REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 98 OF 2013

THOMAS OWITI.....APPELLANT

-VERSUS-

WILSON KAYELI KEIZA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.M. Wattimah, Resident Magistrate,

delivered on 12 July 2013 in Eldoret CMCC No. 602 of 2012)

JUDGMENT

[1] This is an appeal emanating from the Judgment and Decree passed in **Eldoret Chief Magistrate's Civil Case No. 602 of 2012: Wilson Kayeli Keiza vs. Thomas Owiti**. The Respondent had sued the Appellant in that suit claiming general and special damages in respect of injuries suffered in a road traffic accident that took place on **14 April 2012** at Msalaba Yellow area along the Kitale-Eldoret Road. The Respondent had averred, in his Plaint dated **26 July 2012**, that he was a pillion passenger on **Motorcycle Registration No. KMCQ 705W,** Focin, when the Appellant and/or his agent/employee/driver, drove **Motor Vehicle Registration No. KPB 008V,** Ford Ranger Pick-up, so recklessly, carelessly and negligently, that he permitted it to lose control and collide with the said motorcycle.

[2] Particulars of negligence attributed to the Appellant were set out by the Respondent in Paragraph of the Plaint thus:

[a] Driving **Motor Vehicle Registration No. KBP 008V** at an excessive speed in the circumstances;

[b] Driving without due care and attention of other road users;

[c] Driving in an erratic and zigzag manner;

[d] Failing to slow down, swerve, or in any other manner maintain the said motor vehicle so as to avert the accident;

[e] Driving a defective motor vehicle;

[f] Driving carelessly, negligently and recklessly;

[g] Failing to adhere to provisions of the Highway Code;

[h] Employing an untrained, ill-trained, reckless and negligent driver/servant/employee and/or agent;

[i] Recklessly making a U-turn on a highway.

[3] The Respondent also relied on the doctrine of *Res Ipsa Loquitor* and blamed the Appellant for the accident and the injuries he sustained, the particulars whereof were set out in Paragraph 5 of the Plaint dated **26 July 2012**. It was in the light of the foregoing that the Respondent prayed for general damages for pain, suffering and loss of amenities as well as special damages, interest and costs. The Respondent also asked to be compensated for future medical expenses, especially for surgery for the purpose of removing the orthopeadic implants, plates and screws.

[4] The Appellant resisted the suit vide his Statement of Defence dated **10 September 2012**. He denied the particulars of negligence and put

the Respondent to strict proof of his assertions. In the alternative and on a without prejudice basis, the Appellant averred that, if indeed the accident took place, which he denied, then the same was wholly and substantially caused and/or contributed to by the negligence of the Respondent. Thus, at Paragraph 3 of the Defence the Appellant furnished the particulars of the Respondent's negligence thus:

[a] Riding recklessly, negligently and carelessly along the Kitale-Eldoret Road without due regard to other road users;

[b] Failing to wear appropriate protective gear such as a helmet;

[c] Failing to maintain a proper look out in the circumstances;

[d] Negligently ignoring the safety precautions expected of a pillion passenger;

[e] Overloading;

[f] Riding a defective motor cycle.

[5] Hearing commenced on **23 November 2012** in which the Respondent's side called a total of 4 witnesses. The Appellant called his driver, **Samuel Okindo Orwa (DW1)** who testified on **17 May 2013**. Upon carefully weighing the evidence presented before her, the learned trial magistrate came to the conclusion that:

