REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 20 OF 2018

FREDRICK MUTEGI.....APPELLANT

VERSUS

JACOB OCHIENG OMONDI .....RESPONDENT

[Being an appeal from the judgment and decree of Hon. R.K. Ondieki, SPM delivered on 21st March, 2018 in Kilifi SPMCCC No. 71 of 2015, Jacob Ochieng Omondi v Fredrick Mutegi]

JUDGEMENT

1. On 17TH August, 2014 the Respondent, Jacob Ochieng Omondi was riding his motorcycle registration number KMCV 152P along Kilifi-Mombasa road when upon reaching Mzambarauni area he collided with motor vehicle registration number KBG 192V belonging to the Appellant, Fredrick Mutegi. The Respondent later sued the Appellant for compensation as a result of the injuries sustained in the accident.

2. In a judgment delivered on 21st March, 2018 in Kilifi SPMCC No. 71 of 2015 the Respondent was awarded Kshs.2,000,000 as general damages for pain, suffering and loss of amenities and Kshs.225,809 as special damages.

3. The Appellant being aggrieved by both the findings on liability and the quantum of damages has appealed to this court on the grounds dated 24th March, 2018 as follows:-

> **"1. That the learned magistrate erred in law and in fact by reaching a decision that was contrary to the weight of evidence adduced before the court, and in holding that the plaintiff had proved his case on a balance of probability on the issue of negligence.**
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> **2. That the learned trial magistrate erred in law and in fact in apportioning liability in the manner that he did, which was contrary to the evidence on record.**
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> **3. That the learned trial magistrate, exercised his discretion in apportioning liability wrongly by acting contrary to the weight of evidence that was before the court.**
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> **4. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions and pleadings while determining the issue of occurrence and blameworthiness for the said accident and damages thus arriving at an erroneous conclusion.**
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> **5. That the learned trial magistrate erred in law and in fact in assessing and awarding a quantum of Kshs.2,000,000 as general damages for pain and suffering which was too inordinately high hence an erroneous and unreasonable estimate of general damages for pain, suffering and loss of amenities.**
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> **6. That the learned trial magistrate erred in law and in fact in failing to consider judicial precedent and in taking into account things he ought not to have considered and failing to take into account things he should have considered hence arrived at an assessment of damages that was erroneous.**
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> **7. That on the face of it there is wanton abuse of judicial discretion in making an award of general damages for pain [and] suffering that is wild, arbitrary, whimsical and inordinate and made based on extraneous issues other than the time-developed principles on assessment of damages for pain, suffering and loss of amenities, which makes the exercise of the discretion wrong and erroneous."**

4. Consequently, the Appellant prays that:-

> **"a) The court do re-evaluate the evidence on negligence and dismiss the case for not being proved to the required standard, or hold the plaintiff substantively liable for the accident.**
>
> **b) That if the court finds that the Respondent proved negligence it be pleased to re-assess both the general and special damages awarded to Jacob Ochieng Omondi be readjusted downwards.**
>
> **c) Costs of the proceedings in the subordinate court and in this appeal be given to the Appellant."**

5. The Respondent opposed the appeal in its entirety.

6. The advocates on record for the parties agreed to have the appeal proceed through written submissions. In submissions filed on 17th December, 2018 counsel for the Appellant faulted the trial court's finding on liability on the grounds that the trial court made findings against the Appellant not based on any evidence at all; that the trial court erred in holding that an un-pleaded issue and contradictory evidence proved the Respondent's case; that the trial court erred in relying on the inconsistent evidence adduced in support of the Respondent's case; and that the trial court failed to properly analyze and evaluate the evidence and misapprehended it.

7. As for the quantum of the damages awarded, counsel for the Appellant contends that the trial magistrate applied the wrong principles of law in assessing the general damages for pain, suffering and loss of amenities and thereby ending up making an inordinately high award.

8. The Respondent's position is that the evidence he adduced at the trial court established negligence on the part of the Appellant. It is his case that the trial magistrate's award of damages was based on the applicable legal principles. He therefore urges this court to dismiss the appeal and award him costs.

9. The advocates for the parties agree that this being a first appeal the jurisdiction of this court involves the reassessment of evidence in order for the court to arrive at its own independent decision. In doing so, the court is required to make due allowance to the fact that it never saw or heard the witnesses. In **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira & Co. Advocates [2013] eKLR** the duty of a first appellate court was summarized as follows:-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited [2009] 2 EA 212 wherein the Court of Appeal held inter alia that:-**
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> **"On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

10. The duty of a first appellate court was also highlighted in **Damiano Migwi v Timothy Maina Waitugi [2009] eKLR** as follows:-

> **"It is an issue of law, as stated in the 1st ground of appeal, to consider whether the first appellate court properly analysed and re-evaluated the evidence on record as it is its duty to do at that stage. A first appellate has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court's decision could be supported–see Peters v Sunday Post Ltd [1959] EA 424, and Selle & Another v Associated Motor Boat Company Ltd & others [1968] EA 123.**
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> **See also Mwangi v Wambugu [1984] KLR 453 where it was held:**
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> **" 2. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.""**

11. Having stated the applicable principles, I now proceed to consider the appeal. On the claim that the trial court made findings not based on any evidence, the Appellant zeroed in on a paragraph of the trial court's judgment where it is stated that:-

> **"Even 15 mph may not be a safe speed in the early and evening hours of the day when children go to school and back home along and across a road which known to the driver as in the instant case, that Mzambarauni serves an area with many activities even schools in it. In a manner of speaking there would be people and cars here, people and cars there and people and cars everywhere. The safe speed therefore on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of probable circumstances which will exonerate the driver, even traveling at half that speed may not afford a defence in a case of negligence."**

12. According to the Appellant's counsel the trial magistrate based his finding on evidence not on record for the reasons that the accident happened at night during a weekend so that the issue of school children did not arise; that there was no evidence that Mzambarauni has many activities including schools; that the statement that there were many people and many cars at the time was not based on evidence; that the accident herein involved two motor vehicles and not a pedestrian hence reference to the principle of 'even half speed being wrong' was misplaced; and that the Appellant explained the evasive steps he took while the Respondent did not. In the Appellant's opinion, had the trial magistrate taken all the factors into account and only considered the evidence on record he would have reached a different finding on negligence.

13. On the allegation that the trial magistrate based his findings on an issue that was not pleaded and contradictory evidence, counsel for the Appellant submitted that nowhere in the plaint was it pleaded that the Appellant was overtaking another vehicle when the accident occurred, yet the case was decided on this issue. Counsel for the Appellant cited the decisions in the cases of **Muthoni Nduati v Wanyoike Kamau & 5 others, HCCC No. 1661 of 1980** and **Galaxy Paints Company Ltd v Falcon Guards Ltd, Civil Appeal No. 219 of 1998 (Nairobi)** in support of the proposition that parties must be confined to their pleadings and it is erroneous to decide a case on un-pleaded issues.

14. Counsel for the Appellant also submitted that there was inconsistency in the testimony of the Respondent and his witnesses as to how the accident occurred and the trial court erred in finding that the Respondent had proved negligence based on the inconsistent evidence. Pages 46 and 48 of Vol. 34 of the 4th Edition of Halsbury's Laws of England are cited as stressing that prove of negligence lies with the plaintiff. Also cited in support of the said principle is the decision in the case of **Josephine Kamau Ngegi v Mohamed Sheikh Omar Bin Dahman**, **Mombasa HCCC No. 312 of 1995.**

15. Closing submissions on the question of liability, counsel for the Appellant submitted that the trial court failed to properly analyse and evaluate the evidence and misapprehended it. Counsel pointed out pieces of evidence which in his view ought to have led to the Appellant not being held liable for the accident. I shall revert to the Appellant's submissions during my analysis of the evidence adduced at the trial.

16. On the quantum of damages awarded, it was urged for the Appellant that this court should interfere with the award of Kshs.2,000,000 as general damages for pain, suffering and loss of amenities on the ground that the trial magistrate failed to take into account the principles governing assessment of damages which require that comparable injuries should be equally compensated. The decision of **Kigaragari v Aya [1985] eKLR** was cited as conveying the principles that should guide a court when assessing damages.

