REPBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 161 OF 2016

MOI TEACHING AND REFFERAL HOSPITA.....1ST APPELLANT

CHRISTOPHER KARIMI KINYUA.....2ND APPELLANT

Versus

SIMON KIMUTAI OLOIBE.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable chief Magistrate T.Cherere delivered on 9th November, 2016 in Eld Cmcc No. 596 of 2009).

JUDGMENT

1. Moi Teaching and Referral Hospital Board (MTRH) (the first appellant and Christopher Karimi Kinyua (the 2nd appellant) are aggrieved by the judgment entered in favour of the Respondent (Simon Kimutai Oloibe) where liability was apportioned in the ratio 80% against the defendants jointly while the 3rd party was to shoulder 20%. Damages were awarded in the sum of **Kshs.2,511,956-=.**

2. The appellants being dissatisfied with the said judgment preferred an appeal before this court on grounds that:-

a). The award in general damages that was excessive and inordinately high compared to the injuries sustained by the Respondent in the circumstances.

b). The trial Magistrate failed to take into account the submissions filed by the appellant before arriving at her judgment.

c). The trial Magistrate applied the wrong principles in law in her judgment.

The appellant prays for the appeal be allowed and judgment and decree in Eldoret Cmcc No. 596 of 2019 be set aside.

4. The appeal was canvassed by way of written submission. The Appellant did not file their submissions. The Respondent submitted that the appellants did not contest liability, and the only issue in contention is the award and assessment of general damages by the trial court.

5. That the appeal is incompetent for failure to include medical reports prepared by Dr. Aluda and produced by Dr. Rono. The only issue raised in the Appeal is on quantum of damages awarded and the same cannot be determined in the absence of the medical reports.

6. The assessment of damages for personal injuries the general method of approach is and was stated in the decision of the court in **Arrow Car Limited vs Bimomo & 2 others (2004) 2 KLR 101** that: **‘’ comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases”.**

7. The plaintiff sustained the following injuries:

i. Severe fracture of maxillary bones (upper jaw).

ii. Deformed distal left upper limb, that is distal radius.

iii. Deformed lower limb that is tibia fibula

iv. Coles fracture

v. Transverse fracture of maxillary, distal radius, tibia and fibula bones.

vi. Fracture of the 4th teeth (42, 41, 31 and 32).

vii. Facial injuries with multiple cuts wherein plaintiff facial reconstruction and surgery.

viii. Bleeding from both nostrils, gum, lip, buccal cavity and mouth.

ix. Swelling of the jaw

x. Multiple scarifications which are permanent feature in the plaintiff's disfigured body.

xi. Surgical scars.

xii. Deep cut in the lip and orbital region.

8. This court is urged not to disturb the award of Kshs. 2,200,000- as it was based on the injuries sustained and after the analysis of comparable case law submitted by the Respondent.

Analysis and Determination

9. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings.

10. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

11. The appropriate standard of review of evidence established in these cases can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii.It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

12. In the case of ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others[1986] eKLR*** the Court of Appeal held that:-

> **"... inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country….."**

13. In assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. In the case of **H. West and Son Ltd v. Shepherd (1964) AC.326** and stated thus:

> **"…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 endeavour 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 ..."**

14. The principles upon which this court should proceed are those stated in the case of **KEMFRO AFRICA LIMITED t/a MERU**

EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR.

> **"…. 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."**

15. According to the Dr. Embezi, the Respondent sustained serious injuries which the Respondent is likely to suffer for a long time. He also testified that in the event of any disability, it can be between the ranges of 5 to 10. He further stated that the patient was referred to Kenyatta National Hospital for specialized treatment.

16. The Appellant has not prosecuted the appeal to show how the the trial Magistrate applied a wrong principle in making an assessment that it led to an erroneous estimate of what ought to have been awarded to compensate the Respondent herein.

17. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

18. In the case of **Kigaraari vs Aya (1982-88) 1 KAR 768**, it was stated as follows:

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

19. In the case of **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, Waweru (J) assessed general damages for pain, suffering and loss of amenities at Kshs 2,000,000/=.

20. Considering the Appeal herein, the written submissions in opposing of the appeal by the Respondent and the cases, the trial court took into account all the relevant factors and applied the appropriate legal principles. Taking into account the nature of the injuries, and the residual effects on the respondent, I do not consider the damages awarded to be inordinately high under the circumstances. Consequently, I hold and find that the appeal lacks merit and is dismissed with costs to the respondent

Delivered and dated this 29th day of January 2020 at Eldoret

H. A. OMONDI

JUDGE