REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 93 OF 2016

JOHN KENNEDY KIBUNYU..1ST APPELLANT

JAMES WAKABA WATHANJI..2ND APPELLANT

-VERSUS-

NAO (Minor suing Through her father EOO as next friend.....RESPONDENT

(An appeal against the entire judgment of the Hon. M. Chesang' delivered on the 4th day of February, 2016 in Chief Magistrate's Court Civil Suit no. 1726 of 2012)

JUDGEMENT

1. NAO, (a minor suing through her father EOO as next friend), the respondent herein, filed a compensatory suit before the Chief magistrate's Court, Milimani Commercial Courts, Nairobi against John Kennedy Kibunyu and James Wakaba Wathanji, the 1st and 2nd appellants respectively for the injuries she sustained when she was knocked down while lawfully walking as a pedestrian along Outering road on 23.2.2010 by motor vehicle registration no. KAP 457P driven by the 1st appellant.

2. On 24th September 2015 counsels appearing in this matter, recorded a consent order apportioning liability whereof the respondent would shoulder 20% and the appellants 80%. Hon. M. Chesang learned Resident magistrate assessed damages on 4th February 2016 and awarded the respondent damages as follows:

a. General damages for pain and suffering ksh.900,000/=

b. Special damages ksh.310,792/86

3. The appellants being aggrieved preferred this appeal and put forward the following grounds:

1. THAT the learned trial magistrate erred in law in failing to appreciate the principles applicable in the award of damages.

2. THAT the award by the learned magistrate is against the law and evidence on record.

3. THAT the learned magistrate erred in law by failing to give proper consideration to the appellant's submissions on the quantum of damages.

4. THAT the learned trial magistrate failed to consider the relevant authorities cited by the appellant and therefore erred in law in his assessment of damages awardable to the respondent which was manifestly excessive.

4. When this appeal came up for hearing, this court directed the same to be disposed of by written submissions.

5. I have re-evaluated the evidence that was presented before the trial court for the assessment of damages. I have also considered the rival written submissions. It is not disputed that NAO sustained the following injuries as a result of the road traffic accident.

a. Fracture of the right mandible

b. Fracture of the left femur mid shaft

c. Fracture of anturm with extentions into inferior orbital wall

d. Injuries on her face, hands and legs.

e. Deformity on the left thigh, swollen tender, shortened and rotated pulmonary contusion on the left middle lobe.

6. It is the submission of the appellants that the award of ksh.900,000/= as general damages for pain and suffering was excessive in the circumstances. This court was urged to interfere with the award and substitute it with an award of kshs.800,000/= subject to the agreed ratio of apportionment.

7. The respondent implored upon this court not to interfere with the award since the trial magistrate considered all the relevant factors and principles in assessing damages.

8. I have examined the judgment of the trial court and it is evident that the learned Resident Magistrate took into account the authorities cited by the parties, the nature of injuries the victim sustained and came to the conclusion the figure she awarded represented a fair compensation and that the same is within comparable awards.

9. The record shows that the respondents had proposed before the trial court to be awarded a sum of kshs.1,600,000/= and relied on the case of **Dominic Peter Koko Mbai =vs= Yusuf Sadik Ibrahim & Another H.C.C.C no. 189 of 2002** where the claimant with near similar injuries was awarded ksh.1,200,000/=.

10. The appellant on their part proposed a sum of ksh.800,000/= to be awarded and relied on the case of **A. M. (minor suing through his next friend MAM) =vs= Mohamed Kahiye (2014) ekLR** where this court made an award of kshs.800,000/=.

11. The learned Resident Magistrate having considered the evidence and the authorities cited awarded the respondent a sum of ksh.900,000/=.

12. The principles to be considered by an appellate court before interfering with an award of damages by a trial court were restated by the court of Appeal in the case of **Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanni =vs= A. M. Lubia & Olive Lubia (1982 – 1988) 1 KAR 728** inter alia as follows:

> **"The principle 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 the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor, 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 damages."**

13. I am satisfied that the trial court considered all the relevant factors before making the award which in my view is not excessive nor exhorbitant. Consequently, the appeal as against quantum is found to be without merit. The same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 25th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……………………………. for the Appellant

……………………………. for the Respondent