17. Counsel for the Appellant cited the decision in **Nicholas Neche v KBS (Msa) Ltd & another, Nairobi HCCC No. 369 of 1986** where the plaintiff was awarded of Kshs.400,000 for injuries similar to those suffered by the Respondent and urged this court to award Kshs.400,000 to the Respondent.

18. In submissions filed on 19th February, 2019 counsel for the Respondent dwelt at length on alleged improprieties of the investigating officer, one police constable Samwel Kirui, which later led to his being internally disciplined by the Kenya Police Service for interfering with investigations into the accident in collusion with the Appellant. This issue will be considered in detail during the determination of the appeal.

19. It was submitted by the Respondent's counsel that the evidence adduced established that the Appellant was overtaking a matatu when he hit the Respondent. Counsel submitted that the trial court therefore reached the correct finding on liability.

20. Responding to the four points taken up by the Appellant on liability, counsel for the Respondent urged the court to find that the observations made in the judgment of the trial court amounted to the magistrate's reasoning in line with the Appellant's testimony on record.

21. In response to the submission that "overtaking" was not pleaded in the particulars of negligence, counsel for the Appellant submitted that negligence was pleaded in the plaint and the evidence adduced showed that the accident occurred as the Appellant was overtaking another motor vehicle.

22. According to counsel for the Respondent, the statement by the witnesses that the Appellant hit the Respondent in the course of overtaking another vehicle only went to establish the averment in the plaint that the Appellant was driving dangerously.

23. On the Appellant's assertion that the evidence of the Respondent's witnesses was inconsistent, counsel for the Respondent submitted that no specifics were provided about the alleged inconsistencies.

24. Counsel for the Respondent submitted that the claim that the trial court failed to properly analyse the evidence is not supported by the record.

25. Finally, on the quantum of damages awarded, counsel for the Respondent submitted that the Appellant has not established grounds for interference with the decision of the trial court. He pointed out that the decision in **Nicholas Neche** (supra) relied on by the Appellant was made 25 years ago and considering inflation the award should be Kshs. 7 million at the moment. His view was that the cited decision is not an appropriate reference in the circumstances of this case.

26. Counsel submitted that the award of Kshs.2,000,000 was moderate and referred to the cases of **Michael Njagi Karimi v Gideon Ndungu Ngubiru & another [2013] eKLR** where Kshs.2,000,000 was awarded and **Anthony Mwondu Maina v Samwuel Gitau Njenga [2006] eKLR** where an award of Kshs.1,200,000 was made. He consequently urged the court to find the appeal without merit and dismiss it with costs.

27. A perusal of the evidence adduced at the trial will determine the issue of liability. The Respondent testified as PW2 and told the court he saw headlights of an oncoming motor vehicle as he was riding his motorbike towards Mombasa along Kilifi-Mombasa road. The oncoming car moved to his lane and he swerved to the left but he was nevertheless hit by the motor vehicle. He was thrown to the bushes on the left.

On checking what had hit him he saw motor vehicle motor vehicle registration number KBG 192V which had stopped on his lane. His testimony was that he blamed the driver for overtaking at a bend. He also stated that the driver of the motor vehicle overtook carelessly. He denied riding at a high speed and stated that he was doing 35-40kmph at the time of the accident which occurred at Mzambaraoni area.

28. Answering questions put to him during cross-examination, the Respondent stated that his lane was clear. He told the court that had he seen the motor vehicle at a distance he would have swerved to the left of the road. His evidence was that the motor vehicle which was at a high speed appeared suddenly. He stated that the motor vehicle which hit him was overtaking another motor vehicle. He denied trying to overtake another motorcycle prior to the impact. He stated that he was thrown off into the bushes and his motorcycle landed on the edge of the road.

29. PW3 Police Constable Ismael Aden confirmed the occurrence of the accident at about 7.30pm on the material day. He stated that the accident, which was still being investigated at the time he testified, was initially investigated by Police Constable Kirui who had been transferred to Naivasha.

30. According to PW3, the Respondent who was riding towards Mombasa failed to keep to his lane thereby colliding with the Appellant's oncoming motor vehicle. He stated that by the time the covering report was written by Police Constable Kirui on 17th August, 2014, the Respondent had not recorded his statement. When the Respondent recorded his statement on 27th August, 2014 he indicated that it is the Appellant who had failed to stick to his lane consequently hitting him.

