REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 28 OF 2014

AUTOSOL K. LIMITED.....1ST APPELLANT

BELTA KANINI MBITHI.....2ND APPELLANT

VERSUS

MARTIN GITAU KINYANJUI.....RESPONDENT

***(Being an Appeal from the Judgment delivered by the Honourable I.M. Kahuya Senior Resident Magistrate Kangundo on the 7th of February, 2014)* IN**

REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KANGUNDO

CIVIL SUIT NO. 24 OF 2011

MARTIN GITAU KINYANJUI.....PLAINTIFF

VERSUS

AUTOSOL K. LIMITED.....1ST DEFENDANT

BELTA KANINI MBITHI.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 29th March, 2011, the Respondent herein instituted a suit against the Appellants herein claiming General Damages for pain, suffering and loss of amenities, Special Damages, Costs and interests.

2. The Respondent's suit as pleaded was premised on the fact that on or about the 19th April, 2010, the Respondent, was travelling as a passenger in motor vehicle registration number KBK 498E, legally owned by the 1st Appellant and beneficially or actually owned by the 2nd Appellant along Nairobi -Kangundo road when the driver of the said vehicle so negligently, carelessly or recklessly drove, managed and controlled the said vehicle that it collided with motor vehicle KBD 692N thereby occasioning the Respondent serious bodily injuries.

3. Both the particulars of negligence and injuries were set out in the plaint.

4. On 25th October, 2013 while the matter was partly heard, the parties recorded a consent on liability at the ratio of 90:10% in favour of the Respondent against the Appellants4

5. According to the Respondent who testified as PW1, on that day he was going to work aboard a *matatu* from Donholm when they were involved in an accident at KBC. It was his evidence that though the road was bad with potholes, the driver was over speeding and kept on meandering on the road. The Respondent testified that he was seated along the conductor's row. Upon reaching KBC the vehicle he was

traveling in collided with another vehicle though he was unable to tell how the accident occurred and was unable to tell the exact speed at which the vehicle was being driven.

6. After the accident, the Plaintiff became unconscious and found himself at Kangundo District Hospital where he was admitted for two days before being transferred to Kenyatta Hospital where he was for about a week and thereafter continued with the check-ups 3 times a week and resumed work in September. He later learnt that the accident was reported to the police. Referred to the discharge summary he admitted that he could have been discharged the following day.

7. According to the Respondent, he sustained a cut on his head and severe injuries on his hand and back though by the time of his testimony he had to a large extent healed save for mild back ache and headaches. Though he was not issued with bus ticket, he insisted that he was a passenger in the said vehicle.

8. PW2, **Sarah Wangari**, was on 19th April, 2010 travelling from Nairobi to Kangundo when upon arriving at VOK, they were involved in an accident, though she could not remember exactly how the accident occurred as she just found herself in hospital. According to her, the Respondent was her colleague. It was her testimony that the vehicle was over speeding and the road had potholes which the vehicle was avoiding.

9. It was her evidence that she fractured 3 ribs and was injured on her hand. Upon regaining consciousness, she found herself at Kangundo Hospital and was later transferred to Aga Khan Hospital. She confirmed that she had similarly filed a suit. It was her evidence that she saw the Respondent board the vehicle.

10. **James Muoki**, a medical doctor, testified as PW3. According to him, he was, between 2009-2012 stationed at Kangundo during which period he prepared a medical report for the Respondent. According to him, the Respondent reported that he lost consciousness for 3 hours and had multiple cuts on the right cheek which was bleeding. His right shoulder was dislocated and was admitted at Kangundo District Hospital and spent one week at Kenyatta National Hospital and at the time of the examination, which was 8 months old.

11. On the part of the Appellants, they called **Dr Sophia Opiyo**, who testified as DW1 on behalf of **Dr Theuri**, who prepared a medical report for the Respondent. According to the report, the Respondent was treated at Kangundo and Kenyatta Hospitals. According to him, the Respondent sustained a cut wound on the head and chin and had a dislocation on the elbow. According to him the Respondent bled from the brain and had a scar on the left side of the head during the examination. He reiterated that the CT Scan confirmed bleeding on the head. It was concluded that the injuries were moderate in nature and that the Respondent sustained soft tissue injuries with a dislocation of the elbow but had completely healed. However in cross-examination, the witness admitted that based on the medical report of **Dr Muoki**, the symptoms implied that the injuries were serious.

12. In her judgement, the Learned Trial Magistrate found that the injuries sustained by the Respondent were serious in nature leading to grievous harm. The Court then proceeded to award Kshs 500,000.00 as general damages and Kshs 6,737/- being proved special damages.

Determinations

13. I have considered the submissions of the parties in this appeal.

14. This appeal revolves around the award of quantum of damages. 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…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."**

16. 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."

17. In this case, the Learned Trial Magistrate relied on Civil Appeal No. 546 of 1999 - **Kasarani Sportsview Hotel Ltd. Vs. JAMES Mathenge Munene [2002] eKLR.** In that case **Aganyanya, J** (as he then was) on 20th November, 2002, awarded Kshs 250,000.00 as general damages to the Plaintiff who had sustained injury to the right elbow with fracture of lower end of humerus bone and joint dislocation, soft tissue injuries to left elbow and back and head injury and loss of consciousness As a result of these injuries the respondent suffered permanent incapacity of 20% with a stiff right elbow and flexion deformity in the left hand as a result of which the doctor recommended a CT scan of the head. The Judge therefore was of the view that the said injuries could not be termed as soft tissue in nature.

18. It is however clear that the injuries sustained in the case that **Aganyanya, J** was dealing with were more serious that those sustained by the Respondent herein. Whereas the Plaintiff in the said case sustained fracture of lower end of humerus bone and joint dislocation, in the instant case the Respondent had no fracture though he had dislocation.

19. It is therefore my view that the said decision was erroneously relied upon by the Learned Trial Magistrate in reaching her award. However, the said decision was handed down in 2002 while the judgement appealed against was delivered on 7th February, 2014, some 12 years later.

20. Having considered the injuries sustained by the Respondent and the relevant authorities, it is my finding that the Learned Trial Magistrate, in assessing the damages, misapprehended the evidence as regards the injuries sustained by the Respondent and so arrived at a figure which was so inordinately high as to represent an entirely erroneous estimate. For that reason this Court is justified in interfering therewith.

21. It is therefore my view that the Respondent ought to have been awarded Kshs 300,000.00 as general damages for pain, suffering and loss of amenities. In the premises I allow the appeal to the extent that the award of Kshs 500,000.00 as general damages is hereby set aside and substituted with an award of Kshs 300,000.00. The Respondent will have interests thereon at Court rates from the date of the judgement of the trial court till payment in full. The special damages awarded by the trial court will however accrue interest at the same rate from the date of filing of the suit till payment in full.

22. As the appellant did not comply with the Court's directions to furnish the Court with soft copies, there will be no order as to the costs of this appeal.

23. It is so ordered.

Read, signed and delivered in open Court at Machakos this 21st day of December, 2018

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey