REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 61 OF 2019

VINTAGE AUTOS CO. LIMITED ..... APPELLANT

VERSUS

JAMES KISANGAU ..... RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kaloleni dated 31st July 2019 in PMCC No. 99 of 2015 by Hon. L. N. Wasige (PM))

BETWEEN

JAMES KISANGAU..... PLAINTIFF

VERSUS

VINTAGE AUTOS CO. LIMITED ..... DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Okello Kinyanjui Advocate for the appellant

Tarus Advocate for the respondent

JUDGEMENT

This is an appeal from the Judgment of the Principal Magistrate **(Hon. L. N. Wasige)** delivered on 31.7.2019 in which she awarded the respondent Kshs.600,000/= general damages for pain and suffering and specials of Kshs.2,000/= plus costs and interest on the total quantum.

Being dissatisfied with the award on general damages the appellant lodged this appeal based on the following grounds:

(1) The Learned Magistrate erred in Law and in fact in not properly appreciating the evidence that was before him;

(2) The Learned Magistrate erred in Law and in fact in making a finding that the accident is, ipso facto, blamed on the appellant.

(3) The Learned Magistrate erred in law and in fact making a finding in favour of Dr. Adede's medical report instead of Dr. Sheth's medical report without any valid reason.

(4) The Learned Magistrate erred in law and in fact in making a finding on general damages that was inordinately high in the circumstances.

(5) The Learned Magistrate erred in law and in fact in finding that the plaintiff had a 6% incapacity due to the injuries he sustained.

(6) The Learned Magistrate erred in law and in fact in awarding damages that were not commiserate to the loss suffered by the plaintiff, and who's medical reports only indicated the loss of two teeth.

(7) The Learned Magistrate erred in law and in fact in relying on extraneous factors to award damages in the matter.

(8) The Learned Magistrate erred in law and in fact in completely ignoring the decision of the High Court in Taita Taveta Matatu Cooperative Savings vs Zaina Rukoo {2016} eKLR which decision was relied on by the appellant in its submissions.

(9) The Learned Magistrate erred in law and in fact for making a finding that the appellant's submission on general damages were without basis.

(10) The Learned Magistrate erred in law and in fact in making a finding on general damages and that were extravagant and basing it on a decision made years ago and estimating the rate of inflation instead of seeking other authorities provided by the appellant in determining the recent awards.

(11) The Learned Magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters in making his award for general damages.

(12) The Learned Magistrate erred in law and in fact in generally making erroneous findings in the suit.

Background

The claim as deduced from the pleadings was to the effect that on or about 13.11.2015 along Mombasa – Nairobi at Mariakani Township, the defendants said motor-vehicle registration Number KG6918 was carelessly/recklessly/negligently driven/controlled/managed by the defendants and or their authorized agent/servants. That the same lost control and hit the plaintiff who was a lawful pedestrian seriously injuring him as a result, sustained serious injuries and did suffer loss and damage.

The plaintiff therefore brought the claim based on particulars of negligence as pleaded in paragraph 5 of the Plaint. On the footing of the negligent act and breach of duty of care, the plaintiff sustained severe head injury, mobile teeth 11 and 21, cut wound on the lower lip, blunt injury to the head.

The issue on liability was apportioned at 20%:80% against the defendant quite apart from the issue on liability, the appellant is aggrieved with the award on general damages, which it invites the court to reconsider whether the Learned trial Magistrate erred in Law and fact to award a higher and excessive damages under this head.

Submissions on behalf of the Appellant

As a matter of convenience, both counsels filed their respective written submissions to facilitate quick resolution of the appeal. Though Learned counsel for the appellant raised twelve grounds in support of the appeal the question finally turned on expert evidence and exercise of discretion in awarding damages; for pain and suffering.

In the instant case, it was the case for the appellant as advanced by **Mr. Kinyanjui** that the evidence disclosed the nature of injuries and residual effect on the respondent. According to Learned counsel the Learned trial Magistrate laid more emphasis on the medical report by **Dr. Ndegwa** for the benefit of the respondent ignoring the second medical report of **Dr. Sheth.**