31. PW3 also indicated that a witness by the name Said Juma had recorded a statement indicating that the Appellant's car was overtaking another motor vehicle when the accident occurred.

32. PW3 told the court that the police file showed that Police Constable Kirui had cleared the accident scene. He stated that disciplinary proceedings had been taken against Police Constable Kirui for failing to draw a sketch map and failing to record statements from the Respondent and key witnesses.

33. Cross-examined, PW3 told the court that Police Constable Kirui had drawn a sketch map which was in the police file. He stated that according to the sketch map the motorcycle had left its lane and moved towards the lane of the oncoming motor vehicle. Further, that the point of impact was on the lane of the motor vehicle. The witness also told the court that no new investigating officer had been appointed in the matter. PW3 told the court that a person by the name Joseph Mkono recorded a statement to the effect that after the accident boda boda riders wanted to attack the driver of the motor vehicle. According to PW3 this was a common occurrence as boda boda riders would attack motor vehicle drivers whenever one of their own was involved in an accident. It was PW3's testimony that Mkono recorded that the motorcycle rider wanted him to record a statement in his favour. PW3 also noted that some of the witnesses recorded statements with the police two years after the accident. PW3 told the court that Police Constable Kirui concluded that the motorbike rider was to blame for the accident.

34. PW4 Said Rumba Juma told the court that he is a boda boda operator. On the material day at about 8.00pm he was at Mzambarauni stage waiting for his motorbike. While there he saw a motorbike heading towards Mombasa from Kilifi direction. There were three cars from the Mombasa direction. The motor vehicle which was ahead was exiting the road and the matatu which was following it slowed down. The driver of the third vehicle overtook the matatu in the process hitting the motorcycle which was heading to Mombasa. PW4 stated that the rider was thrown into the bushes.

35. The motor vehicle being registration number KBG 192V stopped as its right tyre had burst on impact. When he approached the motor vehicle he found the driver sipping an alcoholic drink. There was also an untouched bottle of liquor. He took the two bottles from the driver and later handed them over to Police Constable Kirui. The motorcyclist was taken to Oasis Health Centre for treatment.

36. PW4 told the court that he later found the motor vehicle driver drinking alcohol with Police Constable Kirui at a nearby bar. PW4 testified that the next day when he went to record a statement and Police Constable Kirui told him not to bother himself with a case that did not involve him. The witness told the court that the motorcycle rider was not overtaking any motorcycle or motor vehicle and it was the driver of the motor vehicle who was to blame for the accident.

37. Pw4 was cross-examined at length and he told the court that he recorded a statement with the police two years after the accident. He confirmed that it was not indicated in his written statement that the Appellant was overtaking a matatu and another vehicle make Toyota Fielder. He confirmed that his written statement indicated that it was the rider who swerved onto the lane of the oncoming vehicle.

38. The witness also stated that he did not record in his statement that the Appellant had alcoholic drinks in the car or that Police Constable Kirui chased him from the police station when he went to record a statement.

39. PW5 Julius Ziro Ngoa, wrongly recorded in the trial proceedings as PW4, stated that on the material day he had just bought kerosene at Mzambarauni stage when he saw motor vehicle KBG 192V which was overtaking a matatu hit a motorbike which was heading to Mombasa. He stated that the motorcycle was hit on its lane. He also testified that he saw alcoholic drinks in the accident motor vehicle.

40. When cross-examined PW5 told the court that there was no other motorcycle apart from the one that was involved in the accident.

41. The Appellant testified in his defence as DW1 and told the trial court that on the material day he was driving from Mombasa to Kilifi. On reaching Mzambarauni the motorbike KMCV 152V was trying to overtake and entered his lane. He tried to avoid it but it hit the front bumper of his motor vehicle. He stopped his motor vehicle on his rightful lane after the impact. He denied having any alcohol in his motor vehicle or being drunk. He stated that he was roughed up and robbed by boda boda riders who threatened to burn his motor vehicle.

