REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 266 OF 2015

DAVID AUGUSTINE.....1ST APPELANT

SAMUEL MOKAYA.....2ND APPELLANT

VERSUS

PATRICIA KWAMBOKA MOKAYA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C. Obulutsa, Senior Principal Magistrate,

Milimani Commercial Courts, delivered on 10th April, 2015)

JUDGMENT

This appeal follows the judgment of the lower court delivered on 30th April, 2015. In the proceedings before the lower court, the respondent herein was the plaintiff while the appellants were the defendants. The respondent was injured in a road traffic accident and blamed the accident on the negligence of the appellants herein.

After the full trial, the lower court awarded a sum of Ksh. 1,200,000/= general damages, Ksh. 59,039/= special damages and Kshs. 200,000/= for future medical costs bringing the total to Kshs. 1,459,039.95.

The record shows that the parties entered judgment on liability at 90% against the appellants and 10% against the respondent. Subsequently, the case was listed for hearing to determine the award of damages payable.

After the judgment, the appellants were aggrieved by the awards made and filed the present appeal by way of Memorandum of Appeal dated 26th May, 2015. In the record presented before me, I have come across what has been described to be a reply to record of appeal and cross appeal dated 13th and filed on 14th November, 2018. It is not clear from the record whether or not leave was granted to the respondent to file such a document without any record of the proceedings as required under the relevant provisions.

Be that as it may, after the judgment of the lower court the appellants applied to stay the execution of that judgment whereupon consent was recorded to the effect that, the appellants do pay the respondent a sum of Kshs. 750,000/= within 14 days and deposit the balance of Kshs. 704,354/= in court within 14 days. That consent was contained in a letter dated 21st July, 2015. Apparently, the appellant did not comply with the second limb of the consent order which has been made an issue by the respondent's counsel in his submissions filed on 8th May, 2019 in the argument of this appeal.

In those submissions the advocate for the respondent casts doubt upon the competence and sustainability of the present appeal because the appellant failed to comply with that consent order. He has therefore posed a question whether or not having failed to comply with the terms of the consent, the appellants have audience before this court. The advocate then proceeds to state that the appellants have no right to delve into the merits of an appeal that has not been admitted. He then concludes by submitting that he recuses himself from delving into the merits of the purported appeal.

On the other hand, the appellants have filed comprehensive submissions, and cited several authorities in the prosecution the same and in line with the Memorandum of Appeal. I shall first deal with the complaint raised by the advocate for the respondent.

It is true that a consent was recorded as stated above. Going by the contents of that consent, there was no default clause that in the event the appellants did not comply, they shall lose the right to be heard. Paragraph 1 of the consent is clear that stay of execution of the judgment would be granted on the conditions set out thereunder. What that meant was, in the event of noncompliance on the part of the appellants,

then execution would proceed.

The respondent was at liberty to proceed with the execution which option was not taken. It cannot at this stage be submitted that the appellants should be denied audience by the court for noncompliance with the consent order, whereas that order did not contain an express default clause.

The counsel for the respondent is therefore not right to fail to address the appeal, which in my view is valid and competent. On whether or not the appeal was admitted, the record is clear that on 29th October, 2018, in the presence of both counsel, an order admitting the appeal to hearing was given and directions given as to hearing. Subsequently an order was made for the filing of submissions.

I shall now deal with the merits of the appeal. Going by the Memorandum of Appeal, the appellants complained that the award of general damages was inordinately high in view of the evidence tendered, and conventional awards in cases of similar nature.

The plaintiff called Dr. Theophilus Wangata who gave evidence and produced the medical report exhibit 1 in evidence. The respondent sustained compound fracture of the left tibia fibula, traumatic amputation of 1st, 2nd and 3rd toes, deep cut wounds on both thighs, deep cut wounds on the right forearm, loss of six teeth, blood loss physical and psychological pains.

She was hospitalized for a period of 4 months and remained with scars that are of great cosmetic significance. She then had features of post traumatic osteoarthritis at the left ankle and knee, a chronic joint condition that presents with pain, swelling and stiffness which required a recurrent use of pain killers. She also stood a risk of developing chronic osteomyelitis at the fracture site on the left leg in future, which is a persistent bone infection requiring analgesics and antibiotics.

The doctor observed there would be further dental treatment and replacement of the lost teeth estimated to cost Kshs. 200,000/=. The degree of permanent incapacity was assessed at 40%.

The appellants on the other hand called Dr. Moses Kamau who also examined the respondent and produced the medical report defence exhibit 1. The report related to only dental issues and the doctor concluded that, if there was going to be any further aid to repair the lost teeth, this would cost about Kshs. 70,000/=.

In the judgment of the lower court, it is clear the authorities cited by both parties were considered. The court also took into consideration inflation and the incapacity of the respondent placed at 40%.

As the 1st appellate court it is my duty to evaluate the evidence presented before the trial court with a view to arriving at independent conclusions. The appellate court may interfere with awards made by the trial court if that court proceeded on wrong principles leading to wrong assessment of damages, and if the said awards were inordinately too high or low so as to attract the intervention of the appellate court. **See Jabane Vs Olenja (1986) KLR 661.**

For the respondent's permanent incapacity to be assessed at 40%, the doctor must have determined the seriousness and residual effect of the injuries sustained by the respondent. I have also looked at some of the authorities cited by the parties in the lower court which included **Nairobi HCCC NO. 1164 OF 1990 Joseph Muthigani Mihindo vs. Peter Njirwa, Mombasa HCCC No. 165 of 1990 Kana Mugao vs. Adrew Kamau Wokabi & another, Nairobi HCCC No. 2005 of 1999 Margaret Wangui Kioko vs. Muus Kenya Ltd.**

The trial court did not apply wrong principles neither can the awards be said to be too high. I am unable to interfere with the award of general damages made by the lower court in view of the injuries sustained by the respondent, and considering the length of time that has gone by, from the time those comparable cases were decided by the courts.

On special damages, the respondent produced evidence to justify the award of Kshs. 59,039/=. The lower court made an award of kshs. 200,000/= for future medical intervention. It will be noted that the two medical reports are at variance in that regard. There is no reason given why the trial court opted for the doctor's report produced by the respondent and not the one produced by the appellant.

In the absence of such reasons I have opted to take the average figure of the two reports which is Kshs. 135,000/= for future medical costs. The total award is therefore as follows,

General damages	Kshs.	1,200,000/=
Special damages	Ksha.	59,039/=
Future medical costs	Khs.	135,000/=
Subtotal	Kshs.	1,394,039/=
Less 10%	Kshs.	139,403.90
Total	Kshs.	**1,254,635.10**

In the end this appeal is dismissed, with a slight adjustment on the future medical cost such that the respondent is entitled to judgment in the total sum of Kshs. 1,254,635.10. Each party shall bear their own costs in this appeal.

Dated, signed and delivered at Nairobi this 25th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE