REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 64 OF 2019

JOSMIL MARINE LOGISTICS & CONTRACTOR LTD.....APPELLANT

VERSUS

HARRON SHITSESWA ATITWA.....RESPONDENT

(Being an appeal from the Judgment and decree of the Senior Principal Magistrate's Court at Mariakani dated 31st July 2019 in SPMCC No. 374 of 2017 by Hon. N. C. Adalo (SRM))

BETWEEN

HARRON SHITSESWA ATITWA.....PLAINTIFF

VERSUS

JOSMIL MARINE LOGISTICS & CONTRACTORS LTD.....DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Amuga Advocate for the appellant

A. N. Kamau Advocate for the respondent

JUDGEMENT

This is an appeal on against the Judgment of **Hon. N. C. Adalo (SRM)** on 31.7.2019 where she awarded the respondent general damages for pain and suffering, and loss of amenities for Kshs.300,000/= plus costs and interests.

Being dissatisfied with the award, appellant through its legal counsel **Mr. Amuga** filed this appeal on the following grounds:

(1). The Learned trial Magistrate erred in Law and fact in making an award which is so inordinately high as to represent an erroneous award of general damages in the case, considering that the respondent had sustained only minor soft tissue injuries which did not require any lengthy medication and which completely healed with no permanent disability.

(2). The Learned trial Magistrate erred in Law and fact in ignoring or failing to apply binding decisions of the High Court which were cited to her by the appellant's advocate and in which injuries of a comparable nature were considered by the High Court and the Learned Magistrate therefore arrived at a wrong decision when she awarded general damages of Kshs.300,000/= for minor soft tissue injuries, an award which was too high as to amount to a wrong exercise of discretion.

(3). The Learned trial Magistrate erred in Law and fact in failing to consider the medical report on the respondent's injuries prepared by the doctor appointed by the appellant which report was produced in evidence by consent of the parties and further erred by relying only on the medical report produced in evidence by the respondent. had the Learned Magistrate taken all the evidence into consideration, an excessive award of Kshs.300,000/= would not have been made to the respondent whose injury merited no more than an award of between Kshs.50,000/= to Kshs.100,000/= as general damages.

(4). The Learned trial Magistrate erred in Law and fact in failing to exercise her discretion with regard to award of general

damages judiciously.

Submissions on appeal

In support of the appeal Learned counsel argued and submitted that the respondent purely sustained soft tissue injuries which could not attract more than Kshs.50,000/= assessment of damages.

The amplification of his submissions is to the effect that the medical reports by **Dr. Baradia** and **Dr. Ndegwa** both concluded the nature of injuries sustained were mainly to the head and soft tissue with no permanent disability. Counsel relied on the following authorities which on reflection he submitted could have applied to that case involving injuries to the respondent to wit**: M. H. Shaw v Stephen Ngari {2011} Eklr, Gatoka Limited v Daniel Kimathi Nyaga {2012} eKLR, Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd {2015} eKLR, Alex Ogutu v P.N.M.N. (Minor suing through her next friend and mother ENP) {2017} eKLR , Ndungu Dennis v Ann Wangari Ndirangu & Another {2018} eKLR**.

In the circumstances Learned counsel urged this court to interfere with the award and substitute it with a friendlier one consistent with similar awards from the cited referred authorities.

Learned counsel for the respondent argued and submitted by opposing the appeal by first asking the court to appreciate the long standing principles on the rule of the first appellate court as elucidated in **Kenya Ports Authority v Kuston (Kenya) Limited {2009} 2EA 212, Jasper Maluki Kitavi v The Hon. Minister for Lands & Settlement & Physical Planning & another {2017} eKLR, Peters v Sunday Post Limited {1958} EA424.**

Further, Learned counsel submitted that its significant in this regard for the court to take into account the gravity of the injuries sustained by the respondent. That the appellant has failed to explain the disclosed injuries as founded in the initial treatment notes, medical reports by **Dr. Baradia** and **Dr. Ndegwa**. According to Learned counsel, in the round of documentary evidence on medical examination as observed they were not just soft tissue but those accompanied with concussion. In order to demonstrate and distinguish the cases referred to by the appellant counsel having to his perspective the following decisions were cited to be of relevance: **Artan Hussein & 2 others v Said Hamadi Upepo {2017} Eklr, Gatoka Ltd v Daniel Kimathi**. To that extent Learned counsel contended that from the evidence, this part of the award was properly assessed by the Learned trial Magistrate.