42. When the Appellant was cross-examined he insisted that the motorcycle rider landed on his lane after the accident. He denied knowing

Police Constable Kirui and stated that he was not aware that the police officer had been disciplined after the accident.

43. There are two versions as to how the accident occurred and this court must consider each one of them and give reasons why it believes one version over the other.

44. The evidence of the Appellant as captured in the typed proceedings is as follows:-

> **"On 17/8/14, I was driving motor vehicle KBG 152 from Mombasa to Kilifi and upon reaching Mzambarauni at about 6.45p.m., there was a motorbike ahead of me made an overtake in c form and as I tried to avoid, he came to my lane but in the process he hit front bumper. He was riding KMCV 152V. I have not seen this motorbike rider. He was the one overtaking."**

45. The handwritten record is the same with the typed record. In the judgment the trial magistrate recounted the Appellant's testimony, *inter alia:-*

> **"FREDRICK MUTEGI (DW1) told the court that indeed an accident occurred on the 17th August, 2014 as the rider suddenly made U turn and consequently knocked him down on his lane."**

46. From the proceedings and the judgment, the story of the Appellant as to how the accident occurred is not clear. Was the Respondent overtaking or was he making a U-turn? If he was overtaking, what was he overtaking? The evidence of the Appellant is not clear as to how the accident occurred. The impression one gets is that the Appellant did not know how the accident occurred or he lied about it.

47. Counsel for the Respondent urged the court to find the evidence of Police Constable Kirui unreliable. PW3 who is a police officer told the court that Police Constable Kirui failed to record the statement of the Respondent and other witnesses. He also stated that Police Constable Kirui had not drawn a sketch map but referred to a sketch map during cross-examination. The key point to note is that Police Constable Kirui was never called as a witness. His findings as to the point of impact was therefore not tested. Coupled with the Appellant's failure to explain how the accident happened, it is difficult to rely on the sketch map as the author of the same was not called.

48. The only remaining plausible version as to how the accident occurred is that of the Respondent. His testimony was that the Appellant was overtaking when he hit him. The testimony was supported by that of PW4 and PW5 who were independent eyewitnesses. Based on the Respondent's evidence I find that he proved that the Appellant drove negligently by failing to confirm that the road was clear of oncoming traffic before starting to overtake. I have not noted any major contradictions in the evidence of the Respondent and that of his witnesses which can make this court disbelieve the Respondent's case.

49. The Appellant complained about the trial court's finding that the accident occurred as the Appellant was overtaking a matatu. According to the Appellant, "overtaking" was not pleaded as one of the particulars of negligence. I do not find merit in this complaint. Among the particulars of negligence pleaded were:-

> **"a) Driving at an excessive speed or speed that was excessive in the circumstances.**
>
> **b) Driving the said motor vehicle in a manner that was dangerous to other road users."**

50. A driver who overtakes without ensuring that the road is clear of oncoming traffic drives in a dangerous manner and is a danger to other road users. If the Appellant was not driving at an excessive speed in the circumstances he would have braked and avoided hitting the Respondent. As correctly pointed out by counsel for the Respondent the act of overtaking was evidence of negligence. It could either be pleaded as one of the particulars of negligence or it could be proved as a fact establishing negligence.

51. In summary, I find that the learned trial magistrate did not err in finding that the accident was largely caused by the negligence of the Appellant. Having reached that finding, and none of the parties having taken issue with apportionment of liability (70% for the Appellant & 30% for the Respondent), I find that the Appellant's appeal on liability fails. The same is dismissed.

52. As for the appeal on the quantum of damages, the question is whether the Appellant has convinced this court that the award should be disturbed in that the trial magistrate took into account an irrelevant factor, or failed to take into account a relevant factor, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

53. The principles governing assessment of damages were outlined by Nyarangi, JA in **Kigaragari (supra)** as follows:-

> **"I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees. The warning in Rahima Tayab & Another v Anna Mary Kinanu, Civil Appeal No. 29 of 1982, was:**
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> **"if the sums get too large, we are in danger of inuring the body politic…as large sums are awarded so premiums for insurance rise higher and higher." See also Lim Poll Choo v Camder & Islington Area Health Authority [1979] 1 AER 332."**

It is of course desirable that so far as possible comparable injuries should be about or nearly equally compensated: However, the comparison should be confined to decisions of local courts, other decisions, eg overseas ones serving merely as a guide: See Bhogal v Burbidge & Another, [1975] EA 285 at page 289, letter C."

