REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 39 OF 2019

JOSEPH KARISA BAYA.....APPELLANT

VERSUS

CEFIS GIORGIO .....1ST RESPONDENT

TOFIKI HILAU.....2ND RESPONDENT

(Being an appeal against the Judgment delivered on 24.06.2019 by Hon. Wewa,

(Principal Magistrate) in CMCC No. 124 of 2018 – Malindi)

CORAM: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the Appellant

Jengo Associates for the respondents

JUDGMENT

Joseph Karisa Baya, hereinafter referred as the appellant sued the defendants, herein in this appeal referred as the respondents respectively in the Chief Magistrates Court at Malindi, to recover general and special damages for personal injuries he sustained.

On 29.6.2017, the accident involved motorcycle registration No. KMEA 039G, being driven by the appellant and the 1st respondent motor vehicle registration No. KAX 456V being driven by the 2nd respondent.

The averments in the plaint and claim on liability were based on negligence under the doctrine of vicarious liability. However, the issue on liability was settled by consent entered for both parties to shoulder it at a ratio of 20%:80%.

The task before the Learned trial Magistrate was as far as the record shows to assess the nature of quantum as a component of pain and suffering or any other special damages due to the appellant.

In her considered Judgment, the Learned trial Magistrate opined as follows:

> ***"I find the award of Kshs.250,000/= plus 20% contribution adequate degree in severe damages. Kshs.1,900, special damages and Kshs.50,000/= for removal of K-Nail cases and intense thereof."***

Therefore, liability having been resolved by a consent Judgment, the appellant grievance to this court is purely on assessment of general damages.

On appeal

Mr. Wambua, Learned counsel for the appellant argued this appeal by way of written submissions dated 22.1.2020. **Mr. Wambua's** line of argument is that the appellant injuries were so severe that they resulted into an 8% permanent partial disability. He referred the court to the dicta in the case of **Henry Hidayailanga v Manyema Manyioka {1961} 1 EA 705 (CAD), Nance v British Columbia Electric Railway Co. Ltd (4) {1951} A.C. 601.** For this appellate court to exercise discretion and interfere with inordinately low damages awarded by the

Learned trial Magistrate.

Further **Mr. Wambua** submitted that the appellant had presented a prima facie case on a balance of probability that the damage suffered was capable of attracting a higher assessment than what the Learned trial Magistrate was able to assess and award in her Judgment.

At this point he relied on the principles in the case of **Arrow Car Limited v Elijah Shamall Bimomo & 2 Others {2004} eKLR, Nyambati Nyaswambu Erick v Toyota Kenya Limited & 2 Others HCCA NO. 66 OF 2018.**

The case for the appellant as submitted by Learned Counsel was that the fair and just compensation could have been within the range of Kshs.1,500,000/=. In a nutshell, Learned counsel urged this court to allow the appeal a prayed.

Mr. Jengo in his submissions argued vehemently on this ground that the awarded damages were not inordinate or erroneous as submitted by Learned counsel for the appellant.

He referred the court to the principles in **Karanja v Inter continental Hotel & Another CA NO. 38 OF 1985, Tayab v Kinanu CA NO. 29 OF 1982**. As far as the respondent was concerned the trial Magistrate exercise of discretion did not occasion a failure of justice in the sense that the awarded damages was within the well established principles.

Determination

The award of damages of Kshs.250,000/= in the impugned Judgment was based on the medical report of **Dr. Ajoni Adede** dated 17.1.2018. according to the report the appellant suffered fractures of the right tibia and right fibula leg bones. On examination the right leg has 12 cm surgical scar while the right ankle is stiff. **Dr. Adede's** conclusion was that the appellant injury occasioned 8% permanent partial disability. That the fracture area remains weak and painful experiences for life even if the bones unite. Further, the metal implant is to be removed after two years at a cost of Kshs.90,000/=.

The second reference point for the trial court remained the respective submissions by both counsels on authorities with similar injuries and appropriate awards as those suffered by the appellant.

The contention by the appellant was that his injuries were of a grave nature and buttressing them on other past awards, Kshs.1,500,000/= was a legitimate expectation from the trial court in this limb.

Through his legal counsel submissions the appellant relied on the following cases: **Samwel Kimani & Kinuthia v Edward Otieno & Geoffrey Otieno HCCA NO. 128 OF 2015 MSA** the court awarded Kshs.700,000/= for pain and suffering. However, it is not clear as to the extent of specific skeletal or soft injuries sustained by the claimant in this case.

