REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 58 OF 2017

ELIYAS IBRAHIM ABDULLAHI.....APPELLANT

VERSUS

INDAKO MWIKHANO RODGERS.....RESPONDENT

(Being an Appeal from the Judgment of Hon. R. Ondieki, SPM delivered

on 22nd February, 2017 in Kilifi PMCCC No. 62 of 2014, Indako Mwikhano Rodgers v Eliyas Ibrahim Abdullahi)

JUDGEMENT

1. The Appellant is Elyas Ibrahim Abdullahi. He was the defendant in Kilifi PM's Court Civil Suit No. 62 of 2014. The Respondent, Indakho Mwizikhano Rodgers was the plaintiff at the trial. At the conclusion of the trial, the Respondent was awarded Kshs. 500,000 as general damages for pain, suffering and loss of amenities as a result of injuries sustained in a road traffic accident.

2. The Appellant being aggrieved by said decision is through the memorandum of appeal dated 23rd November, 2013 challenging the award on the grounds that:-

> **"1. The Learned Magistrate erred in fact and in law in finding that the Plaintiff/Respondent was entitled to general damages of Kshs. 502,000 that was excessive and manifestly too high in view of the injuries suffered by the Plaintiff/Respondent.**
>
> **2. The Learned Magistrate erred in fact and in law in failing to consider the Defendants' submissions on quantum.**
>
> **3. The Learned Magistrate erred in both fact and in law in failing to consider the conventional awards of general damages in cases of similar injuries."**

3. This appeal is therefore limited to the assessment of damages by the trial court. Urging this court to reduce the award, counsel for the Appellant submitted that the trial court in assessing the damages failed to take cognizance of the principle that comparable injuries should as far as possible be compensated by comparable awards. The decision in the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** is cited as stating the said principle. Counsel for the Appellant submitted that the trial magistrate discounted the authorities cited by the parties as **"dichotomous"** but erred in failing to determine the injury sustained and the comparable awards for such an injury.

4. Counsel for the Appellant also faulted the trial magistrate for holding the Appellant 100% liable for the injury contrary to a consent recorded on liability on 13th July, 2016. The court is therefore urged to review the finding on liability and uphold the consent recorded by the parties on 13th July, 2016.

5. As to the amount that should have been awarded to the Respondent, counsel for the Appellant cited various decisions as offering guidance to the Court. The decisions cited are: **Rose Makombo Masanju v Night Flora alias Nighties Flora & another [2016] eKLR; Naom Momanyi v G4S Security Services Kenya Limited & another [2018] eKLR; Kenyatta University v Isaac Karumbe Nyuthe [2014] eKLR; Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR**; and **Francis Maina Kahura v Nahashon Wanjau Muriithi [2015] eKLR**. Relying on the cited authorities, counsel urged this court to allow the appeal and award between Kshs.200,000 and Kshs.250,000 as general damages.

6. In response to the appeal, the Respondent urged this court to dismiss the same stating that the award was not high or excessive or extravagant.

7. A perusal of the grounds of appeal clearly discloses that the Appellant does not dispute the injuries sustained by the Respondent. The

injuries as per the evidence adduced by the Respondent at the trial were:-

a. Fracture of the left wrist scaphoid bone, and

b. Blunt injury to the chest.

8. The principles that guide an appellate court in deciding whether to disturb an award made by the trial court have been stated in several cases. In **Catholic Diocese of Kisumu v Tete [2004] 2 KLR 55,** the Court of Appeal stated at page 58 that:-

> **"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."**

9. In **Southern Engineering Company Ltd. v Mutia [1985] eKLR**; **Civil Appeal No 46 of 1983 (Mombasa),** the Court of Appeal 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 to prior decisions which are relevant to the case in question."**

10. None of the authorities cited by counsel for the Appellant in support of the reduction of the award was in respect of a scaphoid fracture. They nevertheless deal with fractures generally.

11. In **Florence Njoki Mwangi** (supra) an award of Kshs. 700,000 was made by the trial court for fractures of right mid-shaft femur and several other injuries including computation of the right foot behind the ankle joint. The award was upheld when it was challenged on appeal.

12. A decision that gives better clarity to this court is that of Majanja, J in **Naom Momanyi** (supra) where an award of Kshs. 200,000 for a fracture of the right condylar tibia was on appeal enhanced to Kshs. 300,000. It is noted that a scaphoid fracture is a more serious injury.

13. In the case of **Issac Karumbe Nyuthe** (supra) an award of Kshs. 700,000 for a fracture of the right femur, soft tissue injuries to the head, bruises on the right knee temporary and loss of consciousness was, on appeal, reduced to Kshs. 350,000. It is noted that the claimant's injuries in the cited case were slightly more serious compared to those sustained by the Respondent herein.

14. Considering the decisions referred to above, I find that an award of Kshs. 500,000 was indeed inordinately high in the circumstances of the case. I allow the appeal and set aside the award of Kshs. 500,000 as general damages and instead award the Respondent Kshs. 325,000.

15. The Appellant raised a serious issue in the submissions concerning the finding on liability by the trial court. Submissions cannot be equated to pleadings and the court cannot rely on them in determining a case–see **Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.**

16. However, I have perused the trial court record and find that on 13th July, 2016 a consent was entered as follows:-

> **"By consent of the parties liability be apportioned at 15% against the plaintiff and 85% against the defendant."**

17. In the judgment dated 22nd February, 2017 the trial court held that:-

> **"I hold the defendant 100% liable."**

18. This holding by the trial court was indeed erroneous and contrary to the consent of the parties. This may be explained by the fact that the consent on liability was recorded before a different magistrate namely D. W. Nyambu, SPM and not R. K. Ondieki, SPM who wrote and delivered the judgment.

19. In my view this is an error on the face of the record and the error cannot be left undisturbed. This error is therefore correct and the trial court's finding on liability is set aside so that liability will be in accordance with the consent recorded by the parties on 13th July, 2016.

20. In summary, the appeal succeeds to the extent that the award of Kshs.500,000 as general damages is set aside and substituted with an award of Kshs.325,000 subject to the consent on liability recorded by the parties on 13th July, 2016. Otherwise the other findings and orders of the trial court shall remain undisturbed.

21. Owing to the outcome of the appeal, the Appellant is awarded half the costs of the appeal.

Dated and Signed at Nairobi this 29th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 23rd day of May 2019

R. Nyakundi,

Judge of the High Court