REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 9 OF 2018

MOMBASA MAIZE MILLERS LTD.....1ST APPELLANT

ABASS ATHMAN.....2ND APPELLANT

VERSUS

RACHEAL KASICHANA SAFARI.....RESPONDENTS

(**An Appeal from the Judgment of Hon. S. Wewa, Principal Magistrate made on 29.1.18**

in Malindi CMCC NO. 178 of 2016)

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. S. Wewa, Principal Magistrate, Resident Magistrate delivered on 29.1.18 in Malindi CMCC NO. 178 of 2016, Racheal Kasichana Safari v Mombasa Maize Millers Ltd & Abass Athman. The Respondent, Racheal Kasichana Safari instituted the suit in the trial Court against the Appellants, Mombasa Maize Millers Ltd and Abass Athman claiming both general and special damages arising from a road traffic accident. The Respondent was travelling as a passenger in motor vehicle registration number KAZ 325J from Malindi to Kilifi which collided with motor vehicle registration number KBQ 549T driven by the 2nd Appellant from Mombasa to Malindi. The latter motor vehicle is owned by the 1st Appellant. Following a hearing, the trial Magistrate entered judgment in favour of the Respondent for the sum of Kshs. 150,000/= in general damages less 10% contribution. The Respondent was also awarded special damages of Kshs. 2,000/=, costs and interest.

2. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the Honourable Magistrate erred in fact and in law in that she:

1. disregarded vital evidence adduced by the Appellants thereby arriving at a wrong finding.

2. failed to correctly evaluate the testimony of the defence witnesses thereby making an inordinately/astronomically high award to the Respondent.

3. disregarded and or failed to evaluate the evidence adduced by both the plaintiff and the Defendants in apportionment of liability putting in mind the entirety of the circumstances.

4. failed to consider the entirety of the circumstances of the case.

5. having found that the driver of motor vehicle registration number KAZ 325 J contributed and or led to the occurrence of the accident proceeded to make a wrong finding by punishing the defendant.

6. delivered judgment based on wrong principles of law and fact.

3. The Appellants prayed for the following orders:

i. The appeal be allowed.

ii. The judgment in favour of the Respondent be set aside and the suit against the Appellants be dismissed.

iii. The Appellants be awarded the costs of this Appeal and costs in the lower Court be shared between the parties.

4. The accident gave rise to claims in Civil Cases Nos. CMCC No. 177/2016; CMCC No. 176/2016; CMCC No. 178/2016 and CMCC No. 170/2016. These cases were consolidated for the purpose of determining liability. CMCC No. 177/2016 became the main file. The cases generated Civil Appeals Nos. 7/2018; 8/2018; 9/2018 and 10/2018. The issue of liability has been determined in Civil Appeal No. 10 of 2018 Ibrahim Gumbao Gona v Mombasa Maize Millers Ltd & Abass Athman. In that Appeal, the Court upheld the apportionment of the lower Court of 90% to the Appellants.

5. I have given due consideration to the record of appeal, the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> **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 made 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).**

6. Although the Appellant raised 6 grounds of appeal, the only issues to be determined are whether the learned Magistrate erred on liability and quantum. As indicated above, the issue of liability has been determined. I now turn to the issue of quantum.

7. The record shows that the injuries suffered by the Respondent as enumerated in the medical report by Gama Medical Clinic are:

> Deep cut on the head
>
> Cuts on the upper lip and right eye
>
> Blunt object injury to the head and right foot.

The injuries were described as severe soft tissue injuries which left the Respondent with a 2 cm scar on the upper lip, 4 cm scar on the head and a 3 cm scar on the right eye.

8. In arriving at the quantum for award of general damages, the learned Magistrate stated:

> **"The injuries are soft tissue in nature and no permanent disability noted. I do award Kshs. 150,000/= less 10% contribution in general damages. Kshs. 2,000/= as special damages, costs and interest thereof."**

9. While considering whether the learned Magistrate erred in arriving at this award, this Court is guided by the holding in Butt v. Khan [1981] KLR 349 per Law, J.A that:

> **"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."**

10. The Court is also guided by the decision in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia(1982 –88) 1 KAR 727 at p. 730 where Kneller J.A. said:-

> **"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 by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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."**

11. It is the Appellant's case that the award of damages is excessive given the nature of the injuries. Citing the case of Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR, the Appellant contended that the trial Magistrate erred by relying on wrong principles to arrive at the award. I have looked at the case and note that Ngugi, J. found that an award of Kshs. 300,000/= for soft tissue injuries to the lower right leg and to the back was manifestly excessive and proceeded to reduce it to Kshs. 100,000/=.

12. On her part, the Respondent submitted that the amount awarded was not exaggerated or excessive but fair under the circumstances. It was within the boundaries of awards for similar injuries and should not be disturbed. Reliance was placed on the case of Christine Adhiambo v Falcon Coach Limited & another [2009] eKLR where Kshs. 400,000/= was awarded for soft tissue injuries .

13. As I consider the request for review of the award of general damages, I am guided by the following principle set out by Law J.A., in the case of Butt v Khan (1977) KAR 1:

> **"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 as either inordinately high or low."**

14. The learned Magistrate noted that the Respondent sustained soft tissue injuries. In the Christine Adhiambo case (supra), although the plaintiff therein sustained soft tissue injuries, they were manifestly more severe. The cuts in the head and face were 20 cm and 5 cm respectively leaving what the doctor described as ugly scars which will remain as permanent features. In contrast, the Respondent was left with a 2 cm scar on the upper lip, 4 cm scar on the head and a 3 cm scar on the right eye. The Respondent in the Ndungu Dennis case (supra) sustained soft tissue injuries to the lower right leg and soft tissue injuries to the back and was awarded Kshs. 100,000/=. It is noted that the Respondent herein suffered severe soft tissue injuries which left her with permanent scars. My view therefore is that the sum awarded is reasonable and not excessive. Accordingly, I find no reason to interfere with the assessment of general damages.

15. Accordingly, the Appeal is dismissed with costs to the Respondents.

DATED this 24th day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

..... for the Appellants

..... for the Respondent

..... Court Assistant