REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 12 OF 2016

SOUTH SIOUX FARM LIMITED.....1ST APPELLANT

FRANCIS NZIVO MUNGUTI.....2ND APPELLANT

VERSUS

CHRISTINE N. SIMIYU WANZALA.....1ST RESPONDENT

FALCON COACH LIMITED.....2ND RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. H.O. Barasa, Principal Magistrate, delivered on 7 January 2016 in Eldoret CMCC No. 672 of 2007)

JUDGMENT

[1] This appeal arises from the decision of the Principal Magistrate, **Hon H.O. Barasa**, in **Eldoret Chief Magistrate's Case No. 672 of 2007: Christine N. Simiyu Wanzala vs. Falcon Coaches, South Sioqix Farm Limited and Francis Nzivo Mungai.** The Appellants had been sued in that suit by the 1st Respondent for General Damages for pain suffering and loss of amenities as well as Special Damages, Costs and Interest in respect of injuries sustained by her in a road traffic accident that took place on **29 May 2006**. It was the contention of the 1st Respondent that she was lawfully travelling as a fare paying passenger in **Motor Vehicle Registration No. KAV 249K** along Eldoret-Nakuru Road when, at Nabkoi area near Burnt Forest, the said Motor Vehicle was involved in a head-on collision with **Motor Vehicle Registration No. KAD986U,** thereby occasioning her severe bodily injuries.

[2] The 1st Respondent blamed the Appellants and the 2nd Respondent, who were the three Defendants before the lower court, for her injuries, being the owners and driver respectively of the aforementioned motor vehicles.Particulars of negligence were pleaded at paragraph 9 of the Plaint; and although the Appellants filed a Defence denying the Respondent's allegations before the lower court, the question of liability was settled at 100% by the Court on appeal in **Eldoret High Court Civil Appeal No. 104 of 2010**. That appeal arose from **Eldoret Chief Magistrates Civil Case No. 893 of 2007;** one in a series of similar cases, which had been selected by the parties as a test suit. The matter that is the subject of this appeal was consequently listed for hearing for the purpose of assessment of damages only; and the lower court then took evidence from the 1st Respondent as **PW1** as well as **Dr. Paul Kipkorir Rono** of **Moi Teaching and Referral Hospital (PW2)**.

[3] Having given consideration to the evidence presented before him as well as the written submissions made by Learned Counsel for the parties, the Learned Trial Magistrate came to the conclusion that an award of **Kshs. 1,578,221.64** would meet the ends of justice in the matter, **Kshs. 1,200,000/=** thereof being General Damages for pain, suffering and loss of amenities. Accordingly Judgment was entered in the 1st Respondent's favour against the 2nd and 3rd Defendants (the two Appellants herein) in the aforesaid sum of **Kshs. 1,578,221.64** together with interest and costs.

[4] Being dissatisfied with the outcome of the suit, the two Appellants filed this appeal on **21 January 2016** against the said Judgment and Decree of the lower court on quantum on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and in fact in misdirecting himself as to the exact nature of the Respondent's injuries leading to erroneous assessment of damages awardable to the Respondent;
>
> **[b]** The Learned Magistrate erred in law and in fact in awarding damages that were manifestly excessive and against the evidence and/or testimony on the record;

[c] That the Learned Trial Magistrate erred in law and fact in awarding damages that were manifestly excessive as to amount to an erroneous estimate of the loss actually suffered by the Respondent;

[d] That the Learned Trial Magistrate erred in awarding special damages that were not specifically pleaded and proved;

[e] That the Learned Magistrate erred both in law and in fact in failing to take into account and consider the medical documents produced in court, leading to erroneous finding on the actual injuries suffered;

[f] That the Learned Magistrate erred in law and in fact in failing to adhere to the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules;**

[g] That the Learned Magistrate erred in law and in fact in failing to give due consideration to the contents of the Appellant's submissions and more specifically the authorities on quantum; and

[h] That the Learned Magistrate erred in law and fact in failing to consider, evaluate and determine the issues raised in the Defendant's pleadings to wit the Defence and the evidence adduced.

On account of the foregoing, the Appellants urged the Court to set aside the Judgment of the subordinate court and in lieu thereof issue an order dismissing the 1st Respondent's claim with costs.

