2013 he was a lawful passenger travelling in motor vehicle registration no. KBA 353N along Olkalou-Njabini Road at Kariamu Trading Center when as a result of negligence on the Appellants part they were involved in an accident with motor vehicle registration no. KBT 639B subsequently causing serious injuries to him.

3. The matter was heard and the court delivered judgement on 15th January 2019 finding the Appellants 100% liable and awarding the Respondent 350,000/- as general damages and kshs. 8,000/- as special damages as well as costs and interest at court rates. The Appellant being dissatisfied with the judgement preferred this appeal on the aforementioned grounds.

APPELLANTS' SUBMISSIONS

4. On quantum, the Appellants' Counsel began by pointing out that damages awarded must be set within consistent limits. Reliance was placed on ***West (H) & Son Ltd v Shepherd [1964] AC. 326,345*** as cited in ***Civil Appeal No. 1 of 2014 Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR***, ***Civil Case No. 86 of 2008 Joseph Muse Mua vs Julius Mbogo Mugi & 3 Others [2013] eKLR*** and ***Ossuman Mohammed & Another Vs Saluro Bundit Mohumed Civil Appeal No. 30 of 1997(unreported)*** quoting the case of ***Kigaragari vs Aya***

(1982-1988) 1 KAR 768.

5. Counsel submitted that the Medical Report dated 7th January 2014 confirmed that the injuries as pleaded were soft tissue injuries and classified the degree of injury as grievous harm. Reliance was placed on ***Stanley Maore v Geoffrey Mwenda, Civil Appeal No. 147 of 2002 at Nyeri*** as cited in the case of ***Dickson Ndungu Kirembe & Another v Theresa Atieno & 4 Others [2014] eKLR***, ***John Oduori Pondo & Another v Mattew Kipng'etich Soi & 2 Others [2004] eKLR*** and ***Zakayo Maingi v Hellen Mukii Kilonzi [2012] eKLR***.

6. The Appellants' Counsel asserted that general damages amounting to Kshs.50,000/- would be adequate compensation considering the fact that the injuries sustained were healed and he was back to his normal life. They urged the court to find that Kshs.380,000/ on account of general damages is oppressive and excessive and such an award should be disturbed forthwith and a lesser revised amount to be awarded under this head.

7. On special damages the Appellants'' Counsel averred that the evidence has to be provided before court to ascertain the exact figures that were incurred by the Respondent as pleaded and urged the court to set aside the trial court's award and only award that which was pleaded and strictly proven. Reliance was placed on ***Hahn v Singh Civil Appeal No 42 of 1983 [1985] KLR 716, at p. 717 And 721***.

RESPONDENT'S SUBMISSIONS

8. The Respondent's Counsel submitted that since there was a test suit selected where judgment affects this matter, the Appellant cannot purport to appeal on liability in this particular matter. That it is only prudent that the appeal on liability emanates from the test suit file which would give this court a chance to go through the proceedings since it does not have the benefit of hearing the witnesses in order to make a decision on liability and decide whether or not it will uphold or vary the same. It was therefore the Respondent's submission that the appeal on liability fails for the aforementioned reasons.

9. On quantum, Counsel asserted that the doctor classified the degree of injuries as harm with temporary disability of 4 weeks. That the evidence of the Respondent on injures was not controverted by the Appellant in evidence and therefore the same remains unchallenged.

10. The Respondent's Counsel argued that the award was not excessive in any way but reasonable in the circumstances and within the range of awards made for similar injuries. Reliance was placed on ***Francis Ochieng & Another vs Alice Kaimba [2015] eKLR.***

11. On special damages, the Respondent emphasized that the award was proper as evidenced by ***P. Exhibit 1 (b)*** and ***P. Exhibit 6 & 7*** which were produced during the trial proceedings and prayed that the court upholds the same.

ANALYSIS AND DETERMINATION

12. Beforehand I associate myself with the well-established position that this being the first appellate Court, it is the duty of this court to review the evidence afresh, reassess and reconsider it and make its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify before the trial court and give allowance for this. This position is well settled in the cases of ***Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123,;Peters v Sunday Post Limited [1958] EA 424 ;Nairobi HCCC Appeal No. 213 of 2006, Oluoch Erick Gogo vs Universal Corporation Limited (2015) eKLR*** and; ***Sumaria & Another Vs Allied Industrial Limited (2007)2 KLR).***

13. I have dispensed with my duty as an appellate court to reconsider all the evidence and testimonies on the record afresh. I have further considered the submissions by the parties' advocates and the main issue in question is on quantum specifically whether the trial magistrate made an award of general damages that was inordinately and excessively high in the circumstances, having regard to the injuries sustained by the Respondent.