In this regard **Mr. Kinyanjui** argued and submitted that the factoring in of future dental prosthesis or dentures was never pleaded and therefore any inclusion of it by the Learned trial Magistrate remains a misdirection. **Mr. Kinyanjui,** further sought to explain what would hardly be a matter of concern on the application of Section 48 of the Evidence Act, as appraised and applied by the Learned trial Magistrate. The bone of contention being lack of testing the velacity of the expert evidence by way of cross-examination. On expert evidence he accorded the court the dicta in **Peter Kariuki Njenga v Gabriel P. Muchira & Another {2017} eKLR, Mutonyi v R {1982} KLR 203.** He also admitted that they did not call the makers of the medical reports to clarify any of the issues that may be with regard to the expert option in their reports. On this Learned counsel found solace in **Maina Thiongo v R {2017} eKLR.**

That the Learned trial Magistrate had not tested the expert evidence orally and on oath to produce the respective medical reports argued Learned counsel, was a misdirection for this court to interfere with on appeal. It was on this submissions reliance was placed on the cases of **Wang'ondu's case** and **Akute's case (supra).**

Taking on the Judgment on award of damages, Learned counsel invited the court to appraise the evidence on the injuries suffered and subsequent medical reports with prognosis made by **Dr. Ndegwa** and **Dr. Sheth**. In particular Learned Counsel cited the cases of **Taita Taveta Matatu Co-operative Savings v Zaina Rukoo {2016} eKLR, Isaac Murungu v Silas Kaluvani {2017} eKLR** to set out what could have been the proportionate and fair award for the respondent.

As already observed Learned counsel argued and submitted that on his closing submissions that the appeal should be allowed, award of Kshs.600,000/= set aside as being grossly and inordinately high in the circumstances of the case.

The Respondent's submissions

As an alternative to the appellant counsel submissions **Mr. Tarus** for the respondent encapsulated the principles in **Bashir Ahmed Butt v Uwais Ahmed Khan {1982-88} KAR , Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003, Mariga v Musila {1984} KLR 257, Gitobu Imanyara & 2 others v Attorney General {2016} eKLR, Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini v AM. Lubia & Olive Lubia {1982-88} 1 KAR 727.** Learned counsel underpinned the principles in each of the above authorities in relation to the duty and jurisdiction of the first appellate court and the question of what amounts to a plea to interfere with an assessment and

award of damages by the trial court. Learned counsel went on to submit that the broad criterion applied by the Learned trial Magistrate did not occasion an error or misdirection capable of being corrected by this court. Having regard to the evidence, Learned counsel reiterated and submitted that the respondent did suffer serious injuries as depicted in the medical reports by **Dr. Ndegwa** and **Dr. Sheth.**

Learned counsel relying on **Rushton v National Coal Board {1953} IQB 495, Reddy v Bates {1984} Ilrm 197** submitted that the reasoning of the Learned trial Magistrate was in line with the principles on similar awards in comparable cases for pain and suffering and loss of amenities. Having so submitted Learned counsel urged this court to reject the appeal in its entirety for lack of merit.

Analysis and Determination

In **1860 Chief Justice John Marshall** stated:

> ***"Courts are the mere instruments of the Law, and can will nothing when they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by Law, and, when, that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislature, in other words to the will of the Law. However, judicial discretion does not provide license for a Judge to merely act as he or she chooses."***

These principles would form the bedrock and the force behind the outcome of the appeal. Confronted by the two opposing versions as to how the Learned trial Magistrate succeeded or failed to assess general damages on the already adduced evidence, first and foremost is to bear in mind the principles on the power and jurisdiction of this court as laid down in **Okeno v R {1972} EA 32.** It is only too trite also as stated in **Taita Taveta Matatu Co-operative Savings v Zaina Rukoo {2016}** the court said:

> ***"The assessment of damages is within the discretion of the trial Judge, the appellant court will only interfere where trial Judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence."* (See also Bashir Ahmed Butt v Uwais Ahmed Khan {1982 – 88} KAR, Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142 {2003}).**

The court will also consider the factors as laid down in **Ugenya Bus Service v James Gachohi CR Appeal No. 66 of 1981** where **Madan JA** as he then was stated:

> ***"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderates vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision. I know I am placed in an escapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can. I also knew that the days of small and stingy awards are gone. They were decidedly misery in any event like Ksh.20,000 for the loss of a forearm or Ksh.50,000 for the loss of an eye even without the course of inflation they were niggardly."***

I must say like **Madan J. A.** observed that:

> ***"Civil courts are under a lot of pressure from litigants who would be dissatisfied with one thing or another on assessment of damages."***

It must also be noted that as a general principle a right of appeal to this court is in the form of a rehearing on both fact and law from a discretionary decision. The identification of the error in the Learned trial Magistrate exercise of discretion to award general damages is the basis upon which the court will uphold or allow the appeal.