> **"…both parties did contribute to the occurrence of this accident. It was at 7.00 p.m. and definitely darkness was coming in. The weather was also wet as it was said that it was drizzling, this might have interfered with visibility to some extent… DW1 in cross examination stated that after the accident he came out through the left door as the right door could not open. This simply means that the impact was on his right hand side which actually is the rightful side the plaintiffs were supposed to be. More so, failing to notice the motorcycle prior to the accident confirms that DW1 must have been driving in high speed considering how the weather was and that it was dark at that time. He ought to have been more careful.**
>
> **On the other hand, the plaintiffs were in excess on the said motorcycle. The motorcycle is only meant for one passenger yet the plaintiff and his friends were in excess of two…it has not been established if the rider had a driving licence or not. The plaintiffs had a duty to ensure that they are safe, of course, 3 passengers are more than the capacity the motorcycle could carry. This causes the vessel to be unstable on the road and may even interfere with the driver's comfort to control the motorcycle; besides, the plaintiff and his colleagues did not have any protective clothing e.g. helmet or jackets. Thus they put their lives at risk. I do find that both parties contributed to the accident in equal portions. I do apportion 50%:50% between the defendant and the plaintiff. This order on liability shall apply to Civil Suit number 600 of 2013 and Civil Suit number 601 of 2013 respectively."**

[6] The lower court then proceeded to determine the issue of quantum and ended up awarding the Respondent **Kshs. 355,500/=** together with interest thereon and costs of the suit. The amount aforementioned was computed as hereunder:

[a] General Damages - **Kshs. 700,000/=**

[c] Special Damages - **Kshs. 11,000/=**

Total - **Kshs. 711,000/=**

Less 50% contribution - **Kshs. 355,500/=**

Amount awarded - **Kshs. 355,500/=**

[7] Being dissatisfied with the Judgment and Decree of the lower court on quantum, the Appellant filed this appeal on the following grounds:

[a] That the learned magistrate erred in law and fact in awarding **Kshs. 711,000/=** as general damages which was not consistent with the injuries sustained, submissions of the Counsel for the parties and the legal precedents.

[b] That the learned magistrate erred in law and in fact in arriving at the said general damages, an amount not supported by the evidence on record.

[c] That the learned magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages.

[d] That the learned magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.

[e] That the learned magistrate erred in law and in fact in awarding quantum of damages without having regard to the injuries sustained by the Respondent.

[f] That the learned magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant.

[g] That the learned magistrate erred in law and in fact in failing to consider the submissions tendered by the Appellant.

[h] That the learned magistrate erred in law and in fact in applying the wrong principles of law in determining the quantum of damages payable.

[8] In the premises, the Appellant prayed that the Judgment and Decree in **Eldoret CMCC No. 602 of 2012** on general damages be set aside; and that in the alternative, this Court do make its own independent assessment on quantum of damages. He also prayed for costs of the appeal.

[9] The record of the lower court shows that, at the instance of the parties, directions were issued herein on **25 July 2017** that this appeal be canvassed by way of written submissions. Thus, Counsel for the Appellant, **Mr. Wanyonyi,** filed his written submissions on **1 October 2017**. He urged the Court to rely on **Rahima Tayab & Others vs. Ann Mary Kiwanu** [1983] KLR 114 for the proposition that comparable injuries ought to attract comparable awards in damages with a view of attaining some uniformity in this area of law. He stressed the need for a reasonable balance between the need for compensation and the interests of the economy, arguing that very high awards would, in the end, have a deleterious effect.

[10] It was further the submission of **Mr. Wanyonyi** that, since **Dr. Aluda (PW1),** did not apportion any percentage in terms of disability, permanent or otherwise, the award by the lower court was not only excessive, but was also inconsistent with the injuries sustained and the applicable judicial precedent. He proposed that an award of **Kshs. 300,000/=** would have sufficed. He therefore urged for the setting aside of the award and for the Court to undertake its own independent assessment.

[11] On his part, **Mr. Alwang'a,** learned Counsel for the Respondent, urged the Court to take into account the nature and extent of the Respondent's injuries as set out in the Medical Report prepared by **Dr. Aluda;** and the fact that the Respondent was still on crutches at the time of giving his testimony before the lower court. Counsel therefore defended the lower court's award, contending that it was within the existing legal principles and precedents. He made reference to 8 authorities in which the sums awarded for comparable injuries ranged between **Kshs. 600,000/=** and **Kshs. 2,400,000/=.** Thus, Counsel urged the Court to find that the learned trial magistrate exercised her discretion judicially; and, therefore, that no legal principles were violated to warrant interference.

