REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 250 OF 2011

JAMES MUTUNGI.....APPELLANT

VERSUS

DAVID MUASYA NDELEVA.....RESPONDENT

(From the judgment of B. N. Olao Chief Magistrate in Milimani Commercial Courts CMCC No. 5220 of 2007)

J U D G M E N T

This appeal arises from a case in which the Respondent/Plaintiff suffered the following bodily injuries.

1. Severe closed head injury.

2. Deep cut wound on the left side of face

3. Cut wound of the right leg.

4. Deep cut wound of the left parietal scalp head.

The parties entered consent judgment or liability at 70% to 30% in favour of the Respondent. Two medical Reports by Dr. Wambugu and a P3 by Dr. Kamau were also admitted by consent.

There was undisputed evidence on record that the Respondent, immediately after sustaining injury was admitted in Kenyatta National Hospital for two (2) days and thereafter was transferred to Nairobi Hospital where he received further medical treatment for another three weeks. The Respondent had loss of speech at some point early in his medical treatment, caused by the serious head injury aforecited. The Respondent after hospital discharge, underwent sessions of physiotherapy. The doctors classified the injuries as grievous harm but stated that the Responded had healed well.

The trial lower court awarded the Respondent general damages for pain and suffering and loss of amenities of Ksh.500,000/-. This aggrieved the Defendant who filed this appeal. His major complaint was that the award was not only excessive but was inordinately high and represents an entirely erroneous estimate of proper award in such cases.

The issue before this court accordingly is whether the award of Ksh.500,000/- to the Respondent should or should not be interfered with by this Appellate court.

Principles upon which this court should proceed are those stated in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR**.

> ***"…. 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, or 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."***

In the same quoted case above the Court of Appeal also stated: -

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance."***

However, the same court went further to state: -

> "***The Appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."***

In this case before this court, the facts forming the evidence upon which the trial court relied upon, were undisputed and had been admitted by consent including the nature of injuries and the classification thereof. Several cases of a similar nature with similar or near similar injuries, were quoted by both sides, and it may be helpful to re-examine them.

In **Magara Vs Onachi & Another [2004] eKLR**, Kshs.150,000/- was awarded in 2004.

In **Iwanjani Hardware Ltd & Another Vs Nicolas Mule Mutinda [2008] Eklr**, Ksh.150,000/- was awarded.

In **Margret Musindalu Amukune Vs Joseph Koech & Joel Kiplangat, Nakuru HCCC No. 96 of 1997,** the court awarded Ksh.900,000/-

In **Miriam Athumani & Salma Rashid Vs Obuya Express Ltd & Phillip Kipkemoi Chelule, Nakuru HCCC No. 477 of 1998**, the court awarded Kshs.600,000/-

It is clear from a comparison of the above cases that courts have awarded general damages for pain and suffering and loss of amenities in cases of the nature under discussion, ranging from Kshs.150,000/- to Kshs.900,000/-. The period covered in between is 1997 and 2008. The value of the shilling has since changed a lot.

The Appellant has not pointed out where the trial court went wrong or which principle, that court, wrongly took into account or wrongly failed to take into account. The Appellant has neither justified that in cases of the nature under discussion, an award of Ksh.500,000/- general damages awarded in this case by the trial court in its discretion, is inordinately so high that this court should interfere and reassess same.

What the Appellant has done in this appeal is merely to seize the principles upon which an Appellate court can interfere with the lower court assessment and filing those principles upon the face of the court. This court hears the Appellant telling this court ***"those are the principles for interfering with the trial courts assessment, proceed to find out yourself where the trial court went wrong and interfere."***

However, this court has to be persuaded with clear evidence and legal principles that indeed the lower

court erred in assessing the general damages. The Appellant failed to persuade this court so. This appeal accordingly has no merit. Indeed, the cases of a similar nature quoted above, support the trial courts assessment as within the trite principles quoted in the Appellate cases above.

The appeal is hereby accordingly dismissed with costs. Orders accordingly.

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D A ONYANCHA

JUDGE

Dated and delivered at Nairobi this 18th day of November, 2015.

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JUDGE