[5] The appeal was argued by way of written submissions pursuant to the orders of the Court dated **24 July 2018**. Consequently, the Appellants' written submissions were filed on **5 August 2018** by **M/s Nyairo & Company Advocates;** while the 1st Respondents' written submissions were filed on **29 August 2010** by the firm of **M/s Magare Musundi & Company Advocates**. According to the Appellants, the injuries suffered by the 1st Respondent were not that severe, having been classified as "Grievous Harm." Hence it was submitted that the lower court should have been guided by the economic situation in the country in awarding damages. The case of **Ossuman Mohamed & Another vs. Saluro Bundit Mohamed, Civil Appeal No. 30 of 1997**, was cited in support of that argument and to underscore the proposition that damages must be within the limits that the Kenyan economy can afford; and that large awards ought to be discouraged as they are inevitably passed over to members of the public, the vast majority of whom cannot afford the burden.

[6] The Appellants' Counsel further pitched an argument in favour of uniformity, contending that it is desirable that, as far as possible, comparable injuries be compensated by comparable awards; and therefore that courts must, of necessity, strike a balance between endeavouring to award just amounts and guarding against excessive awards, which in the end would only have a deleterious effect. The case of **Rahima Tayab & Others vs. Anna Mary Kinanu [1983] KLR 114** was cited to augment the Grounds of Appeal on the basis of reasonableness; and therefore a proposal was made by the Appellants for an award in the range of between **Kshs. 400,000/=** and **Kshs. 700,000/=**. The following authorities were also propounded as useful guides:

[a] Ibrahim Kalema Lewa vs. Esteel Company Limited [2016] eKLR in which an award of **Kshs. 300,000/=** was upheld on appeal in **2016** in a case where the Plaintiff sustained a fracture of the left femur; was thereafter admitted for 2 months and healed with a 25% disability.

[b] Eldoret Steel Mills Limited vs. Elphas Victor Espila [2013] eKLR, wherein the plaintiff was awarded **Kshs. 300,000/=** in **2013** for a fracture of the right femur, fracture of the metatarsal bones of the right foot and soft tissue injuries to the right arm, right hip, right thigh and right foot; and in which permanent disability was assessed at 35%.

[c] In **Kenyatta University vs. Isaac Karumba Nyuthe [2014] eKLR,** an amount of **Kshs. 350,000/=** was awarded in **2014** for a fracture of the femur, soft tissue injuries to the head and bruises on the right knee; and permanent disability was assessed at 20%.

[d] High Court Civil Case No. 467 of 2003: Thomas Kamau vs. Target Guards Ltd & Another, in which the Plaintiff suffered a compound fracture of the tibia and fibula, dislocation of the right knee and ankle as well as a de-gloving wound to the right thigh. An amount of **Kshs. 400,000/=** was awarded for the said injuries.

[e] T A M (a minor suing through her father and next friend J O M) vs. Richard Kirimi Kinoti & Another [2015] eKLR, where the Plaintiff sustained a fracture of the left femur, lacerations on the left temple and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded **Kshs. 250,000/=** in **2015**.

[f] In **Bhachu Industries Limited vs. Peter Kariuki Mutura [2015] eKLR**, the Plaintiff suffered an injury on the chest, thigh and a fracture on the femur which was fixed by a K-nail, resulting in a limping gait. He was awarded **Kshs. 300,000/=.**

[g] The Plaintiff in **Julius M'Ringera M'Mwongera vs. George Mutethia & Another [2005] eKLR** was awarded **Kshs. 652,000/=** for head injury, deep facial cut on the forehead, hand injury which caused a complete paralysis of the right hand, cut wound on the left leg around the knee, dislocation of the right knee and injury to the right leg with paralysis.

[h] In **Florence Njoki Mwangi vs. Chege Mbitiru [2014] eKLR**, a sum of **Kshs. 700,000/=** was awarded as general damages where the plaintiff had sustained fractures of femurs, de-gloving injuries of the right knee and right ankle.

[i] In **Thomas Muendo Kimilu vs. Anne Maina & Others**, **Machakos High Court Civil Case No. 6 of 2007,** General Damages were assessed at **Kshs. 700,000/=** for a fracture of the right tibia/fibula, fracture of the left humerus, amputation of one finger, along with multiple bruises and lacerations.

