REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 32 OF 2015

CORAM: D.S. MAJANJA J.

BETWEEN

VERONICA KANGAI.....APPELLANT

AND

JOHN BUNDI.....1ST RESPONDENT

MUETI PETER.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.A. Mayamba, SRM

dated 21st August 2015 at the Senior Resident Magistrates Court

at Githongo in Civil Case No. 48 of 2014)

JUDGMENT

1. The appellant's case before the trial court was that she was a passenger in motor vehicle registration number KAL 511N belonging to the 1st respondent and driven by the 2ndrespondent when on 25th August 2013, it was involved in an accident along the Nkubu-Meru –Mitunguu road. She sustained injuries and sued the respondents. The trial magistrate apportioned liability at the ratio of 80:20 in favour of the appellant and awarded Kshs. 450,000/- as general damages, Kshs. 85,520/- as special damages and Kshs. 20,000/- as future medical costs.

2. The appellant contested the judgment on the grounds set out in the memorandum of appeal dated 9th September 2015. On the issue of liability, she contended that the trial magistrate erred in finding that she contributed to the accident without any basis. While on the issue of quantum, she argued that the award of general damages was inordinately low as to amount to an erroneous estimate of damages having regard to the nature and extent of her injuries. She further contended that the trial magistrate failed to consider the expert evidence in awarding future medical costs. Counsel for the appellant outlined these points in his brief oral submissions.

3. Counsel for the respondent neither attended court nor filed written submissions despite the hearing date being taken in their presence.

4. The principle that governs the exercise of this court's exercise of appellate jurisdiction is that it is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.* [1968] EA 123**).

5. Veronica Kangai (PW 1) testified on the issue of liability. She adopted her witness statement as evidence in chief in which she confirmed that she was a passenger in the 1st defendant's vehicle when it veered off the road, hit a culvert and rolled into a ditch as it was speeding. PC Joseph Kirito Thuku (PW 2) from Nkubu Police Station testified and produced the police abstract confirming that the appellant was injured in the accident that took place on the material day. The respondents did not call any evidence.

6. The trial magistrate apportioned liability on the basis that the appellant had not fastened her seatbelt to avert any accident. On this issue the trial magistrate expressed the view;

I am conscious of the fact that though the defendant did not raise it with her but it was a vital issue. It is a fact which could have

reduced the extent of injuries, though considering the nature of the accident it could not have helped much. Having made the above observations, this court still considers that issue as material as since the plaintiff did not rebut the same, it shows that it was indeed true, which brings contributory negligence into play but to a minute level as the whole blame lays on the driver.

7. The findings of the trial magistrate were a misdirection. It was the respondents' duty to establish the contributory negligence on the balance of probabilities. They did not call any evidence and as the trial magistrate held, the issue was not even raised with either PW 1 or PW 2 in cross-examination. There was therefore no basis to reach a finding of fact in the absence of any evidence. I agree with the counsel for the appellant that the finding of contributory negligence was without any basis and since the appellant was a passenger, the respondents were fully liable and I so hold.

8. I now turn to consider the issue of quantum of damages. The trial magistrate found as a fact and I agree that the nature and extent of the appellant's injuries was not in contention. She sustained bruises on the right shoulder, arm and right knee and internal injuries of the right knee with torn posterior horns of the medial and lateral meniscus (Grade 3). Doctor Mutuku Justus Wambua (PW 3) produced the medical report of Dr. Kihumba dated 10th May 2014 which confirmed the same injuries. He noted that the bruises had healed and that the knee remained unstable and the appellant had a limp. He was of the opinion that the appellant would require an operation to correct the injury. Although Dr. Kihumba did not indicate the estimated cost of the surgery, PW 3 testified that it would cost about Kshs. 300,000/- at Kenyatta National Hospital to perform the surgery and for rehabilitation.

