REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 21 OF 2015

AKAMBA PUBLIC ROAD SERVICES……………………..……….APPELLANT

AND

ABDIKADIR ADAN GALGALO………...……………………………..RESPONDENT

(Being an appeal from the Judgment and Decree of Principal Magistrate (Hon S.M. Wahome) in Voi Civil Case No 19 of 2011 delivered on 27th October 2014)

In

ABDIKADIR ADAN GALGALO………………………………….……….PLAINTIFF

VERSUS

AKAMBA PUBLIC ROAD SERVICES…...……….………………….1ST DEFENDANT

TRANSFAR (K) LIMITED…………………………………………….2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 8th June 2011 and filed on 9th June 2011, the Respondent had contended that at all material times of the accident, he was an employee of the Transfar (K) Limited (hereinafter referred to as the "Employer,") the 2nd Defendant in the said suit.He had also sued his Employer on the ground that it was vicariously liable for the injuries that he had sustained.

2. It was his case that on or about 22nd January 2011, he was lawfully and carefully engaged in the course of his employment as a driver driving Motor Vehicle Registration Number KBL 716 Z/ZD 4405 Mercedes Axor Semi Trailer along Mombasa- Nairobi Road when upon reaching Voi near Ngutuni Lodge when the Appellant's driver, agent and/or servant carelessly, recklessly, dangerously and/or negligently Motor Vehicle Registration Number KAG 847X Scania Bus causing it to collide and hit his Motor Vehicle at the back as a result of which he sustained serious physical injuries.

3. He therefore sought the following reliefs against the Appellant and his Employer jointly and severally for:-

a. Special damages

b. General Damages

c. Costs and interest of this suit at Courts (sic) **rate.**

4. In his judgment delivered on 24th November 2014, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts apportioned liability at 90%-10% in favour of the 1st Respondent. The Learned Trial Magistrate did not expressly exonerate the Employer from having contributed to the causation of the said accident but it could be inferred from the aforesaid apportionment of liability that the 2nd Respondent was not to blame for the said accident.

5. He awarded the Respondent a sum of Kshs 800,000/= general damages for pain and suffering and loss of amenities which was subject to ten (10%) contributory negligence on the part of the Respondent.

6. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 2nd October 2015 on 6th October 2015. The grounds of appeal were as follows:-

a. THAT the Learned Trial Magistrate greatly misdirected himself in treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion of the quantum.

b. THAT the Learned Trial Magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.

c. THAT the Learned Trial Magistrate erred in law and fact in awarding general damages of Kshs 800,000/= without showing how he arrived at the figure.

d. THAT the Learned Trial Magistrate erred in law and fact in finding that the Appellant did not lay basis for the proposed award of quantum in the Appellant's submissions.

7. The Appellant's Record of Appeal was dated 21st June 2016 and filed on 27th June 2016. Its Supplementary Record of Appeal was dated 15th July 2016 and filed on 18th July 2016. Its Written Submissions were dated 10th August 2016 and filed on 11thAugust 2016.The 1stRespondent'sWritten Submissions were dated and filed on 2nd September 2016.

8. The Employer's Written Submissions were dated 1st September 2016 and filed on 5th September 2016. It was not clear how and at what stage the said Employer was enjoined in the proceedings herein as it was not a party at the time the Appellant lodged its Appeal in this court. Although its name appeared in the Record of Appeal and Supplementary Record of Appeal, this court did not consider its Written Submissions as it was not a party to the suit herein.

9. Indeed, when the Appellant and the Respondent appeared before the court on 5th September 2016, they pointed out that the Appeal herein did not affect the Employer. This Judgment is therefore based on the said Written Submissions of the Appellant and the Respondent herein on which they relied upon in their entirety.

LEGAL ANALYSIS

10. This being a first appeal, this court is under a duty to re-evaluateand assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. This was aptly stated in the cases of**Selle vs Associated Motor Boat Company Ltd[1968] EA**

123and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

12. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties' respective Written Submissions, it was clear to the court that all the said grounds of appeal related to the question as to whether or not the Learned Trial Magistrate was justified in awarding the Respondent the sum of Kshs 800,000/= general damages for pain and suffering and loss of amenities as aforesaid.

