REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 50 OF 2017

PASCAL IHA GARAMA.....APPELLANT

VERSUS

JACKSON NJERU NJOKA.....RESPONDENT

[Being an Appeal from the Judgment Delivered by Honourable Wewa, SPM on 4th September, 2017 in Malindi CMCC No. 255 of 2016, Pascal Iha Garama v Jackson Njeru Njoka]

JUDGEMENT

1. The Appellant, Pascal Iha Garama, sued the Respondent, Jackson Njeru Njoka in Malindi CM Civil Suit No. 255 of 2016 for compensation as a result of injuries sustained on or about 9th February, 2015 in a road traffic accident involving the Respondent's Motor Vehicle Registration Number KBX 239D. At the conclusion of the trial the Appellant was awarded Kshs. 200,000 as general damages and Kshs. 3,000 as special damages, the awards being subjected to the agreed consent on liability.

2. The Appellant being dissatisfied with the general damages has appealed to this court on the grounds that:-

> **"1. The Learned Magistrate erred in law and in fact when she awarded the Plaintiff Kshs. 200,000/- general damages a sum which was so inordinately low that it presented a miscarriage of justice.**
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> **2.The Learned Magistrate erred in law and in fact when she declined to award the Plaintiff the cost of corrective surgery yet the same had been pleaded and proved.**
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> **3.The Learned Magistrate erred in law and in fact when [she] failed to analyse the evidence on record before making her determination.**
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> **4.The Learned Magistrate erred in law and in fact when she made an award that was not commensurate to the nature of the injuries sustained by the Plaintiff.**
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> **5.The Learned Magistrate erred in law and in fact when she failed to appreciate the authorities cited by both parties.**
>
> **6.The Learned Magistrate erred in law and in fact when in making her award she failed to consider the passage of time and incidence of inflation**."

3. This being a first appeal, the duty of the court is to reevaluate and reassess the evidence adduced at the trial in order to arrive at its own independent decision. In doing so, the court should give allowance to the fact, that unlike the trial court, it did not observe the witnesses' demeanor as they testified–see **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212.**

4. In submissions filed in court, the Appellant reduced his appeal to two issues namely that the amount awarded as general damages was inordinately low and that the trial magistrate erred in failing to award him damages for future medical treatment.

5. Opposing the appeal, the Respondent submitted that the Appellant was fully paid the amount awarded by the trial court and this appeal is therefore an afterthought arising from the Appellant's desire to enrich himself.

6. The Appellant responded to the Respondent's submission on this particular issue through a reply to the Respondent's submissions. The Appellant's position is that he is exercising his right of appeal and he had filed his appeal within 30 days from the date of judgment as provided by sections 75 and 79G of the Civil Procedure Act, Cap. 21.

7. It is the Appellant's case that he filed his appeal prior to the payment of the decretal amount by the Respondent. Further, that he had, in asking the Respondent to pay the decretal amount, clearly indicated that he was retaining his right of appeal.

8. I do not understand why the Respondent is upset by the fact that the Appellant opted to exercise his right of appeal. There was no undertaking by the Appellant that he was accepting the decretal amount as full and final settlement of his claim. The complaint by the Respondent is therefore without any basis. The right of appeal being exercised by the Appellant is provided by the Constitution.

9. On the award of general damages being inordinately low, counsel for the Appellant submitted that the authority relied on by the Respondent at the trial court related to injuries that were clearly incomparable to the injuries sustained by the Appellant herein hence the same ought not to have formed the basis of the learned trial magistrate's award on quantum.

10. It is the Appellant's case that he suffered serious injuries which were confirmed by the medical report prepared by Dr. S.K. Ndegwa. He submitted that in the case of **Orion Hauliers Limited v Michael Semper Esikhati [2012] eKLR** where the plaintiff had suffered less serious injuries on award of Kshs. 800,000 made in 2010 was upheld on appeal.

11. The Appellant also referred to the case of **Tom Obita Ndago & another v Alfonse Omondi [2015] eKLR** where an award of Kshs. 700,000 was upheld on appeal.

12. It is the Appellant's case that the award of Kshs. 150,000 in the case of **Mulwa Musyoka v Wadia Construction [2004] eKLR** relied upon by the trial court was made in 2004. In that case the injuries were a closed head injury with loss of consciousness for about 30 minutes, cut wound on the face, closed femoral fracture and closed tibial fracture.

13. It is the Appellant's case that a perusal of the cases that were cited before the trial court will disclose that the ones cited on behalf of the Appellant related to injuries closer to those suffered by the Appellant.

14. The Appellant therefore urges this court to find that the trial magistrate based her decision on evidence not on record, or misapprehended the evidence on record, or misdirected herself or acted on the wrong principles thereby awarding an amount that is so inordinately low and therefore resulted in an erroneous estimate of the damage.