54. A perusal of the trial court's judgment will show that the trial magistrate before making the award quoted the statement of Madan, JA in **Ugenya Bus Service v James Kongo Gachohi**, **Civil Appeal No. 66 of 1981** that:-

"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are some many incalculables. The imponderables vary enormously. When I ponderingly struggle to seek a reasonable award I do not aim for precision.

I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but to do the best I can.

I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs.20,000 for the loss of a forearm or Kshs.50,000 for the loss of an eye. Even without the curse of inflation they were niggardly."

55. The trial magistrate then proceeded to award Kshs.2,000,000. He never cited any authority in support of the award. The statement of Madan, JA was relevant only in so far as it urged courts to make reasonable awards.

56. According to PW1 Dr Ajoni Adede the Respondent suffered fractures of the right humerus arm bone, right radius and ulna forearm bones and a fracture of the left clavicle shoulder blade bone. He also sustained a deep cut on the right knee. He was admitted in hospital for three days. Metal implants were inserted in three places; right humerus, right radius and the clavicle shoulder blade. When PW1 examined the Respondent 38 days after the accident he had difficulty in raising the injured limb and there was a 6 cm scar on the knee. He estimated permanent partial disability at 12%. His view was that the injuries would heal with residual joint stiffness.

57. In **Nicholas Neche** (supra) where the plaintiff suffered head injury concussion, fracture of the radius of the left arm, compound fracture of the upper humerus, fracture of scapula, arbitration on the back, unconsciousness, underwent three operations, was out of work for 5 months, could not carry his vocation further and had healed with resultant restricted movement of the left arm due to mal-union, the plaintiff was awarded Kshs.400,000. However, two things need to be noted; the award was made way back in 1994 and the injuries were far more serious than those of the Respondent herein.

58. In the case of **Michael Njagi Karimi (supra)** the plaintiff had fractured both lower limbs and one upper limb. He had undergone several operations. In making an award of Kshs.2,000,000 for pain, suffering and loss of amenities in 2013, Justice H. P. G. Waweru observed that:-

"43. I have noted the very serious injuries suffered by the Plaintiff and his long hospitalization and treatment. Mercifully the injuries suffered did not involve the head or spinal cord. That he suffered much pain and discomfort cannot be in doubt. He still needs to undergo further remedial surgeries and the prospects of the same must be daunting to him. He has ability of the total person to the extent of 35%."

59. One cannot surely compare the serious injuries sustained by the plaintiff in the cited case to those sustained by the Respondent herein. The plaintiff in the said case suffered disability of 35% whereas the disability of the Respondent was assessed at 12%. An award of Kshs.2,000,000 in the instant case was therefore on the higher side considering the kind of injuries suffered by the Respondent.

60. In **Anthony Mwondu Maina** (supra) the plaintiff who suffered 5 fractures and was unconscious for 10 days after the accident was awarded Kshs.1,200,000 for pain, suffering and loss of amenities. It is however, noted that the award was made in 2006 and taking inflation into account, such an amount may be low for those kind of injuries today.

61. Considering the authorities cited and being mindful of the fact that awards should be adequate but not punitive, I find the award of Kshs.2,000,000 for pain, suffering and loss of amenities inordinately high. I set it aside and substitute it with an award of Kshs.1,000,000.

62. The Appellant did not submit on the award of Kshs.225,809 as special damages meaning that the award is unchallenged. The award shall therefore remain undisturbed. The award shall be subjected to the apportionment of liability as determined in the trial court's judgment.

63. Owing to the partial success of the appeal, I award the Appellant half the costs of the appeal. For avoidance of doubt the Respondent will have the full costs of the trial but based on the figures as revised in this judgment.

Dated and Signed at Nairobi this 24th day of April, 2019

W. Korir,

Judge of the High Court

Delivered and Countersigned at Malindi this 20th day of June, 2019

R. Nyakundi,

Judge of the High Court