In the case of **House v The King {1986} 161 CLR 513 518 – 19** The court went about to state as follows:

> ***"Discretion signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard – what is just and equitable – which calls for an overall assessment in the light of the factors mentioned in the statutory provision, each of which in turn calls for an assessment of circumstances. Because this assessments call for value Judgement in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts which its operation depends with a close eye on the characteristics of a discretionary order in the sense which we have outlined, if the questions involved lead themselves to differences of opinion which within a given range are legitimate and reasonable answers to the questions, it would be wrong to allow a Court of Appeal to set aside a Judgement at first instance merely because there exists just such a difference of opinion between the Judges on appeal and the Judge at first instance. In conformity with the dictates of principled decision making, it would be wrong to determine the parties rights by reference to a mere preference for a different result over that favoured by the Judge at first instance. In the absence of error on his part. According to our conception of the appellate process, the existence of an error whether of Law or fact, on the part of the court at first instance is an indisposable condition of a successful appeal."***

In the instant appeal whether one looks at the appellants concerns from the perspective of Section 48 of the Evidence Act and the factors the trial court took into account in assessing general damages, what is fundamentally in issue is the due weight given on exercise of discretion. Nevertheless, in assessing whether the award is grossly disproportionate to the injuries suffered by the respondent the court must consider the various species of evidence, settled principles, personal circumstances of the respondent and the resulting quantum.

Therefore, the matters which should be considered on appeal relate with the evidential and subsequent merit of the claim as founded by the Learned trial Magistrate.

The crux of the dispute in the present matter as earlier alluded to elsewhere in this analysis is whether the award of Kshs.600,000/= awarded for pain and suffering is inordinately so high that would amount to an erroneous estimate of the award.

How did the trial Magistrate calculate the sum. From the record she makes reference to the P3 Form, medical report by **Dr. Ndegwa** dated 17.11.2015 and **Dr. Sheth** dated 29.6.2016. Further, obviously not forgetting the oral testimony of the respondent. She also derived assistance from the cited authorities by both counsels. Its remarkable that in making her findings the Learned trial Magistrate did distinguish the cited cases of **Joseph Musee Mua v Julius Mbogo Mugi & 3 others {2013} eKLR with that of Taita Taveta Matatu Co-operative Savings (supra).** The Learned trial Magistrate in her conceded view the respondent did suffer severe injuries with a disability of 6%. With that she was confident that an award of Kshs.600,000/= is a fair compensation against the appellants.

I must state here and now that my reading of the two medical reports do not form an impression of any material differences to the nature of the injuries suffered by the respondent. It is not in dispute that the respondent sustained injuries tabulated as follows:

(a) Loss of mobile teeth 11 and 21

(b) Cut wound on lower lip

(c) Bruises on the elbow

(d) Cut wound on the 5th web of the left hand.

(e) Blunt injury on hip and back

The evidence of the respondent and that of the medical reports was well balanced. The Learned trial Magistrate has not stated anywhere in her Judgment that she believed the expert evidence of **Dr. Ndegwa** in contrast with that of **Dr. Sheth** as Learned counsel strongly submitted. On this point drawing inspiration from the authorities cited by Learned counsel for the appellant **Peter Kariuki Njenga (supra), Mutonyi v R (supra), Maina Thiongo v R,** it has been held severally that the evidence by experts under Section 48 of the Evidence Act must be considered along with other available evidence on matters in issue. It is within the discretion of the trial Magistrate or Judge to decide whether or not to believe the expert and if one expert is preferred over the other, reasons be given for that legal proposition. In the instant case, the Learned trial Magistrate made reference to the disability of the respondent assessed at 6%. It would be permissible to say that if the prognosis described by Dr. Ndegwa in which the appellant submitted on, either way as to the parameters on questions of degree he was entitled to demand attendance of the expert for cross-examination.

From the record, the admission of the two medical reports was considered in the context of the case management directions agreed between the parties and the discretionary administrative decision of the trial court.

Further, in reference as to whether to call for the experts to give oral evidence as submitted by Learned counsel for the appellants identified in this appeal, there is no specific error capable of being described as a misdirection for purposes of interference by appellate review within the exercise of discretion by the Court.

