REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 110 OF 2017

ZIPPORAH NZOKA.....APPELLANT

=VERSUS=

PKW (Minor suing through the father and friend **JWN.....RESPONDENT**

(Being appeal from the judgment of the Honourable D. Orimba Senior Principal Magistrate court delivered on 19th July 2017 at Senior Principal Magistrate Kangundo SPMC No. 96 of 2015)

=IN=

P K W (Minor suing through the father and friend **JWN.....PLAINTIFF**

=VERSUS=

ZIPPORAH NZOKA.....DEFENDANT

JUDGEMENT

1. On 21st December, 2012, **FNW**, the plaintiff's mother accompanied by her two children, **FKW** aged 2 years and **PKW**, aged about 11 years, the plaintiff herein boarded motor cycle Reg. No. KMCW 685U which was headed towards Tala Market along Katwanyaa-Tala earth road. It was their evidence that suddenly motor vehicle registration no. KAR 282B, Isuzu Pick Up emerged from the opposite direction at a very high speed while being driven on their lane and knocked them down causing them serious bodily injuries.

2. Following the said accident, through the assistance of good Samaritans, the plaintiffs were rushed to Level 4 Hospital where they were given first aid after which the plaintiff was transferred to Kenyatta National Hospital as he had sustained very serious injuries. According to the plaintiff's mother they were yet to fully recover and were still visiting Kangundo Level 4 Hospital for check-up. She therefore blamed the driver of the said vehicle for the accident. It was stated that the accident occurred at a sharp corner in a pot-holed area and that the driver was attempting to avoid the said potholes.

3. According to the evidence, the plaintiff sustained fracture of the pelvis among other injuries and was admitted at Kenyatta National Hospital for 5 months from 23rd December, 2013 to 18th March, 2013. According to the plaintiff's father, **JW** who testified as PW1, upon receiving the news of the accident he went to the scene and found the victims on the ground and his wife and the plaintiff had helmets. Similarly the plaintiff had a reflective jacket. According to him he spent Kshs 150,000.00 for further medical treatment. It was his evidence that incurred Kshs 271,000.00 towards the plaintiff's treatment at the said Hospital. It was stated that the plaintiff who was aged 12 years at the time of the accident was normal before then but after the said accident had his leg was shortened and walked with a limping gait with the aid of a walking stick and was unable to play with his peers and was nolonger able to perform heavy duties. As a result he required Kshs 150,000.00 to undergo an operation. At the time of the hearing of the case he was in form one but had to stay at home for a period of one year

4. According to the plaintiffs, the owner of the said vehicle was the defendant herein and in support of this evidence he produced a certificate of search for which he paid Kshs 500.00.

5. PW2, **Dr James Muoki** produced the medical report prepared by **Dr Irengu** who had gone for further studies. According to the said report, the plaintiff sustained severe pain on the right hip, shortening of the right leg which made it unable to walk on the said leg. In his evidence the plaintiff was admitted for 85 days at Kenyatta National Hospital; and was still following up the treatment. He however walked

with a permanent limp on the right leg and experienced pain on the right leg with tenderness on the right hip. The right leg was shorter by 4cm and had suffered permanent disability and had developed arthritis. According to the witness upon attaining maturity the plaintiff would have to go for operation which operation would cost about Kshs 300,000.00 at Kenyatta National Hospital.

6. **PC Benedict Okemwa** produced an extract of the OB report which showed that the accident occurred on 21st December, 2012 at 1525 hours involving motor vehicle reg no. KAR 282B Isuzu pick up and motor cycle KMCW 682V. According to her the driver of the said vehicle was driving towards Tala and there was a sharp corner where it knocked down a motor cycle carrying 3 people. According to her the accident occurred on the motor cycle lane as the driver was attempting to avoid a pothole. By the time of her testimony, the matter was still pending under investigation and the driver had not yet been charged. She however admitted that it was a crime to overload. She however testified that whereas the motor cycle was authorised to carry one person a child aged 3 years must be carried by the mother.

7. Suffice it to say that the witness statement of the plaintiff's mother, **FNW,** by consent of the parties adopted her witness statement filed in the said case. Accordingly, she was never cross-examined on her evidence.

8. The defendant did not adduce any evidence in rebuttal.

9. After setting out the evidence, the learned trial magistrate awarded the Respondent Kshs 3,500,000.00 in general damages and Kshs 62,800.00 as proved special damages as well as the costs of the suit.