[7] Counsel urged the Court to note that in some of the authorities aforementioned, the injuries suffered by the Plaintiff were far more serious than the 1st Respondent's injuries; and that, on the issue of Special Damages, a calculation based on the receipts produced before the lower court showed that only **Kshs. 329,471/=** was proved as opposed to the amount of **Kshs. 378,721.64** that was awarded by the lower court. Counsel underscored the principle that special damages must not only be specifically pleaded but also proved; and urged the court to disallow any sums that were not specifically proved before the lower court. Counsel relied on **Nizar Virani t/a Kisumu Beach Resort vs. Phoenix of East Africa Assurance Co. Ltd [2004] eKLR**

[8] Lastly, it was the submission of Counsel for the Plaintiff that since the receipt relied on by the 1st Respondent did not bear any stamp of **Kenya Revenue Authority (KRA),** it would follow that those receipts are inadmissible in evidence by dint of **Section 9** of the **Stamp Duty Act**, **Chapter 480** of the **Laws of Kenya**. It was therefore urged that the Learned Trial Magistrate erred in admitting the receipts in contravention of the law. The case of **Leonard Nyongesa vs. Derick Ngula Right, Mombasa Civil Appeal No. 168 of 2008** was cited in support of this proposition. Thus, Counsel prayed that the appeal be allowed and that the Judgment of the lower court be set aside and be substituted with an award for **Kshs. 350,000/=** as general damages and special damages of **Kshs. 329,471/=** only.

[9] In addition to the aforementioned authorities, the Appellants relied on the following precedents:

[a] Harun Muyoma Boge vs. Daniel Otieno Agulo [2015] eKLR;

[b] Sammy Mugo Kinyanjui & Another vs. Kairo Thuo [2017] eKLR;

[c] Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR;

[d] Godfrey Wamalwa Wamba & Another vs. Kyalo Wambua [2018] eKLR; and,

[e] Easy Coach Limited vs. Emily Nyangasi [2017] eKLR.

[10] Counsel for the 1st Respondent, on her part, was of the view that the injuries suffered by the 1st Respondent were extremely severe in nature and therefore that the trial court did not misdirect itself in its assessment of damages. Counsel urged the Court to note that the life of the 1st Respondent had completely changed for the worse after the accident; and is expected to worsen further, granted the prognosis presented in **Dr. Lelei's** medical report. Counsel for the 1st Respondent relied on **Joseph Musee Mua vs. Julius Mbogo Mugi and 3 Others [2013] eKLR** in which the Plaintiff suffered similar injuries and was awarded **Kshs.1,300,000/=.** Counsel pointed out that the Appellants did not rebut the evidence presented by the 1st Respondent; nor did they refer her for a second medical opinion as to the nature and extent of her injuries.

[11] As for the special damage component of the 1st Respondent's claim, Counsel pointed out that what was pleaded in the Plaint was **Kshs. 382,921.64.** She submitted that whereas the 1st Respondent produced receipts in support of her claim for Special Damages as claimed in the Plaint, the trial court was of the finding that only **Kshs. 378,221.64** had been proved, which he awarded. Thus, it was the submission that the trial court only made the award upon being satisfied that the same had been proved on a balance of probabilities.

[12] As regard the authorities relied on by the Appellants, it was the submission of **Ms. Biwott** that the injuries involved in those cases are not comparable to the severe injuries suffered by the 1st Respondent herein. Accordingly, she urged the Court to disregard the said authorities and uphold the decision of the trial court; there being no demonstration that the trial court applied the wrong principles or considerations in arriving at its decision. With regard to the Appellants' submissions in connection with **Section 9** of the **Stamp Duty Act**, it was the contention of **Ms. Biwott** that **Moi Teaching and Referral Hospital**, as an entity, is exempt from the provisions of the **Stamp Duty Act**. She further argued that, in any case, the point was neither taken up before the lower court or in the Memorandum of Appeal; and therefore that the argument is not tenable. Besides, **Section 90** of the **Stamp Duty Act was** cited in support of the argument that time can be given by the Court within which to have the stamp duty paid. In this regard, **Ms. Biwott** relied the case of **Paul N. Njoroge vs. Abdul Sabuni Sabonyo [2015] eKLR.**

[13] I am mindful that this is a first appeal; and as such, it is the duty of this Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> **"...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..."**

[14] Accordingly, I have perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The 1st Respondent's evidence was that, she was travelling from **Mombasa** to **Bungoma** on the **29 May 2006**. She was travelling in the 2nd Respondent's bus **Registration no. KAV 249K** which was being driven on the **Nakuru-Eldoret Road**; and that upon reaching Ainabkoi, that bus was involved in a collision with the 1st Appellant's Motor Vehicle, **Registration No. KAD 986U**, Mercedes Benz Truck/Trailer ZB 3262. She further stated that the 1st Appellant's truck/trailer left its correct lane and collided head-on with the bus on the left lane, facing Eldoret direction.

