REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 128 OF 2015

1. SAMUEL KIMANI

2. KIMWELE ELIZABETH……APPEALLANTS

VERSUS

1. EDWARD OTIENO

2. GORRETY ATIENO OLUM.....RESPONDENTS

J U D G M E N T

1. The appeal herein, initiated by the memorandum of Appeal dated 16/8/2015 and filed in court on 18/8/2016, impugnes the judgment dated 16/7/2016 as far as the award of general damages is concerned.

2. In that judgment, the trial court having heard the parties and taken submissions supported with decided cases, delivered itself as follows:-

> **"The plaintiff's injuries received are uncontroverted. The plaintiff produced P3 form as exhibit 4 and medical report prepared and produced by DR. AJONI ADEDE as exhibit 9. The injuries pleaded have been proved as required. That is, on a balance of probabilities.**
>
> **I have also considered the authorities cited. I find the some reliable case to be *HCCA No. 77 of 2007, Eldoret, Karen Njuguna vs Stephen Tuwet* where the plaintiff sustained compound fracture of the right tibia, bruises on the left thumb, face and left knee and the court upheld an award of Kshs.600,000. I have also taken into account inflationary trend. I am of the view that Kshs.700,000 would be adequate compensation for pains and suffering and loss of amenities"**.

3. It is that decision the appellant fault for having been erroneous

in that; in the words of the memorandum of appeal,:-

> **i. The Learned Magistrate erred in fact and in law in finding that the Plaintiff was entitled to general damages that were excessive as to amount to a wrong estimate.**
>
> **ii. The Learned Magistrate erred in fact and in law in failing to fully consider the medical evidence and reports tendered in evidence and thereby made a wrong finding as to the extent of injuries suffered by the respondent.**

iii. The Learned Magistrate erred in law and in fact by failing to consider the medical report tendered by the Appellants which demonstrated that the 1st Respondent's injuries were not severe in nature and had healed.

iv. The Learned Magistrate erred in Law and in fact in failing to properly consider the submissions and judicial authorities tendered by the Appellants and thereby arrived at an award of general damages which was a wrong estimate in the circumstances of the case.

v. The Learned Magistrate erred in Law in failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which was excessive.

vi. The Learned Magistrate erred in law and in fact in awarding future medical expenses when the same had not been proved to the required standard in law.

4. Those grounds of appeal can be summarized to say that the award of damages was exorbitantly high and exaggerated. The law on when an appellate court would interfere with an assessment of damages is now well settled and need no reiteration. It is that an appellate court will only interfere with an award of damages after satisfying itself that, incoming to the decision it did, the trial court made an award that is on the face of it inordinately high or low as to represent an entirely erroneous estimate, by proceeding upon a wrong principle or misapprehended the evidence in some material act respect. See ***Butt vs Khan [1981] KLR 349***, at 356.

5. The standard test to be applied by an appellate court prior to embarking on a journey to disturb an award by the trial court was laid by ***Lord Morris in H West & Sons Ltd vs Shepherd [1964] AC 316*** when the judge said:-

"The difficult task of awarding compensation in a case of this kind is essentially a matter of opinion of Judgment 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 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 is inevitable difference 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"

6. Before the trial court, the plaintiff pleaded the injuries suffered

as follows:-

a) Compound fracture of the right tibia.

b) Compound fracture of the right tibia

7. At trial one Dr. Ajoni Adede was called as PW 3 and produced his medical report as P Exh. 9. That report says at the relevant portions:-

"The right leg has a curve deformity and a 3cm trauma scar where as the right knee is swollen. Xrays display the fractures notes above and P3 concur and may be annexed".

CONCLUSION:

Eight (8%) per cent permanent partial disability due to

i) Compound fractures of the right tibia and fibula leg bones .

ii) Deformity.

iii) The fracture sites remain weak points for life even if the bones nite".

8. There was also a medical report prepared by Dr. SK Ndegwa and dated 22/3/2012 which was produced and marked MFI 9" that report makes conclusion thus:-

> **"These are severe multiple bone and soft tissue injuries. Swaleh was injured in a road traffic accident, sustained the above injuries, was treated and has now healed with 10% permanent disability due to deformity on the right leg. He will benefit from specially fitted eleved show from APDK at Kshs.10,000 for a pair with lifespan of one and half year".**

9. According to the Record of Appeal that was the nature of evidence adduced on injuries and upon which the court was bound to consider and assess damages to award. In a reserved judgement and which reveal due consideration was given to the submissions filed, the trial court said:-

> **"The plaintiff proposed a sum of Kshs.1,200,000 in general damages whereas the defendant proposed a sum of Kshs.90,000. I have considered the nature of the injuries sustained by the plaintiff. Dr. Adede concluded that the plaintiff has suffered 8% permanent disability and that he has a deformity as a result. I have also read and considered the authorities cited. I found the more reliable case to be HCCA No. 77 of 2007, Eldoret, KAREN NJUGUNA VS STEPHEN TUWEI where the plaintiff sustained compound fracture of the right tibia, bruises on the left knee thumb, face and left knee and the court upheld the award of Kshs.600,000. I have also taken into account inflationary trends. I am of the view that Kshs.700,00 would be adequate compensation for pains suffering and loss of amenities"**.

10. The issue for determination in this appeal is whether the trial court is coming to this assessment of damages erred in principle to warrant being disturbed by this court sitting as a first appellate court. In seeking to answer this question this court takes cognizance of the principle that court awards should be kept within limits as are incapable of inflicting an injury to the body politic ***(Rahima tayab & Another vs Anna Mary Kimuru[1982-1988] KAR 90)*** that comparable injuries should attract comparable awards and lastly that an appellate court should never be in a hurry to substitute its own discretion for that of the trial court.

11. Both parties, at trial, cited to the trial court decisions that were binding upon it as guidelines. The plaintiff cited the decisions in ***NBI HCCC No. 1750 of 1999 Joseph Kitehka vs Stephen Mathuka Pius*** and ***Eldoret HCCA No. 77 of 2007***, ***Karen Njuguna vs Stephen Tuwei***, judgments dated 2000 and 2012 in which awards of Kshs.700,000 and 600,000 respectively were given and upheld. The defendant on his side cited the decision in ***Zipporah Wambui Waibaira & 17 Others vs Chachuru Kiogora & Others [2004] eKLR*** in which the court of Appeal having addressed its mind to the applicable principles on a first appeal and the need to keep awards within limits capable of absorption by the economy enhanced an awards of Kshs.5000 for soft tissue injuries to awards ranging between 50,000 and 10,000.00.

12. To this court the trial court was wholly entitled to rely on the decision cited by the plaintiff as he did for the reasons given and to consider the lapse of time between the date of what decision and the date of its judgment. I have been unable to isolate an error in principle in assessment of damages to warrant my interference with the decision so reached.

13. Consequently I find no merit in the appeal and I order the same to be dismissed with costs to the Respondent.

Dated and delivered this **24th** day of **February 2017**.

P.J.O. OTIENO

JUDGE