10. Aggrieved by the said judgement the Appellant now appeals to this court on the following grounds:

a) That the honourable learned magistrate erred in law and in fact by awarding a manifestly high award of general damages of Kshs. 3,500,000/= which was incommensurate to the proven injuries sustained by the respondent

b) That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

c) That the court failed to consider the totality of the evidence adduced and consequently arrived at an erroneous decision.

11. In her submissions the appellant based her case on Selle vs. Associated Motor Boat Co. Ltd 1968 E.A 123 and urged the court to re-examine and submit that the general damages awarded by the Learned Trial Magistrate and to assess downwards the quantum of damages awarded to the Respondent.

12. It was submitted that the Respondent vide his Plaint dated 14th July 2015 stated to have sustained the following injuries:

i. right acetabular pelvic fracture

ii. severe pain at the right hip

iii. shortening and internal rotation of the right lower limb and thus unable to bear weight on the right limb

iv. soft tissue injuries

13. According to the appellant the award of Kshs. 3,500,000.00 was inordinately high in respect to the injuries sustained. This Court was therefore urged to interfere with the quantum of damages based on the court's decision in **Butt v. Khan [1981] KLR 349** as well as **Boniface Waiti & Another vs. Michael Kariuki Kamau [2007] eKLR**.

14. On behalf of the Respondent it was submitted that the amount of award by the Learned Magistrate was commensurate to the injuries that the Respondent suffered hence the Honourable Court should uphold the same and dismiss the appeal with cost to the Respondent. In support of the submissions the Respondent relied on **Sofia Yusuf Kanyare –vs- Ali Badi Sabre & Another Nairobi HCCC No. 478 of 2007** and submitted that the Judgment of the court on quantum was reasonable and fair considering the nature of injuries sustained by the Respondent, the age of the Respondent, and the fact that the Respondent developed arthritis in his right joint which affected his daily activities and limited the quality of his life. It was submitted that the Respondent's has been greatly prejudiced by the injuries he sustained at that tender age and it is obvious that his life will not be the same as any other normal growing young person without disability and this may affect his self-esteem and confidence to face challenges that may arise because of the disability of not being able to walk normally and the Doctor was not able to estimate the amount of years of expected skeletal maturity.

15. The Respondent therefore urged the court not to interfere with the award of the lower court but should uphold the same and dismiss the Appeal with cost and order that the Appellant to pay the decretal amount forthwith.

16. In support of their submissions the Respondents relied on **Peace Kemuma Nyangera vs. Michael Thuo & Another Ltd {2014} eKLR, Milicent Atieno Ochuonyo vs. Katola Richard {2015} eKLR**, **Raphael Muthoka Mailu Versus- Earnest Jacob Kisaka {2009} eKLR** and **P W vs. Peter Muriithi Ngari {2017} eKLR**

Determination

17. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

18. In this appal, it is clear that the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.**

19. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

20. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

21. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

22. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

23. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or

other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

24. In this case the appellant's case is that the Respondent ought to have been awarded an amount Kshs. 400,000.00 as general damages and relied on **Ken-Knit (K) Limited vs. Enos Ngigi (2012) eKLR**, **Elisha Akello Raga vs. Shajanand Holdings Limited & Another 2016 eKLR**, where the court, on appeal upheld an award of Kshs. 450,000/= as general damages.

25. The Appellant urges this Court as a court of the first appeal to reanalyze and reevaluate the evidence on record and reach its own independent decision.

26. I have considered the award of damages and the relevant authorities. The learned trial magistrate, in awarding Kshs 3,500,000.00 in general damages did not explain why he arrive at that figure and not any other figure since no authority was cited in his judgement. That however is not fatal in light of this Court's duty, sitting as the first appellate court to re-evaluate the evidence and arrive at its own decision. Having considered the authorities cited it is my view that the case that was closer to the instant one was that of **Peace Kemuma Nyangéra vs. Michael Thuo & Another [2014] KLR** in which the appellant suffered fracture of the sactrum bone, fracture of the right superior pubic ramus of the pubic bone, fracture of the ischium/inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumb0-sacral haematoma. As a result, she had deformities including a limping gait. She had already contracted arthritis of the right hip. She was on 3rd December, 2014 awarded Kshs 2,500,000.00 in general damages for pain, suffering and loss of amenities,'

27. In my view an amount of Kshs 3,000,000.00 would have adequately compensated the Respondent. In the premises and to that extent only, this appeal succeeds and the award of Kshs 3,500,000.00 made to the Respondent is hereby set aside and substituted with an award of Kshs 3,000,000.00.

28. Save for that the appeal fails. There will be no order as to costs of this appeal but the Respondent will have the costs of the trial court.

29. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 25th February, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Muia for Mr Mugun for the appellant

CA Josephine