15. As for the trial court's failure to make an award on future medical costs, the Appellant submitted that he specifically pleaded and proved his claim on this head. He cited the decision in **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** in support of the proposition that an award for future medical expenses must be specifically pleaded and proved.

16. The Respondent opposed the appeal and urged this court not to disturb the judgment of the trial court considering that the award of Kshs. 200,000 was based on recent and relevant authorities it had submitted to the trial court.

17. As for the claim for future medical expenses, the Respondent urged that although the same was pleaded, it was never proved as no doctor was called as a witness. The Respondent asked this court to be guided by the decision in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku, HCCA No. 445 of 2003** where it was held that awarding of future medical expenses is irregular and outside the known and established heads of damages under the law of torts. The Respondent's position is that it is only after treatment that the exact cost can be known otherwise a claim under this head remains futuristic.

18. In reply to the Respondent's submissions, the Appellant cited the decision of the Court of Appeal in **Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR; Civil Appeal No. 192 of 2006 (Nakuru)** as confirming that a claim for future medical costs is awardable.

19. Through this appeal the Appellant seeks to upset the quantum of damages made by the trial court. The law on when an appellate court can disturb the quantum of damages awarded by a trial court is found in **Kemfro Africa Limited t/a "Meru Express Services (1976)" and another v Lubia & another (No 2) [1985] eKLR** where the Court of Appeal held that:-

> **" The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

20. Another principle applicable to this appeal is the requirement that comparable injuries should receive comparable awards. One of the cases in which this principle has been stated is that of **Arrow Car Limited v Elijah Shamall Bimomo & 2 others [2004] eKLR** where the Court of Appeal stated that:

> **"But even a more important aspect which has led us to interfere is that the learned Commissioner appears to have misapprehended the general principles in assessment of damages in personal injury cases. It is our view that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

21. At the trial, the Appellant testified as PW2 and told the court he was injured on the thighs and knees. He stated that he broke a bone and the hip was operated on. His testimony was that he was admitted at Malindi General Hospital for 27 days. A medical report prepared for the Appellant by Dr S. K. Ndegwa was produced as an exhibit. The doctor observed that the Appellant sustained a displaced fracture of the mid-shaft of the right femur leading to deformity of the right thigh, shortening of the right leg, stiffness of the right knee and difficulties in

walking.

22. During submissions the Respondent urged the trial court to award the Appellant Kshs.150,000 as general damages and relied on **Mulwa Musyoka v Wadia construction [2004] eKLR** where the plaintiff who had fractures of the mid-shaft femur and mid-shaft left tibia and had sustained bruises on the face and head was awarded Kshs. 150,000 as general damages.

23. For the Appellant the decisions in **Orion Hauliers Limited (supra**) and **Tom Obita Ndago & another (supra**) were cited in urging an award of Kshs. 950,000. The injuries in the cases cited by the Appellant and the Respondent were almost similar to those sustained by the Appellant herein. The award in the **Mulwa Musyoka** case was made in 2004. Although the injuries may be similar to those sustained by the Appellant, inflation should be taken into account when one is relying on old cases to assess damages.

24. A perusal of the record shows that in reaching her decision, the trial magistrate failed to consider the decisions in recent cases. She also failed to take into account inflation as she ought to have done–see **Idi Ayub Omari Shabani v City Council of Nairobi [1985] eKLR**. She therefore ended up making an awarded that was inordinately low.

25. Although the injuries for the plaintiffs or appellants in the cases cited by the Appellant's counsel were almost similar to those of the Appellant herein, those injuries were slightly more serious. In my view, taking all the relevant factors into account, an award of Kshs. 400,000 was reasonable in the circumstances of this case.

26. On the claim for future medical expenses, the same is awardable. The law on this was captured in the case of **Tracom Limited and another** (supra) where the Court of Appeal stated that:-

> **"The award of future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-**
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> **"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."**
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> **We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."**

27. In the case before me it is agreed that the claim for future medical expenses was pleaded. It was also proved through the medical report of Dr. S.K. Ndegwa who stated that corrective surgery at a cost of Kshs.200,000 was recommended. The Appellant was entitled to this amount.

28. In conclusion, I find merit in this appeal and allow it by issuing orders as follows:-

a) The award by the trial court of Kshs.200,000 as general damages is set aside and substituted with an award of Kshs. 400,000 as general damages for pain, suffering and loss of amenities. The Kshs. 200,000 already paid will be deducted from the Kshs.400,000 leaving the sum of Kshs.200,000 payable to the Appellant as general damages but in conformity with the consent on liability recorded before the trial court by the parties;

b) The Appellant is awarded Kshs.200,000 for future medical costs which is again subject to the consent on liability recorded at the trial by the parties; and

c) I note that the Appellant has already been paid costs incurred at the trial. In the circumstances I award the Appellant the costs of this appeal only.

Dated and Signed at Nairobi this 15th 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