[15] It was the evidence of the 1st Respondent that she sustained serious injuries in the accident and lost consciousness shortly thereafter; and that when she regained her consciousness, she found herself in **Moi Teaching and Referral Hospital** three days later, with injuries that included fractures of the lower jaw, right hip and right leg. She also lost one tooth and suffered soft tissue injuries on the right and left hand.

She added that her treatment included the insertion of metal plates to secure the broken bones; and that she was admitted in hospital until **July 2006;** and upon discharge had to spend **Kshs. 376,000/=** on medical bills.

[16] It was further the testimony of the 1st Respondent that the accident had been reported to **Tarakwa Police Station** while she was in hospital, and so upon discharge, she went there and obtained a Police Abstract and a P3 Form, which she took to **Moi Teaching and Referral Hospital** for completion. She thereafter presented herself for examination by **Dr.Lelei** and **Dr. Wakuloba,** who prepared their separate medical reports. She produced the reports along with the receipts, invoices and other documents relative to the accident as exhibits before the lower court in support of her prayer for compensation for her loss, pain and suffering.

[17] The 1st Respondent called **Dr. Paul Kipkorir Rono** (**PW2),** a medical doctor then based at **Moi Teaching and Referral Hospital,** as her witness before the lower court. **PW2** confirmed that the 1stRespondent was admitted at **Moi Teaching and Referral Hospital** on 2**9 May 2006** following a road traffic accident, and that she was in the hospital undergoing treatment until her discharge on **3 July 2006. PW2** confirmed that the 1st Respondent suffered several fractures; namely, a fracture to the right femur, a fracture to the right tibia and a fracture of the mandible; and that the fractures were fixed by some metal plates by a team of doctors, namely: **Dr. Lelei, Dr. Wakuloba, Dr. Ashiraf, Dr. Kituyi** and **Dr. Imbaya.**

[18] PW2 also testified that he had occasion to examine the 1st Respondent and complete the P3 Form in that respect on **11 October 2006.** In his opinion, the injuries suffered by the 1st Respondent amounted to Grievous Harm. Thus, he produced the P3 Form as well as the Discharge Summary, the Prescription Form and the Final Invoice as exhibits before the lower court. He acknowledged that the receipts produced by the 1st Respondent were all issued at their facility for medical expenses incurred at the hospital. It was further the expert opinion of **PW2** that the 1st Respondent's injuries had impacted on her sexuality; and that the scar on the mandible as well as the metal plates would remain in her body forever. He noted too that in his report, **Dr. Lelei** had assessed the 1st Respondent's permanent disability at 20%. Hence, **PW2** confirmed the testimony of the 1st Respondent that she suffered the following injuries in the accident:

[a] Fracture of the mandible with dental injuries;

[b] Fracture on the right hip bone;

[c] Fracture on the right proximal tibia and fibula;

[d] Laceration on the right elbow and left wrist;

[e] Abrasion on the right calf region;

[f] Soft tissue injuries on the right shoulder; and

[g] Soft tissue injuries on the right lumbar region.

[19] Before the lower court, the Appellants opted to await the outcome of **Eldoret High Court Civil Appeal No.104 of 2010** in which the issue of quantum had been appealed. The outcome was that liability against the Appellants was confirmed at 100%. It was thus in the light of the foregoing uncontroverted evidence, that the Learned Trial Magistrate came to the following conclusion:

> **"Having considered the nature of the injuries sustained by the plaintiff herein and the level of disability awarded to him and having taken into account the awards made in the above authorities, I am of the view that the sum of Kshs. 1,200,000/= shall adequately compensate the plaintiff in terms of general damages for pain and suffering and loss of amenities. As regards special damages, the plaintiff was issued with a certificate of clearance dated 11th July 2006 for Kshs. 376,721.64 which document he produced in evidence before this court. PW confirmed tht the bill was paid in full and that is why the two title deeds which were deposited to guarantee payment of the bill were released to the plaintiff. Two receipts from Moi Teaching and Referral hospital were also produced in evidence. One was for Kshs. 1,000/= and another was for Kshs. 500/=. I find that special damages have been proved at Kshs. 378,221.64 which sum I hereby award.**

In the end judgment is entered for the plaintiff as against the 2nd and 3rd defendants jointly and severally as follows:-

a) General damages - Kshs. 1,200,000

b) Special damages - Kshs. 378,221.64

Total Kshs. 1,578,221.64

c) Costs and interest at court rates."

