**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO. 3 OF 2019**

**THE BOARD OF TRUSTEES ANGLICAN CHURCH**

**OF KENYA DIOCESE OF MARSABIT.....APPELLANT**

**VERSUS**

**ADANO ISACKO.....RESPONDENT**

*(Being an appeal from the Judgement of Hon. T.M. WAFULA Senior Resident Magistrate Marsabit Law Court in Civil Suit No.8 of 2018 delivered on 13.12.2018)*

**JUDGMENT**

The respondent was involved in a road Traffic accident on 11th April, 2015 along the Marsabit Moyale road. He filed Civil Suit number 8 of 2018 before the Marsabit Principal Magistrate's Court seeking damages as a result of the accident. Parties recorded a consent on liability at the ratio of 80:20% in favour of the respondent. The trial court assessed damages at Ksh.700,000.

The appellant is dissatisfied by the award of the trial court and preferred this appeal on the following grounds.

1. ***The learned senior Resident Magistrate erred in law and fact in making an award of general damages that was excessively high that there must be an erroneous estimate of the damages payable to the Respondents herein***.

***2. The learned Senior Resident Magistrate erred in law and fact in making an award of Ksh.700,000/-(seven hundred thousand) as general damages and which amount is excessively high considering the injuries suffered by the respondent herein.***

***3. The learned Senior Resident Magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant on the issue of Quantum and the legal Authorities provided therewith.***

***4. The learned Senior Resident Magistrate erred in law and fact in failing to subject himself to the rule of ratio decidendi and in departing from the established principles of stare decisis.***

***5. The learned Senior Resident Magistrate misdirected himself into arriving at a wrong decision on the issue of Quantum and in making an award that is obviously exaggerated and against the medical evidence tendered before Court during the trial.***

Mr. Kariuki, Counsel for the appellant maintain that the award of Ksh.700,00 as general damages for pain, suffering and loss of amenities is excessive. The respondent suffered fracture of the clavicle. In the case of **JOYCE WANJIRU KAMAU –V- KENYA CANNERS LTD & ANOTHER (2004) eKLR**, the claimant was awarded Ksh.100,000 for fractures on the left collar bone and pelvic. The trial Court found the authority as not providing similar injuries which finding is erroneous. Mr. Kariuki is of the opinion that an award of Ksh.200,000 is sufficient compensation. The award is not in line with the medical evidence tendered in Court.

Mr. Orayo, counsel for the respondent, contend that the appellant's authorities are quite old and affected by inflation due to lapse of time. The case of Joyce Wanjiru Kamau (Supra) was decided over 15 years ago. The case **of H. YOUNG & COMPANY E.A LTD –V- EDWARD YUMATSI (2013)eKLR** provide comparable injuries. There is no evidence to show that the trial Court applied the wrong principles or took into account irrelevant factors in arriving at the ward.

This is a first appeal. This Court has to re-evaluate the evidence adduced before the trial Court afresh before drawing its own conclusion. The respondent, **ADANO ISACKO**, is the only witness who testified in Court. He was involved in an accident on 11.4.2015. He was admitted at the Marsabit Referral hospital from 11th April to 13th April, 2015. He was examined by **Dr. Sureti** on 30.3.2018. Prior to the

accident he had been deployed to Somalia as a Police instructor in light weapons. He is a Police officer. After the accident he was transferred to Ongata Rongai Police station. He cannot shoot using a G3 rifle because of the impact and force the rifle has.

The plaint at paragraph 5 itemise the respondent's injuries as fracture of the right clavicle. The medical report by **Dr. Steve Sureti** dated 21.3.2018 describes the respondent's injuries as fracture of the right clavicle. The respondent was admitted for three (3) days and discharged with an arm sling.

In the case of **H. Young & Company E.A. Ltd V Edward Yumatsi (Supra**), the claimant sustained: -

- Deep cut wound on the head

- Bruises on the knee

- Cerebral concussion

- Fracture of the right clavicle bone

- Deep cut wound on the left elbow

The trial Court awarded Ksh.500,000 as general damages and the award was upheld by the High Court on appeal.

The trial Court observed that the **H. Young Case** (**Supra)** was decided in 2016 while the **Joyce Wanjiru Kamau case (Supra)** was decided **on** 2.6.2004. Within the judgment of the Joyce Wanjiru case the learned Judge made reference to the case of **TERESIA NDUTA & ANOTHER –v- PATRICK MUNGAI NJOROGE (HCCC No.3639/83)** where Ksh.150,000 was awarded for fracture of the left collar bone. This is a 1983 case. I do agree that the awards made in 2004 cannot be of much assistance to the court. They can only act as a guide to the Court to just take notice on what used to be awarded for such injuries fifteen years ago.

In the case of **BHOGAL V BURBIDGE & ANOTHER**, **(1975) E.A 265** the Court of Appeal for East Africa held then that some degree of uniformity must be sought in the award of damages.

In the case of **BUTT V KHAN 1981 KLR 349** the Court of Appeal held:

> **"The appellate Court cannot interfere with the decision of the trial Court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.**

In the case of **HENRY HIDAYA ILANGA V MANYEMA MANYOKA [1961] E.A. 705 at 713** Justice Kenneth O'Conner (as he then was) stated:

> ***The appellant alleges that the sum of shs.5,000/- awarded as general damages by the learned Judge was excessive; and the respondent alleges that it was inadequate. In considering this question I apply the rule laid down by the privy Council in Nance V British Columbia Electric Railway Co. Ltd (4), [1951] A.C. 601 at p.613, when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge:***
>
> > ***"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage(Flint V Lovell, [1935] l K.B. 354), approved by the House of Lords in Davies V Powell Duffryn Associated Collieries Ltd, [1942] A.C 601."***

It is my view that the assessment of damages by the trial Court did not consider irrelevant factors or that the trial Court applied the wrong principles. A fracture of the clavicle may be viewed as a simple fracture which heals and leaves no permanent incapacity. The respondent is a Police officer and his duty entails carrying of a rifle which duty can lead to having a sling over the neck for purposes of carrying a rifle. The case of H. young & Co. E.A. Ltd (Supra) provides more direct similar injuries and was decided recently. I do not find it appropriate to substitute the findings of the trial Court with my own assessment. I do find that the assessment of damages by trial Court is fair. The award is not excessive or inordinately high as alledged.

In the end I do find that the appeal lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24TH DAY OF SEPTEMBER, 2019**

**S. CHITEMBWE**

**JUDGE**