REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CIVIL APPEAL NO. 7 OF 2015

DAVID MURIUNGI DANIEL.....................1ST APPELLANT

FRANCIS MURIGU RWENDO...............2ND APPELLANT

Versus

MARTIN GITHONGO NDEREVA alias

MARTIN GITHINGO NDEREVA...................RESPONDENT

(being an appeal from the decision and judgment in the Chief Magistrate's

Civil Case No. 121 of 2011 delivered by F. W. MACHARIA,

Principal Magistrate on 19th February, 2015)

JUDGMENT

1. **MARTIN GITHONGO NDEREVA** alias **MARTIN GITHOGO NDEREVA** (herein after referred to as **Martin**) sued David Muriungi Daniel (hereinafter referred to as **David**) and Francis Murigu Rwengo (hereinafter referred to as **Francis**) before the Principal Magistrate's court at Nanyuki seeking award in general and special damages from both David and Francis. Martin's claim flowed from an accident that occurred on 22nd April 2011. On that day Martin was riding motor cycle registration No. **KMCPQ 291 C** along Naromoru – Nanyuki road. Martin pleaded in his plaint that David negligently drove motor vehicle registration No. **KBF 728 N** thereby collided with Martin's motor cycle occasioning Martin injuries. Martin also pleaded that Francis was vicariously liable for David's negligence.

2. At the hearing of the case before Nanyuki Magistrate's Court two consents were entered. Firstly, the parties consented on liability of 80:20 percent in favour of Martin. Secondly parties consented to the production, without calling its maker, of the medical report dated 30th August 2011.

3. Martin testified and so did a clinical officer from Nanyuki District Hospital who produced Martin's P3 form. David and Francis did not testify nor call any witnesses. The trial court by its judgment dated 19th February 2015 awarded Martin Kshs.1,400,000 less 20% in general damages and Kshs.3,500 in special damages. It is that judgment that David and Francis challenge by this present appeal.

4. The appeal is based on the following grounds:-

*a. **That the learned magistrate erred in law and infact in awarding general damages in the sum of Kshs. 1.4 million which is inordinately excessive compared to the injuries sustained by the respondent ;***

*b. **That the learned trial magistrate erred in law and in fact in failing to consider the authorities supplied by the defence which authorities would have assisted the court arrive at a fair award; and***

*c. **That the judgment of the trial magistrate is against the law and weight of evidence on record.***

5. In the first instance I wish to deal with ground (b) above. Counsel for David and Francis erred in putting forth that ground because my perusal of the trial court's proceedings and file reveal that the said counsel did not call evidence in support of the defence, did not make final submissions at the conclusion of the trial and did not supply the trial court with authorities. This is made clear from the trial court's judgment where the learned trial magistrate stated "there were no submissions from the defendant." On that basis alone ground (b) above is rejected for being misguided.

6. The other remaining two grounds call for this court to examine the award in general damages by the trial court.

7. The appellant (both David and Francis) submitted that the injuries pleaded in the amended plaint were at variance with those that were noted in the P3 form. In the submissions the appellant's counsel further went on to state that this court should not be influence by the exaggerated injuries pleaded in the amended plaint which were at variance with those that were noted in the P3 form. To support this submission the appellants relied on the case **High Court at Meru Civil Case No. 14 of 2001** where the court in considering medical report stated:-

> ***"Medical opinion is only but an expert opinion. It has been stated before that such opinion is not binding on the court, although it will be given proper consideration, particularly where there is no contrary opinion. The court is perfectly entitled to reject a medical opinion if upon consideration alongside other evidence available there is a good and proper basis for rejecting it."***

8. The appellants proceeded to submit that it was doubtful whether Martin suffered the injuries set out in the amended plaint.

9. On behalf of Martin, the respondent, his learned counsel submitted that the medical report, which set out the injuries pleaded in the amended plaint were a mirror of the injuries noted in the medical report that was submitted in evidence at the trial by consent.

10. I confirm that indeed the amended plaint reflected the injuries set out in the medical report which was marked as plaintiff's exhibit No. 4(a). That medical report noted the injuries detected at the first instances and those that were only detected after radiological examination of the X-ray radiograph films. This is what is noted in that medical report:-

> "**EXAMINATION**
>
> **The patient was received in the outpatient department in unconscious state with multiple injuries as follows:-**
>
> 1. **Multiple frictional burns on the foreheads and face.**
> 2. **Cut wound on the pre-auricular, left ear extending to the post-auricular region.**
> 3. **Deformed and swollen left supraclavicular region.**

4. **Deformed and tender pelvic region.**

5. **Degloving injury of the right knee and forearm**.

