REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 152 OF 2014

SILVESTER MUSYOKA JOSPHAT.....APPEALLANT

VERSUS

HADIJA SAWE CHLANGATY Alias PASTERS KHADIJA.....RESPONDENT

J U D G M E N T

1. This appeal challenges only the award of damages made by the trial court by the judgment dated 3/12/2014. In that Judgment having reviewed the evidence led and document produced to prove injuries and the authorities cited to guide him, the court held:-

> **"I have also considered submissions by advocates representing the parties. It is submitted for plaintiff that an award of Kshs.1,200,000 as general damages, Kshs.303,300 as special damages and Kshs.90,000 as Costs or future costs of medical operations could be sufficient. The plaintiff relied on the decision in Peter Mwinzi Mboo vs Isaac Mwangi Kariuki HCCC No. 267 or 1995 (Machakos) where Mwera J awarded plaintiff Kshs.250,000 as general damages for fractures on the right tibia/fibula and left ankle medial malleolus.**
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> **The advocate for the defendant on the other hand proposes an award of Kshs.50,000 and relies on the authorities of Kisovi J. Syengo vs Dharjal Brothers Ltd & Anor HCCC No. 260/87 and Sultan Kiti Kiti Karisa vs Hassan Saleh Hassan HCCC No. 192/88 where the plaintiffs were awarded Kshs.60,001 and Kshs.90,000 respectively as general damages.**
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> **I have on my own also consider the case of Maingi Mutere vs Peter Ngugi Kenya, Nairobi HCCC No. 400 of 1989 where the plaintiff was knocked down while attempting to cross. He suffered fractures of the right leg tibia and fibula and multiples bruises on which time he walked with and of scratches. The permanent disability was assessed at 205 and general damages for pain and suffering assessed at Kshs.150,000. I take note of the fact that this is 1989 matter more than two decades ago.**
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> **Doing the best I can considering the injuries sustained, I award the Plaintiff Kshs.450,000 as General damages".**

2. That decision has elicited the 6 Grounds of Appeal in the Memorandum of Appeal filed on 9/12/2003. Even though enumerated as six grounds, all the grounds except ground one fault the trial court for not adequately considering the evidence and submissions adduced and thereby reached an award that was too how as to amount to a misery.

3. When parties attended court to highlight the submissions, Ms. Osino for the Appellant informed the court that she was abandoning the ground of appeal challenging the word of Kshs.137,341 as special damages on the grounds that there had been an application for review on that head which had been dealt with by the trial court. That position was also revealed in the submissions dated 25/01/2018 and filed on the same day.

4. Before I proceed to the merits of the appeal, there is a preliminary issue raised by the development and on which the Respondent has submitted heavily in challenge of the competence of the Appeal.

5. Mr. Mogaka from the respondent opted to submit on this point totally outside his written submissions which did not make any reference at all to that nature of opposition to the Appeal. He did submit that an appeal cannot run alongside a review and that once one is dealt with the other must fail by being struck out. Counsel relied on the provisions of Section go and Order 45 Rule 1 of the Act. He also relied on the provisions of Order 3 Rule 4 for the submissions that one is bound to bring all his claims together and not by instalments. On those grounds he sought that the appeal be dismissed.

6. In response to that submission, Ms. Osino for the Appellant submitted that Order 3 Rule 4 relate to suits rather than appeals and reviews. To her the review she sought and obtained was limited to special damages only and not general damages concerned with in this Appeal. She

added that the application for review was not opposed but conceded.

7. She added that the question of competence of the appeal went to jurisdiction and that law under Order 42 Rule 13(2) mandated that it be dealt with at direction stage and not later. Lastly, she submitted that no law prohibited a party from seeking review on a point distinct for the point taken on appeal. She therefore prayed that the objection be dismissed.

8. I understand the law under Section 80 and Order 45 Rule 1 to abhor the prospects of a party launching a multi-pronged campaign, to litigate an issue through two process, review and appeal, to be intended to guard against it prospects of two different decisions touching on one issue already determined at trial and thereby embarrassing two different courts.

9. However, I do not read into the law a blanket provision that a party aggrieved by a decision must decide to challenge the entire decision by either appeal or review and not to decide which matter shall proceed on appeal and which can be best handled by review. I hold this view based on three reasons.