13. The Respondent questioned the competence of the Appeal herein. The Appellant did not respond to. This court found it prudent to consider the same before delving into the substantive issues that had been raised in the Appeal herein. The issues were as follows:-

> **a. Whether or not the filing of the Appellant's Record of Appeal out of time rendered the Appeal herein to be incompetent;**
>
> **b. Whether or not the Appeal was filed through the initiative of the Appellant's insurer and not the Appellant and if so, whether or not the same rendered the Appeal herein incompetent.**

14. The said issues were therefore dealt with under the distinct heads shown hereinbelow.

I. COMPETENCE OF THE APPEAL

A. DATE OF FILING OF THE RECORD OF APPEAL

15. The Respondent argued that the Record of Appeal was filed out of time. It was evident from the order of Mureithi J that was issued on 23rd September 2015 indicated that the Appellant was required to file its Memorandum and Record of Appeal within fourteen (14) days thereof which was by 7th October 2015.

16. The Appellant duly filed its Memorandum of Appeal on 6th October 2015 which was well within time of the said order. However, as can be seen hereinabove, it filed its Record of Appeal on 27th June 2016.

17. A perusal of the proceedings of this court shows as at 22nd February 2016, proceedings of the Trial Court had not been typed. By 21st March 2016, the same had been typed and were being proof read. The certified copies of the proceedings were only ready by the time parties attended court on 9th May 2016 when the court directed the Appellant to file its Record of Appeal by 11th July 2016. It duly complied and filed the said Record of Appeal on 27th June 2016.

18. Appreciably, the Appellant was not to blame for not having filed its said Record of Appeal within fourteen (14) days as had been directed by Mureithi J as the duty to ensure that the proceedings were ready lay with this court. Appreciably, the said learned judge J issued the said directions in **HC Misc Civil Application No 2 of 2015 Akamba Road Services vs Abdikadir Adan Galgalo**while based at Mombasa and he may not have been aware of the backlog in the typing of proceedings at the High Court of Kenya Voi where the substantive appeal was to be heard, having emanated from a decision that was given by a Trial Court within its jurisdiction.

19. The Appellant could not be held liable or faulted for the administrative lapses of this court and in this respect, this court rejected the Respondent's arguments that the Appellant's said Record of Appeal was filed out of time.

B. APPLICABILITY OR OTHERWISE OF THE DOCTRINE OF SUBROGATION RIGHTS

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20. The Respondent contended that the Appeal herein was filed through the initiative of APA Insurance Limited (hereinafter referred to as "the Appellant's insurer"). He referred this court to the Affidavit of Paul Kariba that was sworn on 10th March 2015 in support of the Notice of Motion application dated 10th March 2015 and filed on 11th March 2015 seeking leave to appeal out of time and a stay of execution pending appeal amongst other orders therein in which the deponent had averred that there were no formal orders of winding up of the Appellant but that it was not in operation. He had also raised this issue of the Appellant's insurer exercising its subrogation rights during the hearing of the said application. Mureithi J did not make a determination of the issue and deferred the same for hearing in the main appeal.

21. It was the Respondent's submission that the circumstances of the case herein could not give rise to the principle of subrogation as the Appellant's insurer could not file the appeal herein without first satisfying the decretal sum and that in any event, the said insurer had the option of having made an application to be enjoined in the proceedings in the Trial Court, which it did not.

22. An insurer invokes the doctrine of subrogation where it has compensated its insured of loss arising out of an insurance claim against a third party. In invoking its subrogation rights to recover monies it has paid to a third party on behalf of its insured, it steps into the shoes of its insured and assumes all the benefits, rights and remedies that the insured is entitled to.

