REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 14 of 2015

FORMERLY NAKURU CIVIL APPEAL NO. 106 OF 2012

(Being an Appeal from Naivasha SPMCC No. 392 of 2010, E. Boke (PM))

JOHN MWANGI GATEI……..…….1ST APPELLANT

JOHANA GICHOMO……..……..2ND APPELLANT

NAKURU MOLOLINE SERVICES LTD……..…..…...3RD APPELLANT

-VERSUS-

GODFREY MWANGI MWANIKI……..……..……..……RESPONDENT

J U D G M E N T

1. On 15th February, 2010 the Respondent boarded the vehicle KAZ 997J (Matatu) owned jointly by the 2nd, 3rd and 4th Appellants and driven by the 1st Defendant. He was travelling from Nairobi to Nakuru. However an accident occurred on the way; the matatu collided with another vehicle registration number KBH 587V. The Respondent sustained several skeletal and soft tissue injuries. He was treated at Naivasha District Hospital before being transferred to Kijabe Hospital.

2. The Respondent subsequently lodged a claim based on negligence against all the Appellants. A judgment in default of defence was recorded against the Appellants. By consent the judgment in respect of the 1st, 3rd and 4th Defendant was set aside. The judgment against the 2nd Defendant in original suit remains on record. A consent judgment on liability was recorded at 90:10 against the Appellants. Hearing subsequently proceeded on quantum culminating in the judgment and decree which is the subject of this appeal filed by the 1st, 3rd & 4th Appellants appeal. The appeal is in respect of quantum only.

3. There are four grounds of appeal raised in the Memorandum of Appeal as follows:-

"a) THAT the learned Magistrate erred both in law and facts in awarding Kshs 470,000/= as general damages for pain and suffering as the same is excessively high in the circumstances.

b) THAT the learned Magistrate erred both in law and in fact in failing to take into account the medical documents before her whilst making the award.

c) THAT learned Magistrate erred both in law and fact in failing to give cognizance tot eh

Appellants explicit submissions on damages.

d) THAT learned Magistrate erred both in law and fact in making an award on quantum which was unsupported by authorities and against the weight of evidence.

4. The parties agreed to dispose of the appeal by way of written submissions. The gist of the Appellant's submissions is that the award of Shs 470,000/= as general damages was excessive given the nature of the injuries sustained by the Respondent; that the trial court did not properly consider the two medical reports produced in respect of the same; that she failed to take into account the related submissions of the parties and relied on authorities representing more severe injuries; and finally that the failure by the trial court to analyse relevant authorities resulted in the application of wrong principles in assessing damages.

5. For his part the Respondent opposed the appeal and responded to the grounds of appeal together as a challenge to the effect that the award of general damages was excessive. The Respondent took the position that the impugned judgment exhibits an analysis of the evidence, medical report and injuries therein as well as the submissions. He argued that the general damages award was commensurate with the injuries as confirmed by the Appellant's doctor. He cited the case of **Jaldessa Diba t/a Dikus Transporters & Anor. –Vs- Mbithi Isika HCCA 96 of 2011**.

6. It is trite that the appellate court will not ordinarily interfere with an award unless the judge is shown to have acted on wrong principle or that the award is in the circumstances inordinately high or low or that he took into consideration irrelevant matter or failed to consider relevant matters **Butler –Vs- Butler (1954) KLR 22**.

7. In **Butt –Vs- Khan [1981] KLR 349** the Court of Appeal stated:

"An appellate court will not disturb an award of damages unless it is so 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 too high or low."

8. The appeal raised one key question, namely, whether the award of damages was commensurate with the injuries sustained by the Respondent and thus the Appellant's grounds can all be conveniently considered together.

9. Two medical reports were produced in respect of the injuries sustained by the Respondent, one by his own doctor (Dr. Kiamba) the second by the Appellant's doctor (Dr. Gichohi). The primary injuries presented in both reports are similar, namely, fractures of three left side ribs and fracture of the left scapular with attendant soft tissue injuries on the related regions and also to the head and chin.

10. On examination the doctors noted healed multiple scars in the affected parts of the body. The prognosis by the Respondent's doctor states as follows:

"The wounds sustained have healed with permanent scars. He has not recovered from the fractures of ribs and scapula. He suffers from pain and is still on treatment. The fractures may take several weeks to unite. I classify the degree of injury as grievous harm."

The report was dated 8/5/2010 – 3 months since the accident.

11. The report by the insurance doctor, Dr. Gichohi came about a year later. It is dated 14/2/2011. Dr. Gichohi's prognosis is in many ways confirmed Dr. Kiamba's report. It states"

"**Godfrey sustained grievous harm from the accident. This life threatening injury caused him extreme pain and loss of blood. The chest injuries were life threatening necessitating**

admission into intensive care unit. The soft tissue injuries and the fractures have healed well but he will continue to experience traumatic left shoulder pain and stiffness which will require occasional use of analgesics and physiotherapy……. The scars have healed with keloid formation which will remain a permanent disfiguration which is of cosmetic note."

12. In his evidence, the Respondent cited the sharp shoulder pain on exertion and numbness in the left hand. The medical reports were produced by consent at the trial. The trial magistrate in her judgment outlined the injuries presented in the two medical reports noting the severity of the injuries. She clearly read the submissions and the authorities cited. She noted that the proposed damages on the part of the Respondent were too high while the Appellants was too low. She opined that the Plaintiff in **John Thuo –Vs- Joseph Gichuhi Alex HCC No. 1737 of 1996** relied on by the Respondent, had suffered more severe injuries including shortening of one leg.

13. She also considered the Appellant's two authorities:

1. **John Kario Kamau & 6 Others –Vs- Samuel Muchiri Njuguna HCCC 3415 of 1991.**
2. **Moses Nyalidhe Opondo –Vs- Tawfiq Bus Services Ltd HCCC 204 of 2000.**

14. In regard to the said authorities, she observed that some injuries were comparable with the present Respondents. She took note of the age of the authorities. The first authority was rendered in 1995. So far as the same entailed fractures of ribs and the vertebrae, with recurrent pain requiring physiotherapy, one cannot fault the trial court's comparison of the two cases, and moreover an upward award to capture inflation can be justified.

15. Equally the second authority involved skeletal fractures to a rib and left clavicle and other soft tissue injuries. In a sense this authority reflects less severe injuries than the instant case but a sum of Shs 150,000/= was made in 2005. Assessment of damages is an exercise of discretion. Because no two cases are exactly similar, it would be unreasonable to expect the court to carry out an assessment within surgical precision. By considering the Respondent's particular injuries, taking the middle ground between the Plaintiff's authority, and the Appellant's authorities while factoring in their age, I think the trial magistrate arrived at a reasonable assessment of damages.

16. Her judgment contains a clear analysis of the relevant material in justifying the award and she cannot be faulted. Subjecting the award to the principles laid out in **Jabare – Vs – Olenya [1989] KLR**, I cannot find any misdirection on part of the trial magistrate. There is no cause shown to persuade this court to interfere with the award. I find no merit in the appeal and will dismiss it with costs.

Delivered and signed at Naivasha this **21st** day of **September, 2015.**

In the presence of:

For Appellants

For Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE