REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 39 of 2007

BEN KIPTUM EGO…..……APPELLANT

VERSUS

JOSEPH KARANJA……...RESPONDENT

JUDGMENT

On 19th December 2003, **JOSEPH KARANJA,** the Respondent in this appeal filed Nakuru CMCC No.2916 of 2003 against **BEN KIPTUM EGO**, the Appellant in this appeal claiming damages for the injuries he suffered in the road accident on 8th June 2003 along Nakuru-Nairobi road involving the Appellant's vehicle. By the consent of the parties liability was resolved at 30/70% against the Appellant. Thereafter the parties testified before the Resident Magistrate, H.M. Nyaga, who assessed damages at Kshs.360,000/- on 100% liability. This appeal is against that award.

The major complaint raised in the four grounds of appeal is that the award in this case is "**inordinately too high as to represent an erroneous estimate of the damages payable."**

Counsel for the parties agreed to rely on written submissions which they have both filed. In his submissions counsel for the appellant contends that the award is erroneous as it is based on the fractures of both the Respondent's right tibia and fibula. According to him the Respondent did not suffer a fracture of the fibula. He only suffered a segmental fracture of the tibia. The award based on the fractures of both the tibia and the fibula, he said, is therefore totally erroneous and should be set aside. He referred me to the **P3 Form** and the medical report both by Dr. Kiamba which he said refer to a fracture of only the tibia.

Counsel for the appellant further argued that the learnt trial magistrate erred in relying on the authorities cited by the Respondent's advocate which had more serious injuries than those suffered by the Respondent in this case. He cited three authorities which he said had injuries fairly similar to those suffered by the Respondent and urged me to reduce the award of Kshs.360,000/- to Kshs.150,000/-.

Although the Respondent has not cross appealed his advocates submitted that the award in this case, far from being excessive, is actually on the lower side. Starting with the principles upon which an appellate court can interfere with an award of the trial court, counsel submitted that the award in this case is quite reasonable. He said the trial magistrate did not misapprehend the evidence or proceed on wrong principles. To the contrary he confined himself to the medical evidence on record and considered the nature, extent and seriousness of the injuries as well as their residual effects. He also cited other authorities which I should consider and urged me to dismiss the appeal with costs.

I have considered these submissions and read the authorities cited. A first appeal like this one is like a retrial. The principles applicable were stated by the Court of Appeal in Selle & Another - Vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126, thus:-

"An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (*Abdul Hameed Saif –Vs- Ali Mohamed Sholani (1955) 22 EACA 270*)"

On a first appeal therefore, an appellate court has power to examine and re-evaluate the evidence on record where that becomes necessary. That is what in effect counsel for the Appellant has invited me to do.

It is trite law that the appellate court will normally not interfere with the trial court's finding of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding—**Mwanasokoni Vs Kenya Bus Services Ltd, [1985] KLR 931**. The law is therefore quite clear as to when an appellate court can interfere with the trial court's award: when, in assessing damages, the trial court has taken into account an irrelevant factor or ignored a relevant one or when its award is so inordinately high or so inordinately low and is therefore wholly an erroneous estimate. This is how the Court of Appeal put it in the case of in **Butt Vs Khan [1982-88] KAR 1**:-

"**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 arrived at a figure which was either inordinately high or low."**

In **Kemfro Africa Ltd & Another Vs Lubia & Another (No.2) [1987] KLR 30** at page 35 the Court of Appeal reiterated the same principle in the following words:-

"**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 that 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. See *Ilanga vs Manyoka [1961] EA 705, 709, 713, (CA-T) Lukenya Ranching* and *Farming Co-operative Society Ltd V Kavoloto [1979] EA 414, 418, 419 (CA-K).* This Court follows the same principles."**

Applying these principles to the award of Kshs. 360,000/= made in this case, though I would myself have awarded a slightly lower figure, that, however, is no reason for me to interfere with it. I agree with counsel for the Respondent that the trial magistrate did not misapprehend the evidence or proceed on wrong principles. To the contrary I find that he confined himself to the medical evidence on record and considered the nature, extent and seriousness of the injuries as well as their residual effects.

With respect to counsel for the appellant, both the P3 Form and Dr. Kiamba's report state that the Respondent suffered fractures of both the tibia and fibula. That is what is also in the discharge summary. The statement in Dr. Kiamba's report that the "X-ray show (sic) segmental fracture of the left tibia", is, in my view, a comment on the nature of the tibia fracture as he had earlier on in the report stated that the Respondent suffered fractures of both the tibia and fibula. And as I have said that is what he had stated in the P3 form and is what is in the discharge summary. I therefore find that the award was based on the correct injuries suffered by the Respondent.

For these reasons I find no merit in this appeal and I accordantly dismiss it with costs.

DATED and delivered at Nakuru this 23rd day of April, 2009.

D. K. MARAGA

JUDGE.