23. An insurer institutes or defends a claim in its insured's name because it cannot prosecute or defend such claim in its name. It provides legal representation to its insured and pays the legal costs for such legal representation. On its part, the insured is contractually obligated to fully co-operate with counsel who has been appointed on his behalf to assist the insured in recovering any sums paid to such third party.

24. In this respect, it is not uncommon in insurance practise for an insurer to appoint legal counsel for its insured once its insured is served with Summons to Enter Appearance so as to control the process from inception and mitigate its losses especially where its insured is a defendant, This benefit does not, however, accrue to an insured whose claim has been repudiated by an insurer.

25. This very court interrogated the doctrine of subrogation in the case of**Mercantile Life & General Assurance Company Limited & another v Dilip M Shah & 3 others [2015] eKLR**, when it referred to the Treatise of **K.I. Laibuta; Principles of Commercial Law at pg 254** where the author stated as follows:-

> **"Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action IN THE NAME OF THE INSURED who must lend his name in return of an undertaking that he will not be personally liable for the costs in the action. The insurer is said to "step into the shoes" (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other."**

26. Mureithi J made similar observations in Paragraph 14 of his Ruling dated 23rd September 2015 in **HC Misc Civil Application No 2 of 2015 Akamba Road Services vs Abdikadir Adan Galgalo**when he referred to the Halsbury's Laws of England 4th Edition (2003 reissue) at Paragraph 490 where the principles of subrogation had been set out as follows:-

> **"Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject matter insured, he thereupon becomes entitled to take over**

> **the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss. …"**

27. In the case of **Leslie John Wilkins vs Buseki Enterprises Limited [2015] eKLR**, Kasango J also had regard to the observations of the learned author Mac Gillivay&Parkingon **"Insurance Law" at page 471when he said the following in regard to the doctrine of subrogation:-**

> **"Nature of the doctrine (sic). The doctrine conferns(sic)two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss."**

28. It therefore follows without a doubt that the Respondent was correct in arguing that the doctrine of subrogation was not applicable in the circumstances of the case herein as the Appellant's insured had not effected any payment that would warrant it to step into the shoes of the Appellant.

29. Having said so, save for Paragraph 1 of the aforesaid Affidavit of Paul Kariba that he was swearing the said affidavit on behalf of the APA Insurance Limited's right of subrogation and under the relevant policy of insurance, it was evident that the Applicant in that application was the Appellant herein. There was no indication that the Appellant's insurer was the one initiating the Appeal herein as had been contended by the Respondent.

30. Indeed, in Paragraph 2 of the said Affidavit, the deponent stated that it was the insurer that instructed the firm of M/S Menezes, Oloo & Chatur Advocates to represent the Appellant herein in the proceedings in the Trial Court. There was also reference in Paragraph (4) and (5) of the said Affidavit that there had been a mix up in the Appellant's offices and that together with its counsel, they were of the mistaken view that the Judgment by the Learned Trial Magistrate would be delivered on notice.

31. In view of the interest of an insurer in insurance matters, there is nothing in the law that prohibits it from having an interest in a case involving its insured. If indeed the Appellant's insured is the one that paid legal representation for the Appellant in the Trial Court, nothing prevented its insured from taking an active role in the background to safeguard its interests in appeal.

32. Though the right of subrogation was alluded to in the aforesaid Affidavit, there was no single element evidencing that the matter that was before this court was one of the Appellant's insurer invoking its rights under subrogation. This court notes, however, that at the time of lodging the Appeal herein, the Appellant was not operating and had not been wound up.

33. It would have been reasonable for the deponent to have laid basis why he was the one who was swearing the Affidavit in place of the Appellant's officers. If, however, the matter was at the trial stage, the deponent would have had no legal capacity to represent the Appellant herein. It is perhaps because the matter was at the appellate stage that Mureithi J accepted the said Affidavit and allowed the said application.

34. The form of the Affidavit did not change the substance of the appeal. The Appeal herein is still in the name of the Appellant. This court saw no prejudice that was suffered by the Respondent in the deponent swearing the said Affidavit as he was not deponing on substantive issues of the Appeal hereinand if there was any, he did not demonstrate the same.