Determination

As stated in the cases of **Peters v Sunday Post Limited {1958} EA 424 and Selle & Another v Associated Motor Boat Co. Ltd & others {1968} EA 123,**

> ***"the first duty of this court is to assess, evaluate and subject the evidence tendered before the trial court to afresh scrutiny, and to draw its own conclusions, though bearing in mind that it has neither seen or heard the witnesses and should make allowance in this respect…."***

In re-assessing general damages for pain and suffering of the lower court the principles that guide this court are clearly stipulated in various decisions. In **Henry Hidaya Ilanga v Manyema Manyoka {1961} 1 EA 705:**

> ***"In considering this question when discussing the principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a Judge in this case the Learned trial Magistrate " The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a Jury, the appellate court is not justified in substituting a figure of its own for that awarded below, simply because it would have awarded a different figure if it had tried the case, in the first instance. Even if the tribunal of first instance was a Judge sitting alone before the appellate court can properly intervene, it must be satisfied either that the Judge in assessing damages, applied a wrong principle of Law (as by taking into account some irrelevant factors or leaving out of account some relevant one) or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

Further in **Cecilia W. Mwangi & Another v Ruth Mwangi {1977} eklr** cited with approval in the case of **Tayab v Kinamu {1982-88} 1 KAR 90:**

> ***"I state this so as to remove the misapprehension so often repeatedly, that the plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the Law she is only entitled to what is in the circumstances a fair compensation, for both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill."***

I readily accept the dicta of **Wooding C. J. in Cornillac v St Louis {1965} 7 WIR 491:**

> ***" The court in exercising discretion to assess damages ought to bear in mind the following guiding principles:***
>
> ***(a). The nature and extent of the injuries sustained.***
>
> ***(b). The nature and gravity of the resulting physical disability.***

(c). The pain and suffering which had to be endured.

(d). The loss of amenities suffered and

(e). The extent to which consequentially, the claimant's pecuniary projects have been materially affected."

In the instant case, it's clear from the record that both parties agreed to consent on liability apportionate at 35%:65% against the appellant. From the witness statement of the respondent he was involved in an accident in which a bag fell on his body occasioning trauma to the head and soft tissue to the neck and right ankle. The medical reports by **Dr. Baradia** and **Dr. Ndegwa** produced in evidence as exhibits show that a medical investigation carried out found the multiple injuries to be soft tissue in nature with a mild concussion.

Based on this initial injury and further clinical findings as diagnosed by the experts pursuant to Section 48 of the Evidence Act the injuries were all consistent to what was sustained at the time of the accident.

The pain aforementioned and intensity of it suffered by the complainant though present was of a temporary nature. No sooner was he attended at Bomu hospital, the respondent had no reason for further review. There was no evidence of psychological trauma or the respondent's normal predictable course of life was altered in anyway following the accident.

This observation is in tandem with the principle in **Angeleta Brown v Petroleum Company of Jamaica Ltd and Juici Beef Limited Claim No. 2004 {HCV1061}** where the court held interalia:

"That an award for loss of amenity as meant to compensate claimant for the loss of quality of or reduced enjoyment of life."

In view of the court in **Derrick Munroe v Gordon Robertson {2015} JMCA** stated that:

"There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum Judges are not entitled to simply pluck a figure from the air. Regard must therefore be had to comparable cases in which complainants have suffered similar injuries."

Pursuant to this appeal, I have reviewed the authorities referred to by the respondent's counsel to advance the case for a higher award of damages for pain and suffering and loss of amenities. On the same breadth, the appellant counsel also had submitted and placed reliance on various cases which to his view compared with the respondent's injuries.

I must mention that when applying the principle of similar injuries and awards to award compensation its materially not plausible to sufficiently justify the making an award by reference to a supplementary statement on injuries. The evidence and findings of the court must be read and taken as a whole for particulars on similar characteristics of injuries and final assessment made by the court.

In the instant case, the contested assessment of damages at Kshs.300,000/= for soft tissue injuries with no permanent disability to me tends to be on the higher side. I bear in mind that appropriate damages assessment is a discretionary function bestowed upon the trial court and on appeal, any interference can only be undertaken within the scope of **Henry Hidaya Ilanga case (supra)** read in conjunction with the principles in **Nance v British Columbia Electric Railway Co. Ltd (supra).**

Further, the appellant counsel submits that to the best of his knowledge on the evidence against what looked to be the gravity of injuries an award of Kshs.30,000/= can be taken to be a fair award. The argument raised by the appellant counsel against the award to a large extent is primafacie correct on what to be relied upon to assess damages.

Nevertheless, Learned counsel forgets one thing the carrier principle on assessment of damages on pain and suffering is as held in **Pickett v British Rail Engineering Limited {1980} AC 136** in which the court stated:

"There is no way of measuring in money pain, suffering, loss of amenities, loss of expectation of life. All that the court can do is to make an award of fair compensation inevitably, this means a flexible judicial tariff, which Judges will use as a starting point in each individual case, but never itself as decisive of any case…."

From this court's position weighing one factor after another, the evidence and medical reports of **Dr. Baradia** and **Dr. Ndegwa** the award with respect to the injuries suffered cannot be maintainable at a sum of Kshs.300,000/=. This part of the award for pain and suffering was on the higher scale of the, fulcrum and, must therefore be set aside varied and substituted with re-assessment of Kshs.160,000/=.

In the result, the appeal succeeds to that extent as the rest of the claim remain undisturbed. The appellant is also awarded costs of this appeal but interest on the award for the respondent from the date of Judgment delivered by the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MAY 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang for Kamau for the respondent