REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 36 OF 2013

BARNABAS BIWOTT.....APPELLANT

-VERSUS-

THOMAS KIPKORIR BUNDOTICH.....RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. E.A. Obina, Senior Resident Magistrate, delivered on 21 February 2013 in Eldoret CMCC No. 709 of 2010)

JUDGMENT

[1] The Appellant herein, **Barnabas Biwott**, was sued before the Court of the Chief Magistrate in **Eldoret CMCC No. 709 of 2010** by the Respondent in connection with injuries that the Respondent sustained in a road traffic accident, while travelling in the Appellant's motor vehicle **Registration No. KBA 039V**, Toyota Matatu. It was the contention of the Respondent before the lower court that the accident occurred as result of the negligence of the Appellant or his agent in driving and/or controlling the said motor vehicle. Particulars of negligence and of the injuries suffered were duly supplied in paragraphs 5 and 7 of the Plaint dated **19 August 2010**. The injuries were particularized as hereunder:

[a] Compound fracture of the right tibia and fibula;

[b] A fracture of the left tibia and fibula;

[c] A dislocation of the right hip joint;

[d] Both hip and lower limbs were swollen and tender with cut wounds;

[2] Although the Appellant filed a Defence denying the Respondent's allegations before the lower court, the parties subsequently agreed on liability and a Consent Order recorded to that effect on **8 March 2012** in the following terms:

"(a) Judgment on liability is hereby entered at 90%:10% in favour of the plaintiff as against the defendant.

(b) The matter be scheduled for assessment of damages."

The matter was consequently listed for hearing for the purpose of assessment of damages. The Respondent testified as along with **Dr. Paul Kipkorir Rono** of **Moi Teaching and Referral Hospital**. In effect therefore, the Appellant did not adduce any evidence but opted to file written submissions in the matter.

[3] It was on the basis thereof that the Learned Trial Magistrate made his determination dated **21 February 2013** in which he assessed the General Damages payable at **Kshs. 1,000,000/=** together with Special Damages of **Kshs. 19,350/=;** less 10% contributory negligence. The Appellant, being dissatisfied with the outcome of the suit, filed this appeal on **25 March 2013** against the said Judgment and Decree on quantum on the following grounds:

[a] That the Learned Magistrate erred in law and in fact in awarding damages which were inordinately high and/or excessive in the circumstances;

[b] The Learned Magistrate erred in law and in fact in failing to consider the pleadings, evidence on record and the submissions filed in awarding damages herein.

[4] Accordingly, it was the Appellant's prayer that the appeal be allowed on that score; that the Judgment in **Eldoret CMCC No. 709 of 2010** on quantum be set aside; that the Court be pleased to make its own decision on assessment of damages; and that he be awarded the costs of the appeal.

[5] The appeal was canvassed by way of written submissions which were filed herein by Learned Counsel for the parties. The Respondent's written submissions were filed on **15 November 2017** by the law firm of **R.M. Wafula & Co. Advocates**, while Appellant's written submissions were filed on **30 November 2017** by the firm of **M/s Nyaundi Tuiyott & Co. Advocates.** The Appellant's argument was basically that the award of **Kshs. 1,019,350/=** was inordinately high and/or excessive in the circumstances and hence ought to be adjusted. Reliance was placed on the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5**. The Appellant reiterated his submissions before the lower court and proposed that an award of **Kshs. 600,000/=** would be adequate to compensate the Plaintiff for the injuries he suffered.

[6] It was further the contention of the Appellant that the Learned Trial Magistrate not only failed to consider the medical reports by **Mr. Z. Gaya**, but also failed to take into account comparable injuries in making his award. The cases of **Simon Tareta vs. Mercy Mutitu Njeru [2014] eKLR; Jackson Maringu Kimani vs. Richard Githenya Gichuru [2008] eKLR** and **George Kinyanjui t/a Climax Coaches & Another vs. Hassan Musa Agoi [2016] eKLR** were cited by the Appellant as useful guides to the Court for purposes of determining what would be reasonable compensation for the Respondent herein.

[7] Counsel for the Respondent, on the other hand, was of the view that the award was a fair assessment and that the Trial Magistrate took into account the severity of the injuries that the Respondent suffered and the seriousness of the complications likely to arise from the injuries in the future, in arriving at his award of **Kshs. 1,000,000/=;** and that that award was well supported by the authorities that were drawn to the attention of the Learned Trial Magistrate, involving comparable injuries. According to the Respondent, the Learned Trial Magistrate did not act on wrong principles of law or adopt a wrong approach in making his award. Counsel relied on **Catholic Diocese of Meru (Registered Trustees) vs. Munaine Mitinda HCCA No. 18 of 2003** to support the submission that the Appellant had failed to demonstrate either that the Learned Trial Magistrate applied a wrong principle of law or that the amount awarded was so inordinately high as to be an erroneous estimate.

[8] This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."**

[9] Accordingly, I have re-evaluated the evidence that was presented before the lower court. The Respondent's evidence was that, he was travelling in **Motor Vehicle Registration No. KBA 039V** from **Eldoret to Metkei-Nyara** on **14 December 2009**; and that the motor vehicle was involved in a road traffic accident in which he was injured. He added that he sustained fractures of both legs as well as a dislocation of his hip joint for which he was admitted at **Moi Teaching and Referral Hospital** for 10 days, while undergoing treatment. That he was discharged on a wheel chair and was still in pain at the time of his discharge; and had to be on a wheel chair thereafter for two months, and on crutches for about 5-6 months.