35. As the Respondent did not file a cross-appeal, this court was therefore not persuaded to find that the Appeal herein was incompetent merely because the aforesaid deponent had averred that he had sworn the said Affidavit on behalf of the Appellant's insurer's rights of subrogation and under the relevant policy of insurance. This is, however, a practise that must be discouraged at all costs as all pleadings must be in the name of the insured.

36. In matters that are not contested such as that of an application a stay of execution pending appeal, it will be acceptable if an advocate swears an affidavit on behalf of his client if the matter is urgent and the said client is not available.

II. **QUANTUM**

37. Turning to the issues that had been raised in the Appeal herein, the Appellant was categorical that the damages awarded to the Respondent herein were excessive as she had fully recovered and that the Learned Trial Magistrate had absolutely no justification to award the sum of Kshs 800,000/= general damages for pain and suffering and loss of amenities and urged this court to award a sum of Kshs 250,000/=. This, it said, was despite the fact that it had opined in the Trial Court that a sum Kshs 200,000/= general damages for pain and suffering and loss of amenities would have sufficed.

38. It took issue with the Learned Trial Magistrate in stating in his Judgment that it did not lay basis for the sum of Kshs 200,000/= because it had relied on several cases to come up with the said figure and further because the said Learned Trial Magistrate awarded a sum of Kshs 800,000/= without any basis at all. It contended that the said figure was excessive in the circumstances of the case.

39. It referred the court to several unreported cases. of **HCCC No 537 of 1985 Otieno Musa vs MzeeMtoto& Another**, **HCCC No 629 of 1982 Mombasa Alexander Muhati vs Hon Attorney General & Another** and **HCCC No 1989 Geoffrey Mitabari vs Abdi Mohamed.**

40. In the case of **HCCC No 537 of 1985 Otieno Musa vs MzeeMtoto& Another,** the Plaintiff thereinhad been hospitalised for one and a half (1 ½) months and healed with shortening of the left leg by two (2) centimetres. The court awarded a sum of Kshs 150,000/= general damages for pain and suffering and loss of amenities in 1989.

41. In the case of **HCCC No 629 of 1982 Mombasa Alexander Muhati vs Hon Attorney General & Another,** the Plaintiff therein sustained a head injury with loss of consciousness for about two (2) days, bleeding through the nose and mouth, compound fracture of the left tibia and fibula, a large lacerated wound on the left foot and small cuts on both hands. In 1989, the court awarded a sum of Kshs 120,000/= for pain and suffering and loss of amenities.

42. In the case of **HCCC No 1989 Geoffrey Mitabari vs Abdi Mohamed**, the Plaintiff therein suffered several bruises, lacerations, cut wounds and a compound fracture of the left tibia and fibula which led him to being hospitalised for two (2) months. His leg healed with restricted movements and he had loss of function on the left leg. In 1989, the court awarded Kshs 200,000/= general damages for pain and suffering and loss of amenities.

43. On its part, the Respondent had relied on the case of **HCCC No 213 of 1989 Karisa Mwambire vs Kashuruv Chivatsi& Another Mombasa** that was decided in 1994 where the court therein awarded a sum of Kshs 400,000/= for similar injuries. He did not attach a copy of this decision in his Written Submissions.

44. This court was not certain if the case on pg 90 of the Record of Appeal was the case he was referring to as the same did not have any citation. Suffice to state that the said case related to a plaintiff who had sustained a head injury concussion, fracture of the radius of the left arm, compound fracture of the left upper humerus, fracture of the scapula and abrasions on the back and had no relation whatsoever to the injuries that the respondent herein sustained.

45. According to the Respondent’s evidence, the Respondent sustained a fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis, Dr Ajoni Adede (hereinafter referred to as “PW 1”) stated that the Respondent had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. He estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability.

46. The Learned Trial Magistrate dismissed the case law that the Appellant had referred to and opined that the proposed sum was contemptous and could not countenance such an amount for the fracture and severe injuries that the Respondent had sustained leaving him with a disability of three (3%) per cent.