In **Isaac Mwina Mwebea v David Gikinda HCCA NO. 67 OF 2016 Meru:**

> ***"The plaintiff herein suffered fracture of the tibia/fibula and blunt injury on the head. The court awarded Kshs.1,000,000/=."***

Basically, the appellant appeared to place reliance on this authority to persuade the trial court to award damages within this range.

On the other hand Learned counsel for the respondent submitted what would be adequate remedy for the appellant pain and suffering claim. At the center of the respondents submissions was the reliance on the following awards which they prospected to be similar with those suffered by the appellant. **Eldoret Steel Mills v Eliphas Victor Esipila HCCA NO. 72 OF 2006**

> ***"In this case the claimant suffered***
>
> ***(1) sub-trochanteric fracture of the right femur.***
>
> ***(2) Fracture of the metal-tarsal bones of the right foot.***
>
> ***The degree of injury assessed at 3.5% the court awarded Kshs.300,000/= for pain and suffering."***

Ibrahim Kalema Lewa v Esteel Co. Ltd HCCA NO. 475 OF 2012

> ***"The appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains. The appellant suffered 25% disability. The court awarded Kshs.300,000/=."***

Its against this background the respondents hold the view that the exercise of the discretion of the Learned Magistrate was in tendem with the well settled principles in the above cases. That in coming to her decision she was bound by the principles set out in the aforementioned authorities of the superior courts.

As I embark to evaluate and appraise all the material evidence available at the trial court the principles to be observed which have been comfortably followed by this court are to be found in the cases of **Savanna Saw Mills Ltd v George Mwale Mudumo {2005} eKLR, Karanja case (supra).**

In overall this court must be satisfied that the trial Magistrate in assessing damages took into account an irrelevant factor or left out of account a relevant matter or that the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.

Whatever the reason in this case both counsels relied on fairly old cases with dissimilar injuries compared to what the appellant sustained as confirmed in **Dr. Adedes** medical report.

To this extent even the Learned trial Magistrate consequently undertook the assessment without making reliance on any of the authorities referred to by counsels. The assessment therefore seems to have been in vacuo with respect to both counsels. None of the cases cited in their submissions would principally appeal to the claim filed by the appellant and as determined by the trial court.

This appeal provoked me to find out the latest trending principles and awards relevant to the instant case by the appellant. The position on award of damages taking into account not only similar injuries and corresponding awards but the prospect and salvage of inflation on the value of money.

In my considered view the cases of **Zabro Transporters Ltd v Absalom Dova Lumbasi HCCA NO. 31 OF 2012** the plaintiff suffered soft tissue injuries and fracture of the left tibia/fibula, the appellate court set aside award of Kshs.500,000/= and substituted an award of Kshs.400,000/= as general damages for pain and suffering. In the case of **Zacharia Mwangi Njeru v Joseph Wachira Kanoga HCCA NO. 9 OF 2012:**

> ***"The court set aside an award of Kshs.800,000/= and substituted it with an award of Kshs.400,000/= for the injuries suffered to the commented fracture of the tibia and fibula."***

So, both on broad principles and in the particular circumstances of this case, the award of damages for fracture of the tibia and fibula may range between 250 – 400,000 depending on the severity and residual disability as opined by the medical evidence.

In this appeal, the respondent did not challenge the nature of the injuries suffered and the partial permanent disability of 8% in **Dr. Adede's** medical report.

In the light of the facts put before the Learned trial Magistrate, it is my opinion that she acted outside the principles of being guided by past similar awards and therefore exercised her discretion erroneously to deprive the appellant a just and fair award for pain, suffering and loss of amenities.

It is also apparent therefore that the Learned trial Magistrate did not factor in the inflationary trends intended to apply as contributory measure to insulate the claimant for any prospect for the loss of the value of money.

The point is this, the deserving successful Judgment creditors in accident claims evidently expend long period of time before they could redeem the award from the Judgment of the court.

Similarly, it seems self-evident that the Learned trial Magistrate did not explain in her Judgment by giving reasons for the decision. The duty to give reasons is a function enshrined under Article 10 of the Constitution on National values and principles of governance. Reasons for Judgments/Rulings both manifest transparency and accountability. The rationale for the duty to give reasons by Judges as a custom has been recognized by the courts and that position is well documented in a precedent in the case of **Soulemezis v Dudley Holdings {1987} 10 NSWLR 247:**

> ***"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned Judgment "is not only to do but to seem to do justice." The Writing of Judgments [1948] 26 Can Bar Rev at 491. Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In Defence of Judicial Candor [1987] 100 Harv L Rev 731 at 737):***
>
> ***"…… A requirement that judges give reasons for their decisions – grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power."***

In **Blacks Law Dictionary 5th Edition**

> ***"Judgment is defined as the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."***

Courts are also alive to the fact that the onus of interpreting every constitutional provisions and Act of parliament is vested with the judiciary under Article 159 of the Constitution. To determine parameters of a dispute upon evaluation of the evidence on record for completeness and exhaustiveness, reasons for the decision is the norm rather than the exception. Clearly implying that the court or tribunal in granting or rejecting the claim has to set down the facts, general principles and the reasons for the decision. It is often considered that a Judgment given in absence of points of determination offends the basic principle of natural justice. The requirements are that the parties should know the reasons for and against the decision.

