REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 31 OF 2017

JOSEPH NJUGUNA GACHIE.....APPELLANT

VERSUS

JACINTA KAVUU KYENGO.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable Senior Principal Magistrate

A. Lorot (Mr)on the 9th march, 2017 in Machakos CMCC No. 402 of 2015)

JUDGEMENT

1. The subject of this appeal is Machakos CMCC No. 402 of 2015, a suit instituted by the Respondent herein against the Appellant for damages arising from a road traffic accident which occurred on 10th December, 2013.

2. On 25th January, 2017, a consent judgement was entered in this matter in which liability was entered for the plaintiff against the defendant at the ratio of 95:05 and the parties agreed that the claim supporting documents filed with the plaint herein be admitted as evidence without calling the makers and that the originals be annexed to the plaintiff's submissions. The parties then agreed to file written submissions on the quantum. The parties also agreed that the medical report by **Dr Leah Wainaina** dated 13th August, 2014 be admitted as evidence.

3. In his judgement the learned trial court awarded the Respondent Kshs 950,000.00, Special Damages of Kshs 114,250.00 and Future Medical Expenses of Kshs 250,000.00

4. In this appeal the appellant submits that from the medical report of **Dr Kimuyu** dated 15th July, 2014, the Respondent sustained blunt temporal injury with swelling, facial bruises, blunt injury on the left forearm, comminuted fracture left radius and dislocated left ulna joint. He was found to be clinically stable and no disability was anticipated. As for the medical report of **Dr Leah Wainaina** dated 13th August, 2014, it was submitted that the Respondent sustained fracture of the left distal radius comminuted with dislocation of ulna with no disability anticipated.

5. It was therefore submitted that the respondent sustained comminuted fracture of the left radius, dislocated left ulna joint and soft tissue injuries with no disability anticipated. In support of the submissions the Appellant relied on **Haron Cheron vs. Eastern Produce (K) Limited [2014] KLR**, where the plaintiff suffered fracture of the right radius distal third, double fractures of the right ulna and fracture of the right olecranon of the right ulna at the elbow joint and was awarded Kshs 350,000.00 which was upheld by the Court of Appeal. The Appellant further relied on **Gogni Rajope Consturuction Compoany Limited vs. Francis Ojuok Olewe [2015] eKLR** and **Peris Mwikali Mutua vs. Peter Munyao Kimata [2008] KLR** where the court awarded Kshs 450,000.00 in a case where, according to the appellant the plaintiff sustained more serious injuries than in this case.

6. The court was therefore urged to re-evaluate, re-examine and review the award on quantum based on actual current trends and court awards. The appellant proposed that the award of Kshs 1,000,000.00 general damages be set aside and substituted with an award of between Kshs 250,000.00 and Kshs 400,000.00.

7. In opposing the appeal, the Respondent submitted that as a result of the said accident, the Respondent sustained blunt left temporal injury with swelling; facial bruises; blunt injury left forearm; comminuted fracture of radius; and dislocated left ulna joint. According to the

Respondent, the Medical Reports by both **Dr. Kimuyu** and **Dr. Leah Wainaina** confirm the above mentioned injuries and no evidence to the contrary was ever produced by the Appellants.

8. It was submitted that the trial Court properly directed itself based on the Plaintiff's/Respondent's injuries and documents and that the case law attached to the Plaintiff's/Respondent's submissions also supported the Plaintiff's/Respondent's case. It was therefore submitted that the sum of Kshs. 950,000/- awarded by the trial court is not excessive in the circumstances and this Court should not disturb the award as it is not inordinate high to represent an erroneous estimate. The award was fair and reasonable based on the injuries sustained by the Plaintiff/Respondent.

9. In support of the submissions the Respondent relied on **Robert Gitau Kanyiri –vs- Charles R. Kahiya & others Nakuru HCCC No. 22 of 2009** where the Plaintiff sustained similar injuries and Kshs. 1,000,000/- was awarded and **Samuel Mwangi Kamau –vs- Joseph M. Kimemia & Another HCCC No. 192 of 2001** where Kshs. 1,000,000/- was awarded in similar circumstances.

10. It was submitted that the Respondent herein was treated at Bishop Kioko hospital a private hospital in Machakos town where she was admitted from 10/12/2013 and discharged on 14/7/2014 over six months later. It is therefore clear that the injuries sustained by the Respondent were serious and life threatening**.**

11. Regarding the award for future medical expenses, it was submitted that according to **Dr. Kimuyu J.M** and **Dr. Leah Wainaina** in both their reports, they both recommended surgical removal of the implants in situ. However, the contention and the protest staged by the Appellants is on the award of Kshs. 250,000/- which was estimated by **Dr. Kimuyu** in his report and the same was upheld by the learned trial Magistrate. **Dr. Lean Wainaina** on the other hand made an estimate of Kshs. 30,000/- which surgery would be conducted at a Government hospital while the earlier estimate by **Dr. Kimuyu** includes surgery conducted at a private hospital. The Respondent was of the view that the appeal ought to fail.

Determination

12. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are 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 this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he 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 demeanour of a witness is inconsistent with the evidence in the case generally."**

13. In this appeal, the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.**

14. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

15. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

16. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

17. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

18. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."**

19. In this case according to the medical report of **Dr Kimuyu**, the Respondent sustained blunt temporal injury with swelling, facial bruises, blunt injury to the left forearm, comminuted fracture of the left radius and dislocated left ulna joint. According to him the Respondent was predisposed to future post traumatic joint osteoarthritis. The inserted implants were still in situ and required removal at an estimated cost of Kshs 250,000.00 and full recovery was not possible hence occupational therapy would be of help to her.

20. On the other hand, **Dr Leah Wainaina's** report revealed that the Respondent had a fracture of the left radius with dislocation of the ulna bone and plating was done. In her view there was no physical disability.

21. I have considered the injuries sustained as well as the authorities relied upon. Although the learned trial magistrate cited the authorities relied upon by the parties he did not make any specific finding as to which of them was or were relevant to the matter. In my view the most relevant authority in so far as the award of damages is concerned is the decision in **Peris Mwikali Mutua vs. Peter Munyao Kimata [2008] KLR** in which the plaintiff sustained marked pain and tenderness on the left hip joint marked swelling and severe tenderness of the left forearm, bruises on the left forearm and fracture of the ulna of the left distal forearm. The said injuries left the plaintiff with significant permanent disability. **Lenaola, J** (as he then was) on 17th December, 2008 confirmed the award of Kshs 450,000.00

22. Consideration the time lapse between the time when the said decision was handed down as well as the inflation, it is my view that an award of Kshs 600,000.00 would be reasonable.

23. Consequently, this appeal in so far as the award of general damages is concerned succeeds and I substitute the award of Kshs 1,000,000.00 with Kshs 600,000.00. This shall be discounted by 5% being the agreed contribution leaving a sum of Kshs 570,000.00.

24. Save for the foregoing the appeal otherwise fails.

25. Each party will bear own cost of this appeal.

26. It is so ordered.

27. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 18th December, 2019.

G V ODUNGA

JUDGE

Delivered the presence of:

Mrs Kihika for Miss Kavita for the Respondent

Miss Robi for Mr Kariuki for the Appellant

CA Geoffrey