[20] It is manifest from the Record of Appeal that, in his assessment of damages, the Learned Trial Magistrate took into account not only the nature and extent of the injuries that the 1st Respondent suffered (at pages 67 to 68 of the Record of Appeal), but also the written submissions and authorities cited by Learned Counsel for the parties. This is clear at pages 68 to 69 of the Record of Appeal. The trial court took into account that damages are awarded as compensation for the physical and mental distress caused to a plaintiff both pre-trial and in the future, as a result of the injuries suffered; and that the loss include the pain caused by the injury itself and the treatment intended to alleviate it, the

awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition might deteriorate.

[21] In my careful consideration therefore, the trial court had in mind the applicable principles in assessing damages in this matter. I am mindful, too, that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged 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."**

[22] Accordingly, there is no sufficient cause, in my view, for disturbing the award made by the Learned Trial Magistrate. It is also manifest at pages 27, 28 and 29 of his Judgment (at pages 68 to 70 if the Record of Appeal) that the Trial Magistrate took into consideration the submissions and authorities cited by Learned Counsel. It is further manifest that of the **Kshs. 382,921.64** Special Damages pleaded in the Amended Plaint filed on **19 January 2011**, only **Kshs. 378,221.64** was awarded by the lower court; and at page 69 of the Record of Appeal, a justification was given by the Learned Trial Magistrate for the award as quoted herein above. Hence, the Special Damage component of the award was not only pleaded as required by law, but was also proved to the requisite standard.

[23] There is also no doubt that the Judgment of the lower court was in full accord with **Order 21 Rule 4** of the **Civil Procedure Rules**, which provides that:

> **"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."**

The Record of Appeal confirms that, in his Judgment, the lower court provided a summary of the facts at pages 66 to 67; and that the issue for determination was singled out to be quantum of damages, liability having been settled in **Eldoret Chief Magistrate's Civil Case No. 893 of 2007** which the parties had selected as a test case. There is no doubt that a decision was rendered on quantum and the reasons for the decision given. Thus, the decision of the lower court can hardly be impugned from the standpoint of **Order 21 Rule 4** of the **Civil Procedure Rules.**

[24] In connection with the receipts issued by Moi Teaching and Referral Hospital, it was the submission of Counsel for the Appellants that since those receipts did not bear any stamp of **Kenya Revenue Authority (KRA),** they were inadmissible in evidence by dint of **Section 9** of the **Stamp Duty Act**, **Chapter 480** of the **Laws of Kenya;** and therefore that the Learned Trial Magistrate erred in admitting them as exhibits in disregard of the applicable law. In this regard, Counsel relied on **Leonard Nyongesa vs. Derick Ngula Right, Mombasa Civil Appeal No. 168 of 2008 [2013] eKLR**, wherein **Hon. Kasango, J**. was of the opinion that:

> **"... a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award any damages based on such a receipt..."**

[25] However, the Court of Appeal, in **Paul N. Njoroge vs. Abdul Sabuni Sabuni [2015] eKLR** was of a contrary view. It held that:

> **"The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR..."**

The Court proceeded to reiterate it position on the matter by emphasizing the position earlier adopted by **Law J.** (as he then was) in **Suderji Nanji Limited vs. Bhaloo [1958] EA 762** that:

> **"...before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ... The appellant has never been given the opportunity to pay the requisite stamp and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd Defendant/Respondent and he must be given the opportunity...We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof..."**

[26] In this case the receipts were never objected to before the lower court. Indeed the issue of failure to pay stamp duty did not even arise; and therefore the lower court had no opportunity to express itself on it. Such, therefore, is not an issue that can validly be raised on appeal. It any case, it is untenable in view of the Court of Appeal decision aforementioned.

[27] The foregoing being my view of the matter, it is my resultant finding that this appeal is completely lacking in merit and is hereby dismissed with costs. The Judgment of the lower court dated **7 January 2016** in **Eldoret CMCC No. 672 of 2007** and the Decree ensuing therefrom are hereby upheld.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE