REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 136 OF 2013

BETWEEN

JOSEPH WAMBURU TUMBU

SIMON KIMANI TUMBU…….……...APPELLANTS

AND

MICHAEL MUTISO MULWA…...……..... RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. A Opanga, RM at the Resident Magistrates' Court at Yatta in Civil Case No.83 of 2013 dated 21st November 2012*)

JUDGMENT

1. The Respondent was on 11 May 2011 a lawful fare-paying passenger in the motor vehicle registration number KAR 549B when the motor vehicle collided with another motor vehicle registration number KXZ 781 owned by the 1st Appellant and then driven by the 2nd Appellant along Yatta Mwala Road. As a result of the accident the Respondent sustained injuries leading him to launch a claim against the Appellants.

2. The parties somehow, during the proceedings, agreed to apportion liability by consent at 80:20 in favour of the Respondent notwithstanding the agreed fact that the Respondent was a passenger.

2. The trial court was thus left with only the issue of damages for assessment. The Amended Plaint filed on detailed the injuries sustained as "blunt trauma to lower back, blunt trauma to right lip, haematoma to lower lip and blunt trauma to forehead". The Respondent prayed for general damages and also asked for special damages amounting to Kshs.5,000/=. The amount was cumulatively for the medical report and official search fees.

3. The Respondent was awarded Kshs. 150,000/- as general damages and the special damages of Kshs. 5,000/= subject to the apportioned liability.

4. The substratum of the appeal as is evident from the four grounds in the Memorandum of Appeal and the written submissions by Mr Manthi Masika , learned counsel for the appellant, was that the general damages awarded were excessively high in the circumstances having regard to the nature and extent of the injuries. The Respondent's counsel Mr. Larry Wambua supported the decision of the subordinate court.

5. The Respondent did not give any oral testimony on the injuries sustained. Both parties however by

consent admitted in evidence the medical-legal report prepared by Dr P. M. Wambugu who had examined the Respondent. The report gave a clear prognosis of the Respondent's injuries. It confirmed the injuries as had been pleaded. The report gave a verdict of the Respondent having sustained multiple soft tissue injuries. The report, which was not contested also stated that the Respondent stood to suffer a 4% permanent incapacitation but had otherwise made adequate recovery.

7. In the court below, the Respondent asked for damages in the sum of Kshs. 250,000/- in compensation and as general damages. The Appellants on the other hand submitted that the Respondent was only entitled to Kshs. 70,000/=. On appeal, the Appellant still insisted that the Respondent was only entitled to Kshs. 70,000/= while placing reliance on the cases of **Robert Gateri *v* Maningo Transporter [2005]eKLR** and **Sokoro Saw Mills Limited *v* Grace Nduta Ndungu [2006]eKLR** decided in 2005 and 2006 respectively and where Kshs. 60,000/= and 30,000/= were awarded respectively as general damages.

8. The Respondent supported the judgment on quantum and offered case law in the form of **Equator Bottlers Limited *v* Dennis Kimori Mecha & Another HCCC No 108 of 2007** where Kshs 130,000/= was awarded for soft tissue injuries. The Respondent also relied on the case of **Douglas Mwirigi Francis *v* Andrew Miriti HCCA No 34 of 2005** where an amount of Kshs 150,000/= was awarded. For completeness. The Respondent submitted that the amount of Kshs. 150,000/= was not manifestly excessive due to the inflationary factor.

9. I have no doubt that the legal principle is that assessment of damages is a discretionary exercise of judicial powers undertaken with the circumstances of each case clearly in mind and on the basis of established legal principles. If the court ventures out of the principles then the appellate court will interfere. If the award is also manifestly low or inordinately high not to equate the injuries suffered, the appellate court will also interfere. If the trial court ignores a relevant factor or conversely takes into account an irrelevant factor, then the appellate court will interfere. For these principles, see generally the Court of Appeal decisions in **Shabani *v* Nairobi City Council (1985) KLR 516, Kemfro Africa t/a Meru Express & Another *v* A. M. Lubia & Another [1982 – 88] 1 KAR 72** and **Mariga *v* Musila [1984] KLR 257.** See also the Court of Appeal case of **Ali *v* Nyambu t/a Sisera Store [1990] KLR 534** which quoted with approval the principles laid down by the **Privy Council in Nance *v* British Columbia Electric Railways Co. Ltd [1951] AC 601, 613** where it was held that;

> ***"The principles which apply under this head are not in doubt. Whether the assessment of damage be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one), or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages."***

8. In the instant case the parties are in agreement that the Respondent suffered injuries in the form of soft tissue injuries. The doctor's report was not contested.

9. The trial magistrate in awarding the amount of Kshs. 150,000/= as damages stated that he had taken into account all the relevant factors. The relevant factors, according to the trial magistrate, were that the Respondent was set to face some form of permanent incapacitation minimal as it was. The trial magistrate also took note of the inflationary trends and whilst acknowledging the cases cited by the parties took into account the possible inflationary trends.

10. I do not see fault in the trial magistrate's approach. It may have been shallow but the relevant factors were considered before arriving at the decision. More critically, the trial magistrate was very conscious of the nature and extent of the injuries suffered by the Respondent and the inflationary influence.

11. Case law in 2009 would reveal that for very similar injuries , that is soft tissue injuries where the claimant is fully healed , claimants were being awarded amounts of between Kshs. 150,000/= and 200,000/=: see for example **Leah Nyaguthii Kamunya *vs.* Kenya Broadcasting Corporation NBI HCCC 1128 of 1193** decided on 19 June 2009 and Kshs.200,000/= awarded for multiple soft tissue injuries. Admittedly, comparative injuries should be compensated by comparable awards ideally but not to the extent of artificial precision or exactitude.

12. The Respondent had at the time of the judgment in the subordinate court adequately healed from the soft tissue injuries. The injuries were not in any way described as serious. They were also not described as minor. Taking all these into consideration and also the awards made for multiple soft tissue injury victims in 2009, I do not consider the award made by the subordinate court in this matter in 2012 to have been manifestly high as exhibit an error on the estimate of compensation and thus to invite my intervention.

13. In the result the appeal is dismissed and the judgment of the trial court affirmed. The appellant shall also pay costs of the appeal.

Dated, signed and **delivered** at **Machakos** this **27th day of June 2017.**

J.L.ONGUTO

JUDGE