10. The first reason is that not every ground for appeal may be a good ground for review and vice-versa. The Court of Appeal in National ***Bank Ltd vs Ndugu Njau [1997] eKLR*** the Court of Appeal said:-

> **"In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise we agree the learned judge would be sitting on appeal on his judgment which is not permissionable in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it"**.

11. The second reason why I believe there cannot logically and justifiable bar taking the two process on different points is that; in law, a party is allowed, infact obligated, to state in his Memorandum of Appeal whether he appeals against the entire decisions or just on a portion of it. That to me is another window for the proposition that a party may legally appeal on one point in a judgment and seek review on another.

12. The third reason why I hold that Mr. Mogakas position is not tenable in law is that in law, a party is at liberty to withdraw his matter form court at anytime. The withdrawal can be whole or in part. This position flows from the general understanding that a party before court must be taken to be the best custodian of own rights and the best protector thereof. One is allowed to waive or even abandon a right as he pleases. Put in the context of this matter, once the appellant said in his submissions that he was abandoning his appeal against special damages, as he did in the written submissions, and repeated same in oral highlights, this court and indeed no other person has the right to stop him and force him to pursue a dispute he does not wish to pursue. This is the position taken by the apex court in this country in the case of ***Nicholas Kipto Arap Korir Salat vs IEBC & 7 Others*** when the court said:-

> **"A party's right to withdraw a matter before court cannot be taken away. A court cannot bar a party from withdrawing his matter".**

13. For those reasons, I do find that no law bars a party from choosing what portion of a decision he can appeal against and which to seek review on provided that same dispute and issue is not subjected to the two processes either concurrently or consecutively. I also find that the Appellant was entitled to withdraw his appeal challenging award of special damages for whatever reason and that the court could not stop on his way. For these reasons the objection taken against the propriety of the appeal lacks merit and is dismissed.

14. On the merits, and this being a fast appeal, this court has the discretion and mandate to analyze, re-examine and re-appraise the evidence afresh to enable it come to own conclusion[1] while observing the principle that the duty of assessment of damages is in the nature of exercise of judicial discretion and further that a court of law should be slow before it sets to upset the factual findings by the trial court[2]. However the court is entitled to interfere only where some established dimensions are met being that the trial court took into account an irrelevant matter or failed to take into account a relevant matter or that the award is inordinately and manifestly to high or too low as to amount to a wholly erroneous estimate of damages[3].

15. I will keep in mind that mandate and the principles being well established as the law to be applied in this appeal.

16. Being so guided, I have perused the entire record at trial as reproduced in the Record of Appeal filed on the 17/8/2016 and the supplementary Record of Appeal filed on the 16/2/2017 together with the submissions filed. General damage for personal injury under the heading pains, suffering and loss of amenities are measured assessed and awarded to compensate the plaintiffs for the pains suffered and any amenities of life lost thereby.

17. Consequently, the factors that determine the quotum and which a court must take into account, is the severity of injuries, the time taken to heal and any residual incapacity so inflicted. These are matters of evidence which is then subjected to past decisions of Courts of Record with a view to achieving the principle that comparable injuries should attract comparable damages. It therefore follows, that in an appeal like this, where I do not have the benefit of observing the witnesses testify, I must rely on the recorded testimonies and any medical evidence put in by documents to assist understand whether the trial court exercised its discretion judiciously or if it did commit any error of principle.

18. At trial other than the oral evidence by the plaintiffs and doctor Ajoni Adede who produced a medical report dated 25/07/2013, there was also a medical report prepared by DR UDAYAN R SETH dated 29/4/2014 and produced in court by consent without calling the maker.

19. The three pieces of evidence show that the Appellant here as the plaintiff at trial, suffered compound fracture of the right tibia and fibular as well as fracture of the right humerous (arm bone). Dr. Adede who saw the Respondent some five (5) months after the accident say he was

still using crutches, was still in cast plaster of paris with the right arm held by a 20 centimeter metal implants. The doctor assessed paramount partial disability at 13% due to the injuries.

20. Dr. Udayan saw the same Appellant some 14 months later and confirmed the same injuries and found him still using crutches, there were two (2) centimeter wounds over the right leg with 1 cm shortening of the leg while movement of the ankle, knee and elbow joints were restricted. He was still under treatment by the time the doctor examined him.