[12] I am mindful that, this being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[13] I have given careful consideration to the evidence placed before the lower court. That evidence shows that the Respondent, **Wilson Kayeli Keiza (PW2),** a teacher at **Chatamilly Primary School**, had gone to Soy Market on the **14 April 2012** to buy some seedlings. There he met his colleagues, **Bartholomew Shilla Makongele** and **Thomas Hamisi**. That after doing their shopping they decided to take a ride home on the same motorcycle but got involved in a road traffic accident on their way when an oncoming pick up, **Registration No. KBP 008V**, lost control and hit them. He further told the lower court that he sustained fractures on the femur and tibia of the right leg which had to be fixed by metal plates. In addition, he suffered a fractured pelvis along with neck and chest pains. He was consequently admitted at **Moi Teaching and Referral Hospital** for treatment. The Respondent produced his treatment documents, including the Discharge Summary and receipts issued at **Moi Teaching and Referral Hospital**.

[14] Dr. Samuel Aluda, a private medical practitioner based in **Eldoret Town**, testified as **PW1** before the lower court. He testified that he had occasion to examine the Respondent, **Wilson Kayeti Keiza**, on **7 May 2012** following a road traffic accident which took place on **14 May 2012**. He confirmed that the Respondent had sustained injuries for which he was admitted at **Moi Teaching and Referral Hospital** for treatment before his discharge on **30 April 2012**. His examination of the Respondent revealed the following:

[a] Tenderness in the scalp forehead and back, pelvis and right lower limb;

[b] Scars on the scalp and forehead;

[c] Sustained double fractures of the right femur;

[d] Sustained double fractures of the right tibia;

[e] Sustained treble fractures of the right fibula

[15] Dr. Aluda produced his Medical Report as the **Plaintiff's Exhibit 1(a)** along with a receipt for **Kshs. 3,000/=** which he charged the Respondent for his services. The receipt was marked **the Plaintiff's Exhibit 1(b).** In his opinion and prognosis, the injuries were "**very severe"** but were continuing to heal. He took the view that a proper prognosis could not be made at that particular point in time. **PW1** further testified that he filled the Respondent's P3 Form and expressed a similar opinion, in addition to classifying the Respondent's injuries as "**grievous harm".** He produced the P3 Form as **the Plaintiff's Exhibit 2** before the lower court.

[16] Granted the foregoing summary of evidence, it is manifest that he only issue for determination in this appeal is the question whether the lower court erred in principle in its assessment of damages. It is to be borne in mind that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In **H. West & Son Ltd vs. Shephard [1964] AC 326**, for instance, it was held that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[17] Similarly, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."** (Also see **Butt vs. Khan [1981] KLR 349)**

[18] The approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, and which I find useful, was thus:

> **"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."**

[19] And in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR,** the Court of Appeal suggested thus:

> **"…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] With the foregoing principles in mind, I have taken into consideration the injuries suffered by the Respondent as set out in paragraph 11 herein above; namely, double fractures of the right femur; double fractures of the right tibia; and treble fractures of the right fibula, as well as soft tissue injuries. I have, consequently, put into consideration the authorities cited by learned counsel herein and endeavoured to ascertain the current range of judicial thought involving comparable injuries and noted that:

[a] In **Vincent Mbogholi vs. Harrison Tunje Chilyalya** [2017] eKLR, the plaintiff sustained a fracture of the left tibia bone along with soft tissue injuries and was awarded **Kshs. 500,000/=** as general damages for pain suffering and loss of amenities. The appellate court declined the invitation to reduce that award, terming it reasonable in the circumstances.

[b] In **Alphonza Wothaya Warutu & Another vs. Joseph Muema** [2017] eKLR, the plaintiff was awarded **Kshs. 800,000/=** for multiple injuries which included compound fracture of the right humerus and compound fracture of the right tibia. That award was upheld on appeal.

[21] In the light of the foregoing, I am not at all persuaded that the lower court's award was manifestly excessive or erroneous in any way. Consequently, I find no merit in the appeal and would accordingly dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL, 2020

OLGA SEWE

JUDGE