Further radiological examination of the x-ray radiograph films of the main injury sites revealed:-

1. **Subluxation of the cervical spine at C3 to C5**

2. **Displaced fracture of the left clavicle**

3.**Unstable pelvis secondary to multiple pelvic bone fractures involving; fracture dislocation of the left sacro iliac joint and bilateral fractures of ischial tuberosity."**

It is pertinent to note that the P3 form only reflected injuries that were noted when Martin was admitted immediately after the accident.

11. Bearing in mind that the above are the injuries noted by the doctors, did the trial court err in awarding Kshs.1.4 million in general damages.

12. In consideration of whether the trial court erred in awarding Martin general damages I need to bear in mind the principles that should guide an appellant court. I need firstly to bear in mind that the trial court had the advantage of seeing and hearing the witnesses who testified. Secondly, the power of the appellant court to interfere with an award in damages by the trial court has been the subject of many decided cases such as:-

(a) **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICES, GATHOGO KANINI – vs- A.M.M. LUBIA & ANOTHER (1982 – 88) 1KAR 777** where the court stated:-

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, of that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

(b) **DMM (**_Suing as the Administrator and Legal Representative of the Estate of_ **LKM) v STEPHEN JOHANA NJUE & ANOTHER (2016) eKLR,** where the expressed itself thus:-

"(6) I will be guided by the law in my decision herein. The law is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account irrelevant fact or failed to take into account relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

13. With the above caution I will begin to interrogate the ground raised by the appellants that the trial court's award in general damages was excessive. The appellants submitted four authorities in support of its submissions. There are three cases amongst those which cannot be of assistance to the court because they were decided 17 years, 12 years and 11 years ago. It is inappropriate to consider those cases because the awards made those many years ago would be eroded by the present inflation rate.

14. In considering the fourth case cited by the appellant which was decided in the year 2016 I will be guided by the holding in the case **JULIUS KIPROTICH –V- ELIUD MWANGI KIHOHIA (2006) eKLR** where the judge stated:-

"I have taken into account the fact that the assessment of the general damages for injuries sustained by plaintiffs in accident cases is not a scientific or mathematic process but is based on what a judge assesses to be the best compensation to such a plaintiff in the circumstances of each case."

15. The case cited by the appellants and which was decided in the year 2016 is **GEORGE KINYANJUI t/a CLIMAX COACHES & ANOTHER –V- HASSAN MUSA AGOI (2016) eKLR**. In that case the claimant suffered fractures and multiple soft tissue injuries. Those injuries which were stated in two medical reports were trauma to the neck and chest, fracture to the 4th and 5th rib, dislocation of the shoulder, fracture of the left clavicle and blunt trauma to the spinal column. The doctor's prognosis of the claimant's injuries was that the pain he suffered was expected to decline with usage of analgesics. The trial court awarded the claimant Kshs. 450,000 in general damages. Now, comparing the injuries stated above and those that were noted in the plaintiff's exhibits No. 4 (a) it is clear that Martin's injuries in that exhibit were far more serious in nature. The prognosis or opinion of the doctor who examined Martin was as follows:-

"***PROGNOSIS/OPINION***

In view of this, I formed the opinion that the injuries Martin Githongo sustained are valid and consistent with the mode of the injury and that the immediate clinical results of the injury caused him severe pain with restricted mobility rendering him temporarily incapacitated. Due to the extent of the pelvic injury, he developed a permanent deformity of the pelvis causing him to have a waddling gait while walking."

16. The learned trial magistrate in making the award in general damages considered the following comparable cases:-

(a) Nakuru High Court Civil Case No. 202 of 2009 MICHAEL MAINA GITONGA –V- SERAH NJUGUNA alias SERA WANJIKU MUNGAI where the court awarded Kshs.1,500,000 in general damages;

(b) CAROLINE WANJIKU KARIMI –V- SIMON K. TUM & ANOTHER MOMBASA HCCC No. 368 OF 2010 where the court awarded Kshs.1,800,000 and;

(c) IRENE WANJIKU GITONGA –V- KINYANJUI NGETHER & 2 OTHERS CMCC 456 of 1996 where the trial court awarded Kshs. 1 million in general damages.

17. Having considered the trial court's judgment I find that the award in general damages was not excessive nor do I find that the trial court took into account any irrelevant factors or left out relevant ones. Nor did the trial court err in estimating the damage suffered by Martin.

18. It is because the above finding that this appeal fails. The appeal is hereby dismissed with costs to the respondent.

DATED AND DELIVERED THIS 27TH DAY OF JULY 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

For Appellants: …………………

For Respondent: …………………

COURT

Judgment read in open court.

MARY KASANGO

JUDGE