14. On the issue of quantum I shall rely on the Court of Appeal's decision in the case of ***Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR***, where the Court of Appeal held that –

> **"…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:**
>
> **'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."**

15. During the trial court proceedings, PW1, Dr. Wellington Kiamba testified in court that he did physical examination on the Respondent and noted soft tissue injuries on the neck, chest, upper limbs and legs. That by that time he had not recovered from injuries as the neck was tender on the lateral aspect, anterior chest wall was tender as was the upper limbs. He pointed out that he has recovered from most injuries other than the neck and chest but was still on drugs. He classified the degree of injuries as harm with temporary disability of 4 weeks and produce d the Medical Report as ***Pexhibit 1a.*** The nature of injuries suffered by the Respondent remain undisputed i.e. soft tissue injuries on the neck, chest, upper limbs and legs.

16. Notably, the trial court magistrate indicated that the Appellants did not submit despite being given time to do so. The implication is therefore that the appellants' ground of appeal that the Learned Magistrate erred in both law and fact by not considering the submissions and authorities tendered on behalf of the Appellants on quantum and thereby, making an award of general damages that is clearly not compensatory but enriching to the Respondent is in my view misplaced.

17. As cited by the Appellants, I fully agree with the holding in the case of ***West (H) & Son Ltd v Stephard [1964] AC 345*** it stated as follows: -

> **"But 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 the endeavor to secure some uniformity in the general method 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 to a considerable extent conventional."**

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.

19. I associate myself with the finding of the court in ***Hussein Dairy Limited & another v Asha Moteo Athman & 3 others [2021] eKLR*** where it was stated that:-

> **"In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two cases are exactly alike as the Court of Appeal observed in the case of Stanley Maore –vs- Geoffrey Mwenda, NYR CA Civil Appeal No.147 of 2002 [2004] eKLR that:**
>
> > **"Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

20. Accordingly, the test is not that the award must be that in the past cases but it is that it needs to be comparable with the post awards so that comparable injuries attract comparable awards.

21. I have thoroughly perused the authorities relied on by the Appellants' Counsel i.e. ***Stanley Maore v Geoffrey Mwenda, Civil Appeal No. 147 of 2002 at Nyeri*** as cited in the case of ***Dickson Ndungu Kirembe & Another v Theresa Atieno & 4 Others [2014] eKLR***, ***John Oduori Pondo & Another v Mattew Kipng'etich Soi & 2 Others [2004] eKLR*** and ***Zakayo Maingi v Hellen Mukii Kilonzi [2012] eKLR*** to justify that an award of kshs. 50,000/- would be adequate compensation. It is my opinion that the same is on the lower side and unfair. These authorities relate to the period between 2002, 2004 and 2012 and even in the 2012 authority a sum of Kshs.180,000/- was awarded.

22. In the decision in ***Omar Athumani Mohammed t/a Paint Work and General Maintenance v Jumwa Kaingu [2021] eKLR*** it was stated that past decisions were 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.

23. Further, in ***Francis Ochieng & Another v Alice Kajimba [2015] eKLR***, in respect of multiple soft tissue injuries sustained in January 2012, where trial court's judgment was rendered in February 2014. There, the High Court reduced the award from Kshs.500,000/= to Kshs.350,000/= for multiple soft tissue injuries.

24. Additionally, in ***H. Young Construction Company Ltd v Richard Kyule Ndolo [2014]*** and ***Devki Steel Mills Ltd v James Makau Kisilu [2012] eKLR*** an award of Kshs.250,000/= general damages was made for soft tissue injuries in both cases.

25. To that extent, in determining whether the award was consistent with comparable awards made, I find that the Learned Trial Magistrate did not rightfully exercise her jurisdiction by balancing the comparable award in ***Devki Steel Mills Ltd vs James Makau Kisuli [supra]*** against the high cost of living and inflation by awarding kshs. 350,000 for pain, suffering and loss of amenities. She therefore did misdirect herself on the principles of law and evidence applicable to the case.

26. Based on the material availed to the trial court including cited decisions when looked at against the decision arrived at, I find thus valid reason to interfere with the sum awarded. I am persuaded that this is a suitable case for this court to exercise its discretion and interfere with the trial court's finding on general damages for the reason that the quantum that was awarded was manifestly excessive and therefore does warrant such interference thus will reduce the award to Kshs.150,000/.

27. On the question of special damages, in the judgment the Learned Trial Magistrate has enumerated the damages and the supporting evidence. I will therefore not disturb the award of Kshs.8,000/-.

28. The upshot is that the court makes the orders:

i. The appeal succeeds to the extent that the general damages award is reduced to ksh 150,000.

ii. Parties to bear their own costs in appeal.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 16TH DAY OF DECEMBER, 2021

.....

CHARLES KARIUKI

JUDGE