I would at this stage adopt the observations made in the case of: **South Nyanza Sugar Co Ltd v Omwando Omwando {2011} eKLR**

Justice Makhandia had this to say**:**

> ***"Ordinarily and in law, a Judgment should deal with issues raised and should not be scanty. A Judgment must comply with the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules which provide that a Judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision….. Any Judgment that does not contain the aforesaid essential ingredients is not a Judgment and an appellate court will frown at such a Judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal."***

It is thus both a statutory requirement under the Civil Procedure Act under Order 21 Rule 4 and Fair Administration Act in Section 6, that after a Judge adjudication process the conclusion drawn from the issues raised in the claim discloses the reasons for the determination. These are the guidelines laid out in **Taggart Review Administrative Law {2001} NZ Law Review 439 and Lewis v Wilson & Horton Ltd 2000 3 N 2LR 546**:

> ***"It was observed that reasons provide a dispute for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so. The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the Judge and satisfied the task human demand of those affected by judicial action to be told why. In this way the losing litigant may be able to accept the decision. The statement of reasons connects the decision to criteria external to the Judge and enhances the fairness of the process as well as demonstrating the rationality of the process"***

The other basic essentials for the duty to give reasons by Judges and Magistrates is to be found in the case of **Grollo v Palmer {1995} 184 CLR 348** while **Gummow J** said:

> ***"An essential attribute of the judicial power of the Commonwealth is the resolution of such controversies….. so as to provide final results which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning, an objective of the exercise of the judicial power in each particular case is the satisfaction of the parties to the dispute and the general public that, by these procedures, justice has both been done and been seen to be done."***

Furthermore, having demonstrated that the adjudication of disputes bears both constitutional and statutory trajectory it is most certain that those charged with the responsibility of judging cannot make decisions without giving reasons. On appeal or review the success or failure of it is to be determined on the basis of the reasons in the impugned Judgment. In **Wainohu 2011 CLR 181 214 and AA v BB {2013} ALR 353 French CJ and Kiefel J**

> ***"set out directly the relationship between the duty to give reasons and the principles to open justice that: the provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of Law, the application of those rules to the facts and the exercise of any relevant judicial discretion."***

Against the backdrop the appellant challenges the assessment on award of damages by the Learned trial Magistrate. A reading of the impugned Judgment does not disclose the reasons or the criteria that in part the court acted upon to grant orders on general damages. In the circumstances therefore, it is imperative at the contested claim can only be allowed or not be interfered with subject of course to the Judgment and reasons for the decision.

It is trite that an appellate court only interferes with the decision of the trial court where it has been shown that he or she applied wrong principles of Law, or ignored a relevant factor, or took into account irrelevant material that resulted in a quantum which wholly erroneous estimate of the damages. In the instant case, the absence of reasons a probable inference can be drawn that the tenor of which the assessment was done was more subjective and as a first appeal court when confronted with such a situation, an error of fact and rule is clearly manifested in regard to the Learned Magistrate specific finding.

This court on appeal, is unable to appropriate the impugned Judgment in absence of the underlying reasons for the decision. This is reinforced by Order 21 Rule 4 of the Civil Procedure Rules which requires the legality of the Judgment to contain the reasons for such a decision.

It is therefore an error of Law and flawed judicial exercise of discretion for a decision emanating from the trial court without the duty of giving reasons. It follows therefore that such a Judgment be subject of review on the lawfulness of the decision. That as it may be this appeal is mainly on whether or not to reverse the assessment of damages.

Having carefully considered the material before this court and circumstances of the case the discretion of the trial court is hereby interfered with pursuant to the principles in **Mbogo v Shah {1968} EA 93.**

The upshot is that the appeal succeeds as follows:

> ***(a) General damages set aside and enhanced to Kshs.400,000/= subject to 20% liability.***
>
> ***(b) The claim on future medical of Kshs.50,000/= also varied and substituted with Kshs.90,000/=.***

(c) Specials of Kshs.1,500/= cost and interest at court rates form part of the success of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Kiponda for Wambua for the appellant

2. Mr. Shujaa for Jengo for the respondent