REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 28 OF 2012

HILLTOP MOTORS ENTERPRISES LTD…….....…….....…. 1ST APPELLANT

E-KAZI AFRICA……..…….....…. 2ND APPELLANT

MICHAEL MAGUDEDI……...……3RD APPELLANT

VERSUS

REBECCA NAIGA……..…….....……RESPONDENT

(Appeal from the judgment of Hon. KL Kandet on Quantum of Damages in the Chief Magistrates' Court in Millimani Civil Case No. 6066 of 2007 delivered on 24/01/2012)

JUDGMENT

On or about 30th June, 2005, the Respondent was crossing Ngong Road when the 3rd Appellant being the driver and agent of the 2nd Appellant drove motor vehicle registration number KAK 718 S and knocked her tearing into her right thigh. The Plaintiff suffered injuries the particulars of which are degloving wound on the right thigh, cut wound occipital region and soft tissue injury on left leg. The Respondent in her Plaint dated 21st April, 2007 filed a suit claiming general damages for negligence, special damages of Kshs. 248, 073 and interest and costs of the suit.

The claim was denied by the Appellants who filed a Statement of Defence dated 23rd November, 2007 and averred that if the accident ever occurred, the same was caused by or substantially contributed to by the negligence of the Respondent.

During the proceedings, liability was apportioned by consent at 70:30 against the Respondent and the only issue left for determination was that of damages.

The Respondent submitted on Kshs. 900,000 in general damages whilst the Appellants proposed Kshs. 100,000. The trial magistrate awarded Kshs. 800,000/- in general damages and Kshs. 236,373 in special damages, which was pleaded and proved.

Aggrieved by the decision, the Appellants filed this Appeal on the grounds set out in the memorandum of appeal. The Appellants claim that the trial magistrate erred in awarding Kshs. 800,000 in general damages, that the award of special damages was colossal and should not have been loaded over to the Appellants, that the Learned Magistrate erred in Law in failing to consider the defendant's evidence as considered together with that of the plaintiff, the learned Magistrate erred in law and in fact in failing to order that the plaintiff bears her own expenses and that the costs of the suit should not have been awarded to the Respondent.

The Respondent testified on the events of the fateful day that, after the accident, she was treated at Masaba hospital for a week and later on at Nairobi Women Hospital. She produced the medical and treatment receipts in the sum of Kshs. 236,473/=. It was agreed by consent that the medical reports by Mr. Shah dated 23/4/08, Dr. Jacinta Maina dated 9/3/2007 and that of George Adari dated 11/1/2006 be admitted as evidence without calling the makers.

Dr. George Adari examined the Respondent on 11/01/2006 and assessed her residual disability at 20% and noted that the entire treatment had taken a period of 5 months. Dr. Jacinta Maina examined her on 9/3/2007 and formed the opinion that the injuries were severe and had caused permanent disability. Dr. Shah observed that the Respondent suffered soft tissue injuries to the chest wall, a cut on the back and a long deep cut on the back right thigh.

This Appeal was canvassed by way of written submissions and the Appellants proposes an award of Kshs. 250,000/= in general damages. They rely on the case of **Daniel N. Onchangi Oira & Ano Vs. Esther Nyabiage Onkware (Kisii HCCA No. 3 of 2009)** where the Respondent suffered injuries in the year 2008, including deep cut wound to the right fore leg and left thigh and the Court awarded Kshs. 200,000 in general damages.

The Respondent submitted that the award of Kshs. 800,000/= in general damages was justified and relied on the cases of **Hellen Kwamboka Ongang'a Vs. John Ouko Oyoo HCCC No. 57 of 2004** in which justice Musinga awarded Kshs. 800,000 where the Plaintiff sustained leg injury and was operated on. The trial magistrate relied on this authority to make her award of Kshs. 800,000/=

It is a well established principle that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judiciously having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; ***Kanga v Manyoka*** **[1961] EA 705**, ***Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto*** **[1979] E. A. 414**, ***Butt v Khan*** **[1981] KLR 349**, ***Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another*** **[1982 – 88] 1 KAR 72** and ***Mariga v Musila [1984] KLR 257.***

The assessment of general damages is not a mathematical exercise and the court in doing the best it can takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. In **Denshire Muteti Wambua vs KPLC Ltd (2013) e KLR** the Court of Appeal observed that " ***further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that of comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd vs Bimomo &*** **2 Others (*2004) 2 KLR 101)"**

In the case herein, the Respondent sustained a deep cut wound on the thigh which was serious enough to warrant a period of hospitalization and its effects were permanent with the degree of disability at 20 %. In the case of **H. Young & Company E.A Ltd v Edward Yumatsi [2016] eKLR** where the Respondent suffered injuries on the right shoulder , deep cut wound on the elbow joint, wrist, pain in the head and chest and injury to the right knee in the year 2008, an award of Kshs. 500,000/= in general damages was upheld on appeal. Similarly **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR ,** the appellant who suffered blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia and fibula an award of Kshs. 300,000/= was made in general damages.

I have considered the submissions of the respective parties vis-à-vis the decided cases and I find that the award of Kshs. 800,000/= was excessive in the circumstances. On the other hand, the proposal of Kshs. 250,000/= made by the appellant is too low. Factoring in, the nature of injuries sustained by the

Respondent, I will substitute the award by the trial magistrate of ksh.800,000 with the sum of Kshs. 500,000. The special damages awarded were specifically proved and I have no reason to disturb the same. The parties recorded a consent on liability at 70;30 as against the appellant, therefore, the ground of appeal that the trial magistrate did not find that the Respondent contributed to the accident is baseless. Costs follow the event and the Learned Magistrate did not err in awarding costs to the Respondent.

In the result, the appeal succeeds to the extent that the award of general damages is set aside and substituted with the sum of Kshs. 500,000/- subject to the agreed apportionment as per the consent on liability. For the avoidance of doubt I award the Respondent a total sum of Kshs. 736,373 less contribution of 30% making a total of 515,531/=.

Each party to bear its own costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **19th** Day of **October, 2017**.

…….

L. NJUGUNA

JUDGE

In the Presence of

……. for the 1st Appellant

……. for the 2nd Appellant

……. for the 3rd Appellant

……. for the Respondent