21. In his evidence before court, the Respondent said that he was admitted in hospital for a period of three months and would require to undergo a surgery to remove the metal implants. That would be after trial.

22. These are the material facts and matters the trial court was bound to consider. I have read the judgment appealed from and I find that I did not consider the medical opinion of Dr. Udayan at all which was availed at the behest of the defendant. That was important to show the status of the plaintiff's injuries and suffering as proximate as possible with the date of the judgment. Had the trial court considered that piece of evidence it could have found that the Respondents pain had persisted over a period of one year and fair months and was expected to persist for a further duration to enable the wounds heal and the implants be removed.

23. The decision equally does not seem to reckon with the fact that long after the accident, the Respondent was unable to walk without the aid of crutches and had infact been confined in hospital for a period of some three months. Additionally, that he was still nursing wounds seen by Dr. Udayan was ignored. All these were factors that were relevant but were ignored or just neglected by the trial court. To that extent he committed an error in principle and has thus invited the courts interference with his otherwise secured sphere of judicial discretion in assessment of damages.

24. The second area of consideration is that there were decided case cited to the court by way of guidance. Those cases were purely for guidance and not in any way binding upon the court just as much as the court was entitled to look and find its own guidance in other cases not cited by parties. I have perused those decision and I have noted that the decisions cited by the Respondent were both made in the year 1989 some 24 years before being quoted before the trial court. Using those decisions the Respondent proposed a sum of Kshs.150,000/= for general damages for pains and suffering.

25. On the other hand the Appellant also proposed a sum of Kshs.1,200,000/= and relied on some for decisions rendered in the years 1994, 1995, 1999 and the year 2000.

26. The trial court felt the duty to do more and researched for itself, as he was entitled, and came by a decision in ***Maingi Mutere vs Peter Ngugi Keya*** decided in 1989, (according to the judgment) in which a sum of Kshs.150,000/= was awarded for fractures to the fibular and tibia with multiple bruises. It is apparent that the trial court disregarded the decisions cited by counsel and relied on own industry in assessing the damages he awarded. It is not in dispute that the decisions cited to court and that it chose to rely on were all none than 12 years old. A little and additional industry by counsel and the court would have revealed that one of the consideration by courts in assessing damages is the erosion of value of money by passage of time. I hold the view that inflation aside, what was worth Kshs.200,000/= in 1989 is no longer valued the same. To the extent that the decision relied on were too old and therefore did not reflect a reasonable compensation is yet another error that invite my intervention. This I do while very well aware that the task of assessing damages is a difficult and heavy one and never mathematical but discretionary[4].

27. Equally, I am aware and well guided by those wise words of Madan J that day of law and miserable awards are long gone[5].

The Judge said:-

> **"An award of damages should not be a misery, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award".**

28. Having reconned with the law and the evidence availed to court and having made a decision to interfere with the decision of the trial court, I do set aside the award of Kshs.450,000/= made by the trial court and substitution therefore an award of Kshs.800,000/= being general damages for pains suffering and loss of amenities. I have added the element of loss of amenities for I consider that to be confined to the use of crutches for a period of more than 14 months inevitably denied some amenities of life to the appellant then aged just 29 years on the date of the accident. In coming to this decision I have been persuaded by the decisions in ***Mary Wangechi Elijah vs Kenya Tea Development Authority*** where an award of Kshs.800,000/= was made as well as ***Catholic Diocess of Meru vs Regina Munania Mutinda [2009] eKLR*** where Anyara Emukule J, awarded Kshs.800,000/= for comparable injuries in the year 2009.

29. As the Appellant as succeeded on the appeal, I award to him the costs of the appeal.

30. It is so ordered.

Dated and delivered at **Mombasa** this **21st** day of **March 2018.**

P.J.O. OTIENO

JUDGE

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[1] PIL Kenya Ltd vs Oppding [2009] KLR 447

[2] **Peter Kariuki vs AG[2014] eKLR. Paul Kipsang Koech vs Titus Osule Osore[2013] eKLR**

[3] Kenfo Africa vs Amlubia [1982-1988] 1 KAR 727

[4] Ugenya Bus Service vs Gachihi [1976-1985] EA 575

[5] Mohammed Juma vs Kenya Glass Works Ltd CA No. 1 of 1986.