As a practical matter it was for the appellant counsel to object to the admission of the medical reports without calling oral evidence to that effect. Its also appropriate to bear in mind that the ultimate decision of the trial Magistrate is never dependent on expert opinion but a fact proved on other relevant factors to render the decision on existence or non-existence of a fact in issue. With respect, I think the Learned trial Magistrate was not in error when he permitted production of the medical reports without personal attendance of **Dr. Ndegwa** and **Dr. Sheth,** to give oral testimony.

In **R v Mohan {1994} 2 S.C.R 9** the Court held that:

"Admissibility of expert evidence is governed by the following principles: (a) relevance (b) necessity in assisting the trier of fact (c) the absence of any exclusionary rate (d) a properly qualified expert."

It is not in dispute that none of these elements was raised at the trial to exclude or treat **Dr. Ndegwa's** medical report on the aspect of his opinion on disability degree of assessment at 6%. The important point to note about this case is that, notwithstanding, the Learned trial Magistrate mention of 6% degree of disability; there are other multiple considerations which go in the assessment of general damages. In short this ground of appeal fails.

Keeping in mind these principles I am of the view that the nature of the award as put forward by the appellants counsel ought to be considered. The reason for this is that for all intents and purposes, the appellant postulates it to be excessive and inordinately high.

At this point I should now turn to the significant case of **Taita Taveta Matatu Co-operatives Savings (supra),** which formed the basis of the decision by the Learned trial Magistrate the facts of the case are not in dispute. The respondent in this case had suffered loss of two lower teeth, dental alveolar fracture upper teeth and soft tissue to the leg. At the time of the medical examination, she had difficulties in chewing and had a small scar on the left knee. The degree of injury was assessed as grievous harm. When it came to assessment she was awarded Kshs.250,000/= as general damages for pain and suffering. On appeal in 2016 the award was confirmed by the High Court at Voi. It's this award the Learned trial Magistrate adjusted upward to Kshs.600,000/= which the appellants challenges for being excessive.

As noted above, the respondent in the authority referred to by the Learned trial Magistrate was considerably of multiple degree of injuries in comparison with the present claimant. There are necessary conditions for any appeal court as specifically stated in **Mwanta Jonathan v Silvia Omunga HCCA NO. 17 of 2017** in which the court stated that:

> ***"In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Geofrey Mwenda CA No. 147 of 2002 {2004} eKLR "Having so said , 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 as far as possible be compensated by comparable awards keeping in mind the correct make of awards in similar cases."***
>
> ***In addition, the current value of the shillings and the economy have to be taken into account and although astronomical awards which must be awarded, the court must ensure that awards made sense and result in fair compensation."***

In the present case the Learned trial Magistrate never explained herself in the Judgment that indeed Kshs.600,000/= fits in the scheme of similar award with **Taita Taveta case (supra)** whose assessment was pegged at Kshs.250,000/= for general damages. In the first place there was a marked variance as to the injuries though both of them shared a common denominator on loss of two teeth.

There was also the factorial ratio on the issue of fluctuations in value of Kenyan currency as at 2016 and 2019 when the Judgment of Kshs.600,000/= was delivered by the Learned trial Magistrate, specifically, under general principles on inflation and deflation influential factors, to be taken into account, using any measure of consistency a devaluation of Kshs.250,000/= to a Judgment value of Kshs.600,000/= would be far too distinct to be considered as the extent of the inflationary salvage in Kenya. Inflation is a quantative measure of the rate at which a decrease in the purchasing power of a nation's currency. That analyzed measure of inflation percentage change in my view has not risen to a more varied level to attract 50% ratio compensation as the Learned trial Magistrate award seems to reflect.

Broadly, considered the trade off between the award of Kshs.250,000/= in 2016 and the resultant award of Kshs.600,000/= is an erroneous estimate.

A related problem a core component is that, the Learned trial Magistrate completely ignored the important principle of a fair compensation, comparable awards keeping in mind the correct level of awards in similar cases. The severity of the injuries was also mistakenly considered between the respondent in **Taita Taveta case (supra)** and the present respondent.

From the analysis of the evidence, I can safely conclude that the appellant counsel has shown that the assessment was in the circumstances ridiculously and manifestly high. Disclosure of an error of Law or fact is a necessary condition for this appeal court to interfere with the award complained of by the appellant. These relevancy grounds provide a basis under which I vary and set aside the award of Kshs.600,000/= by substituting with Kshs.320,000/= for the respondent, subject to a consent order on liability of 20%. This appeal therefore succeeds to that extent with costs.

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

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Wambui holding brief for Okello Kinyanjui for the appellant