REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 151 OF 2016

BENJAMIN KUTUNDI MUSYIMI.....APPELLANT

VERSUS

MWANGI DANIEL.....1ST RESPONDENT

DANIEL MURITHI.....2ND RESPONDENT

[Being an appeal from the judgment of Honorable C.A. OCHARO, Principal Magistrate,

in Machakos CMCC No. 288 of 2015 dated 22nd November, 2016]

JUDGEMENT

1. By a judgment dated 22nd November, 2016 by Hon C.A. Ocharo (PM) in Machakos CMCC NO 288 of 2015, the Learned Trial Magistrate awarded the Appellant Kshs 350,000 being General Damages for pain and suffering and Kshs 3,000 as special damages as a result of a road accident that occurred on 10th October 2014, in which the Respondent was seriously injured.

2. The Appellant was aggrieved by the said award and filed this appeal on 19th December 2016. The grounds thereof are set out in the Memorandum of Appeal as follows THAT:

> ***a. The Learned Trial Magistrate erred in law and fact in failing to appreciate the relevant principles and case law in assessing damages on pain and suffering and thereby arrived at a very low award on general damages.***
>
> ***b. The Learned Trial Magistrate erred in law and fact in failing to properly evaluate the evidence on record, particularly the evidence on permanent incapacity of the appellant and thereby erroneously awarded a low award on General Damages.***
>
> ***c. The Learned Trial Magistrate misdirected herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgement on General damages.***

3. When the matter came up for hearing on 9th October, 2018, I directed the Appeal be disposed of by way of written submissions. The submissions are discussed below.

4. In brief, the Appellant's quarrel is to do with quantum of damages. It was submitted that a medical report from Dr. Amugada had indicated that he had a compound fracture but however the trial magistrate did not appreciate the severity of the injury when she gave an inordinately low award. It was submitted that an award of Kshs 1,000,000/- would have been reasonable as was found in the case of **Victoria Veneziani v A.A. Kawir Transporters & Another (2009) eKLR** where the court awarded Kshs 700,000/- for injuries of a similar nature.

5. On special damages, the Appellant made no submissions.

6. It was submitted that the appeal be allowed, the trial court's judgement be set aside and the quantum be reassessed and the appellant be awarded costs of the appeal in the trial court and in the appeal.

7. On the other hand, it was submitted for the Respondent that the award of general damages should not be interfered with, unless in assessing the damages the trial court acted on wrong principles or took into account irrelevant factors or left out of account a relevant one or

that short of this, the amount was so inordinately high or low that it must be a wholly erroneous estimate of damages. The case of **Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR** was cited.

8. The Respondents submitted that the quantum awarded by the court ought not to be interfered with because according to the evidence on record that the trial court relied upon, to wit, the medical report of Dr. Desire Aime of Bishop Kioko Catholic Hospital dated 1st January, 2015 which had not indicated that the appellant suffered a compound fracture. The said report was relied upon by Dr. Maina Ruga and Dr. J. L. Amugada. However, the same were not the primary documents. Counsel cited the cases of **Samuel Ndirangu Nganga v Lucy Wambui Wachira (2013) eKLR** and **Johnson Mose Nyaundi v Petroleum & Industrial Service Ltd (2014) eKLR** where the sum of between Kshs 250,000/- and Kshs 180,000/- was awarded to injuries comparable to the one given by the trial court and therefore the award of Kshs 350,000/- by the trial court was fair, reasonable and not inordinately low.

9. I have carefully considered this Appeal, the Grounds of opposition filed by the Respondents, submissions by the parties and the authorities relied upon by the parties. This being a first appeal, the court shall carry out its task, to wit, analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. See the case of **Lake Flowers v Cila Francklyn Onyango Ngonga & Anor [2008] eKLR** where it was stated:

> ***"…being a first appeal, the principle upon which this court acts are well settled, in 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 that respect. In particular this court is not bound necessarily to follow the trial judge's findings of facts if it appears either that she 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 demeanor of a witness is inconsistent with the evidence in the case generally.*** *Selle v. Associated Motor Boat Company [1968] EA 123****."***

10. This Appeal is on the issue of quantum only as liability was apportioned by consent at 75: 25 in favour of the Appellant. I recognize that assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on a wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini v A.M. Lubia And Olive Lubia**, where it was held inter alia that:-

> ***''…the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 , he amount is so inordinately high that it must be wholly erroneous estimate of the damages''.***

I will apply the foregoing test on the facts of the case.

11. The trial magistrate stated that according to the Medical reports by Dr. Amuguda and Dr. Ruga, the appellant suffered fracture, however the Report of Dr. Ruga, the P3 form and the treatment notes from Bishop Kioko Hospital disclose that the appellant suffered bruises and in addition the P3 form indicated the injuries suffered by the appellant as harm. The Reports together with the treatment notes were attached to the submissions to form evidence before the trial court. For these injuries, the Learned Trial Magistrate awarded the Appellant a sum of Kshs 350,000 as General Damages for pain and suffering. The question which this court has to ask itself is whether the Learned Trial Magistrate in awarding damages of Kshs 350,000 took into account an irrelevant factor or left out a relevant factor, or acted on a wrong principle, and short of that, whether the award of damages was inordinately so high or low so as to be a wholly erroneous estimate of damages.

12. In awarding damages, the Learned Trial Magistrate stated that she had considered the injuries suffered by the Appellant which injuries were confirmed by the medical reports and her comment on the authorities relied by the appellant was that the authorities were of no help to the court, for they relate to injuries that are not comparable to the instant case. With regard to the authorities cited by the respondent, she commented that the decision was made 15 years ago and cannot be a measuring stick for the matter before the court.

13. In this case, Dr Mutunga as at 5.1.15 found that the appellant suffered a fracture of the left ulna as a result of the road traffic accident on 11.10.14 and the injuries are classified as harm. Dr Desire Aime, as at 6.1.15 found that the Appellant suffered a fracture of both the radius and ulna as result of the injury he sustained following the road traffic accident on 11.10.14. On the other hand, Dr J.L. Amugada as at 17.2.2015 indicated that the appellant suffered a compound fracture of the left radius/ulna. These findings are what the trial court considered and her analysis of the different reports had immense bearing on the award of general damages, and I am satisfied that the trial magistrate did factor all the reports in totality in the general damages awarded to the appellant.

14. From the reports on record, I note the fact that the Doctors were not in agreement that the respondent suffered compound fractures. It is only one out of the four reports that indicate the aspect of compound fractures and I agree with the finding of the trial magistrate and find that in awarding general damages the trial court did not take into account irrelevant factors and had not acted on wrong principle, neither did it arrive at a wholly erroneous estimation of damages. The amount awarded was reasonable and therefore there are no sufficient reasons to disturb the award by the Learned Trial Magistrate. Accordingly, I uphold the decision by the trial court on the award of general damages.

15. The amount of special damages was not challenged and the same shall not be interfered with.

16. The appeal is dismissed for it lacks merit. Costs of the appeal and in the lower court will go to the respondents. Award and costs will be at court rates.

It is so ordered.

Dated and delivered at Machakos this 22nd day of May, 2019.

D.K KEMEI

JUDGE