[10] It was further the evidence of the Respondent before the lower court that he was examined by **Dr. S.I. Aluda** on **10 April 2010** and a Medical Report prepared which was produced as an exhibit before the lower court. He also underwent a second medical examination at **Dr. Gaya's Clinic,** in respect of which a Medical Report dated **5 July 2011** was produced before the lower court. He produced all the receipts and other pertinent documents before the lower court in proof of the averments set out in the Plaint. It is noteworthy that the **Dr. Gaya's** Medical Report was copied to the Appellant's Advocates, an indication that the second medical examination was commissioned by the Appellant. Both **Dr. Aluda** and **Dr. Gaya** were in agreement as to the nature and extent of the Respondent's injuries.

[11] The evidence of **Dr. Rono** (**PW1** before the lower court) was that the Respondent visited Moi Teaching and Referral Hospital on **14 December 2009** following a road traffic accident, and that he had suffered three fractures on the right tibia, left tibia fibula, and right hip along with hip dislocation. He also observed that the patient had lost consciousness for some time. He added that the Respondent was taken to the theatre and internal fixation done by provision of a plate; and that he responded well to treatment, hence his discharge on **23 December 2009**. He classified the injuries as grievous bodily harm; and stated that the metal plates will be in place for life. He produced the Discharge Summary for the Respondent, the P3 filled by **Dr. Imbenzi** with whom he worked for 30 years, and who was unable to attend court; and an Invoice issued to the patient along with other documents as exhibits.

[12] In the light of the foregoing uncontroverted evidence, the Learned Trial Magistrate assessed General Damages due at **Kshs. 1,000,000/=.** Here is what the Learned Magistrate had to say on the matter:

> **"I have considered the pleadings. The evidence of Doctor Paul Kipkorir Rono of Moi Teaching and Referral Hospital, the evidence of the plaintiff Thomas Kipkorir Bundotich, the medical report of Dr. J. Sokobe of Mr. Z Gaya medical practitioners dated 5.7.2011, the medical report of Dr. S.I. Aluda M.D. Dated 10.4.2010, The p3 form issued on 15.3.2010 and filled on 24.3.2010 by doctor Imbenzi of Moi teaching and referral hospital. The discharge summary from Moi teaching and referral hospital...I have considered submissions by counsel for the plaintiff and counsel for the 2nd Defendant. I have considered the authorities cited. It is the court's considered view that an award of Kshs. One million only (Kshs.1,000,000/-) should be adequate to compensate the plaintiff for the pain suffering and loss of amenities and the plaintiff is hereby awarded the same, Kshs. 1,000,000/-. On special damages, the plaintiff have pleaded Kshs. 21,350/-. A bundle of receipts have been exhibited whose arithmetic comes to a total of Kshs. 19,350/-. The plaintiff is therefore awarded special damages of Kshs. 19,350/-. The total amount awarded to the plaintiff is Kshs. 1,019,350/-"**

[13] The Learned Magistrate then proceeded to reduce that sum by 10% being the contribution apportioned to the Respondent vide the Consent Judgment. It is manifest therefore that, whereas the Learned Trial Magistrate did state in his Judgment that he took into account the submissions made before him, he failed to specify any decisions with comparable injuries to indicate that he was appropriately guided. Nevertheless, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

> **"...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."**

[14] Accordingly, to determine whether or not that assessment was reasonable and not inordinately high as posited by Counsel for the Appellant, I have given due consideration to the authorities cited by the Appellant, and note that:

[a] In **Zachary Kariithi vs Jashon Otieno Ochola [2016] eKLR, Kshs. 1,500,000** was awarded in **2016** for compound fractures of the right femur, and tibia/fibula and the left femur bone. The Plaintiff in that case had also suffered fractures in the 3rd, 4th and 5th ribs along with soft tissue injuries. It is apparent that the injuries were of a more serious nature than those of the Respondent herein.

[b] In **Eldoret High Court Civil Appeal No. 29 of 2012: George Kinyanjui t/a Climax Coaches & Another vs. Hassan Musa Agoi, [2016] eKLR**, the Plaintiff had sustained injuries that included fracture of the left clavicle and fractures of the 4th and 5th ribs, as well as two loose teeth. The court awarded **Kshs. 452,000/=** in **2016;**

[15] In the same vein, I have considered the authorities relied on by Counsel for the Respondent, namely:

[a] Wilson Okoko Makucha vs. Teita Estate Ltd in which **Kshs. 800,000/=** was awarded in **1998** for dislocation of the left hip, fracture of both left and right femur, fracture of the pelvis;

[b] Catholic Dioces of Meru (Registered Trustees) vs. Munaine Mutinda Civil Appeal No. 19 of 2003 (Meru) in which the Respondent sustained a fracture of the pelvic bone and a ruptured liver, among other injuries. An award of **Kshs. 800,000/=** was made in **2009.**

[c] Simon Githaiga Wachira vs. Timothy Ndirangu Mwangi Nairobi HCCC No. 723 of 1998, an amount of **Kshs. 800,000/=** was awarded for a fracture of the rib, blunt injury to the abdomen and a fracture of the pelvic bone.

[16] In this matter, the Respondent suffered fractures of both legs and dislocation of the hip bone as well as soft tissue injuries to the upper lip and lower limbs. Hence, from the foregoing comparison, the award of **Kshs. 1,000,000** as General Damages by the Learned Trial Magistrate cannot be said to be so excessive as to amount to a wrong assessment, given the age of some of the authorities aforementioned. Accordingly, there is no sufficient cause, in my view, for disturbing the award made by the Learned Trial Magistrate. Hence, the Judgment of the lower court dated **25 April 2013** in **Eldoret CMCC No. 709 of 2010** and the Decree ensuing therefrom are hereby upheld, with the result that this appeal, being without merit as it is, is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JULY 2018

OLGA SEWE

JUDGE