47. The court noted that Dr Ajoni Adede was a family physician/specialist venerologist. He was not an Orthopaedic surgeon. It was not clear to this court whether he could authoritatively come to the said assessment of three (3%) per cent if he was not an orthopedic surgeon.

48. Be that as it may, this court noted the lack of seriousness on the part of the Appellant’ and the Respondent’s advocates in the case law that they relied upon. The Appellant relied on cases that were decided in 1989 while the Respondent relied on a case that was determined in 1994. The Learned Trial Magistrate was right in declining to consider the cases that were relied upon by the Appellant as they were over two (2) decades old.

49. It was difficult to understand the rationale of the use of such old cases by the said advocates considering that there was a dearth of jurisprudence on injury cases. The Learned Trial Magistrate appeared to have arrived at his assessment that Kshs 800,000/= general damages was fair on the ground that the case the Respondent relied upon was decided in 1994.

50. However, as was seen hereinabove, it was not even related to the injuries that were sustained by the Respondent herein. It was the view of this court that the Learned Trial Magistrate applied a wrong principle in making an assessment that it led to an erroneous estimate of what ought to have been awarded to compensate the Respondent herein.

51. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law a principle that was dealt with in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko[2004] eKLR**.

52. In the case of**Butt vs Khan (1977) 1 KAR** , the court therein also rendered itself on the same issue and held as follows:-

> **“An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”**

53. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

54. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

55. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

56. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR** , on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

57. In the case of **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR**, the Plaintiff therein sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxilliary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula.

58. The Plaintiff therein suffered partial paralysis of the hand and although the use of the leg had improved and at the time of the hearing the Plaintiff was able to walk using a cane, the doctor found the stiffness around his ankle joint was likely to remain.In 2014, Emukule J awarded a sum of Kshs 1,750,000/= general damages for pain and suffering and loss of amenities.

59. In the case of**James GathirwaNgungi v Multiple Hauliers (EA) Limited & another [2015] eKLR**, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 com, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg.

60. The residual injuries were re-fracture of the right leg, many sinuses on the right leg with pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficulty in walking, restriction mobility of the forearm, difficulties in squatting, weakness of the left upper limb, inability to carry or lift heavy object, restriction of movement of the left limb, pain due to prolonged surgery procedure and now had to walk with the aid of crutches. In that case that was decided in 2015, Ougo J assessed damages at Kshs 1,500,000/= for pain and suffering and loss of amenities.

61. In the case of **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR,** the Plaintiff therein sustained extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fracture collar bone. The treatment included internal fixation of the fracture with a metallic plate and subsequent amputation of the left leg.In2014, HPG Waweru assessed general damages for pain, suffering and loss of amenities at Kshs 2,000,000/=.

62. Having had due regard to the aforesaid casesand the inflationary trends prevailing at any given time, this court was of the opinion that a sum of award of Kshs 500,000/= general damages for pain and suffering and loss of amenities would be adequate compensation for the injuries that the Respondent herein sustained.

63. Accordingly, having considered the Appeal herein, the Written Submissions in support of the respective parties' cases and the case law, the court was not persuaded that this was a suitable case for it to exercise its discretion to interfere with the Trial Court's finding for the reason that the Appellant as the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same.

DISPOSITION

64. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was lodged on 6th October 2016 was merited. The court hereby sets aside the Judgment of the Learned Trial Magistrate in the sum of Kshs 800,000/= general damages for pain and suffering and loss of amenities subject to ten (10%) per cent contributory negligence on the part of the Respondent and

replaces the same with judgment against the Appellant herein in favour of the Respondent herein in the sum of Kshs 500,000/= general damages for pain and suffering and loss of amenities subject to ten (10%) per cent contributory negligence on the part of the Respondent.

65. It is so ordered.

DATED and **DELIVERED** at **VOI** this **25th** day of **October** 2016

J. KAMAU

JUDGE