9. Before the trial court, the appellant submitted that an award of Kshs. 1,000,000/- would be adequate compensation based on the case of ***Dennis Schumacher v Ostrich Park Limited*** **NRB HCCC No. 1062 of 1997 [2001] eKLR**. The plaintiff in that case sustained a severe knee injury which adversely affected his ability to put weight on it. The doctor also noted that the plaintiff was likely to suffer osteoarthritis in the future. He was awarded Kshs. 650,000/- as general damages in 2001.

10. The respondent submitted that a sum of Kshs. 300,000/- was reasonable in the circumstances based on the decision of ***Zakayo Chamwama Busakha v Spice World Limited*** **NRB HCCA No.131 of 2003 (UR)** where the appellant sustained an injury to the chest wall, tear of the medial ligament of the right ankle. The court awarded Kshs. 360,000/- as general damages in 2008.

11. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see ***Butt v Khan*** **[1981] KLR 349).**

12. In awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards bearing in mind that no two cases are exactly alike as the Court of Appeal observed in ***Stanley Maore v Geoffrey Mwenda*** **NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

13. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja[1986] KLR 661**).

*1*4. The gap between the cases the parties cited was too wide although I note that the case cited by the appellant was more dated than that cited by the respondent. In my view, it is the duty of counsel to assist the court by citing several decisions where the claimants have sustained similar injuries in order to assist the court come to a fairer outcome consistent with its duty as outlined in the **Salome Maore Case (Supra)**. Noting the two cases and the fact that the case cited by the appellant may have been an outlier, I cannot say that the sum of Kshs. 450,000/- awarded as general damages was inordinately low to warrant intervention.

15. As regards future medical expenses, the law is settled. In ***Kenya Bus Services Ltd v Gituma*** **[2004] EA 91**, the Court of Appeal summarized the law as follows:

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.

16. The appellant pleaded that she would require Kshs. 200,000/- for surgical correction of the right knee, drug therapy and physiotherapy rehabilitation. Dr Kihumba's report alluded to the fact that the appellant would require surgical correction but did not indicate the amount. PW 3 estimated that the cost would be about Kshs. 300,000/-. The trial magistrate rejected the evidence of PW 3 on the ground that he had not seen PW 1 and could therefore not make such an assessment but concluded that in view of the plaintiff's plight, he would award Kshs. 20,000/- considering that general damages had already been awarded.

17. The issue, as I see it, is whether the appellant pleaded and proved costs for future medical treatment. The former is not disputed. On the latter issue, Dr Kihumba, whose report was admitted without objection noted the need for future surgical correction of the knee. It was not disputed that PW 3 was an expert and as a doctor he could give an estimate of the surgery. No counter estimate was given and there was no reason to reject this opinion on the grounds that PW 3 had not seen PW 1. As a doctor, he was able to give an opinion based on the nature of surgery suggested. I therefore find that the trial magistrate erred and I award the appellant Kshs. 200,000/- for future medical costs as pleaded.

18. Before I conclude this judgment, I would like to comment on the procedure used to produce Dr Kihumba's report. PW 3 purported to produce the report on the ground that he knew Dr Kihumba and was familiar with his signature. This was in compliance with **section 77**of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which allows a person other than the one who prepared a report such as a medical report to produce it provided the presumption of authenticity is met. The section provides as follows:

> *77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3)When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.* [Emphasis mine]

19. A plain reading of **section 77** aforesaid is clear that it only applies to criminal cases. In civil cases, the normal rules of admissibility apply. In this case though, the issue is moot since the medical report was produced without objection.

20. I allow the appeal to the extent that I set aside the judgment of the subordinate court apportioning liability and I substitute the same with a judgment on full liability against the respondents jointly and severally. In addition, I also allow the claim for future medical costs amounting to Kshs. 200,000/- only which shall accrue interest from the date of filing suit.

21. The appellant shall have the costs of this appeal assessed at Kshs. 30,000/- only.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Mwanzia instructed by Muia Mwanzia and Company Advocates for the appellant.

Mose, Mose & Millimo Advocates for the respondents.