Aircab Travel Services Ltd & another v Olinyo (Civil Appeal 225 of 2019)
[2023] KEHC 23227 (KLR) (Civ) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23227 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 225 OF 2019

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

AIRCAB TRAVEL SERVICES LTD ..... 1ST APPELLANT

DENNIS NAIBEI ..... 2ND APPELLANT

AND

OLISA ANNE OLINYO ..... RESPONDENT

(Being an appeal from the judgment of K. Orenge (Mr.) SRM. delivered on 28th March 2019 in Nairobi Milimani CMCC No. 5807 of 2017)

JUDGMENT

1. This appeal emanates from the judgment delivered on 28.03.2019 in Nairobi Milimani CMCC No. 5807 of 2017. The suit had been commenced by Olisa Anne Alinyo, the plaintiff in the lower court (hereafter the Respondent) by way of a plaint filed on 18.08.2017. Aircab Travel Services Ltd and Daniel Naibei were named therein as the 1st and 2nd defendant/defendants (hereafter the 1st and 2nd Appellant/Appellants respectively). The Respondent's claim arose from a road traffic accident involving motor vehicle registration No. KBY 266L (hereafter suit motor vehicle), that occurred on 19.06.2017.

2. It was averred that at all material times the 1st Appellant was the registered owner, beneficial owner, insured owner and or owner in possession of the suit motor vehicle which at the material time was being driven by the 2nd Appellant as its authorized driver, servant and or agent.

3. That on the material date, the Respondent was lawfully riding on motor cycle registration No. KMDX 121A (hereafter the suit motor cycle) along Ngong Road-Makini Junction as a pillion passenger when the 2nd Appellant by himself, his authorized driver, agent, servant and or employee managed, controlled

and or drove the suit motor vehicle so carelessly and or negligently and at such a high speed that he lost control causing the suit motor vehicle to collide onto the suit motor cycle thereby occasioning the Respondent serious bodily injuries by virtue of which she suffered loss and damages. The particulars of the negligence were pleaded against the Appellants and the doctrine of Res Ipsa Loquitor was pleaded as well.

4. The Appellants filed a statement of defence denying the key averments in the plaint and pleaded in the alternative and without prejudice to the averments in the statement of defence that, if the Respondent sustained any injuries or suffered any loss or damage as alleged in the plaint or at all, the same was solely caused by the Plaintiff and rider of the suit motorcycle's negligence. Negligence was alleged against the Respondent and rider of the suit motorcycle.

5. The suit proceeded to full hearing during which all the respective parties adduced evidence. In its judgment, the trial court found the Appellants 100% liable for causing the accident. Judgment was entered in favour of the Respondent against the Appellants in the sum of Kshs. 236,864/- made up as follows:

   a. General damages Kshs. 220,000/-;

   b. Special damages Kshs. 16,864/-;

   Total Kshs. 236,864 /-

6. Aggrieved with the outcome, the Appellants preferred the instant appeal on the following grounds: -

   " 1. That the learned magistrate erred in law and in fact in apportioning liability against the Appellants against overwhelming evidence to the contrary.

   2. That the learned magistrate erred in law and in fact in awarding general damages that were manifestly excessive, which were not in line with the evidence on record which was against the tenor, spirit and principles of awarding general damages and incompatible with recent decided authorities" (sic)

7. The appeal was canvassed by way of written submissions. Based on the Appellants grounds of appeal, the appeal was centered on the twin issues of liability and quantum. Counsel for the Appellants anchored his submissions on the decision in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in respect of the duty of an appellate court on a first appeal. Addressing the issue of liability counsel cited the provisions of Section 107 of the *Evidence Act*, several decisions including Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR, Jamal Ramadhan Yusuf v Ruth Achieng Onditi & Anor [2010] eKLR, concerning the onus of proof on the part of the Respondent, asserting that the mere occurrence of an accident does not infer negligence ipso facto as against a party.

8. Counsel argued that the Respondent failed to establish negligence against the Appellants as a police abstract was inadequate in proof of liability and merely proof that an accident was reported. It was further argued that liability cannot be inferred where there is no investigation diary or sketch to aid the court. That since the suit is premised on the tort of negligence the Respondent ought to prove fault. In the circumstances he urged the court to proceed to find the parties equally liable.

9. Concerning the applicability of the doctrine of Res Ipsa Loquitor, counsel relied on the decisions in Muthuku v Kenya Cargo Handling Services Ltd [1991] KLR and Jeremiah Maina Kagema v Kenya Power & Lighting Co. Ltd [2011] eKLR to argue that the principle is was not applicable in the instant matter. That it was not controverted that the Respondent had no protective helmet at the time of the

accident and the court in Said Swaleh Said & Another v Tabitha Njeri Kinuthia [2018] eKLR while faced with a similar situation held the pillion passenger ought to bear 50% of the liability. Lastly on the issue, it was submitted that not every injury is as a result of negligence. The decision in Statpac Industries v James Mbithi Munyao [2005] eKLR was called to aid in the latter regard.

10. Concerning the challenge on damages, counsel began by restating the applicable principles as enunciated in Rahima Tayab & Others v Anna Mary Kinaru Civil Appeal No. 29 of 1982 [1983] KLR 114 and Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] eKLR inter alia. He further submitted that the purpose of awarding damages is not to punish the Appellants or to enrich the Respondent but rather to compensate the Respondent for the loss occasioned on account of the injuries sustained. It was further argued that the court should be guided by the doctrine of precedents in awarding damage by keeping in mind similar awards for like injuries.

11. In urging the court to interfere with the award to Kshs. 120,000/- counsel reiterated the evidence of Dr. G.K Mwaura's medical report and called to aid the decision in George Mugo & another v A K M (Minor suing through next friend and mother of A M K [2018] eKLR to submit that the Respondent merely sustained soft tissue injuries which have healed with no disability anticipated. Lastly, on special damages counsel relied on the decisions in National Social Security Fund Board of Trustees v Sifa International Limited [2016] eKLR, Macharia & Waiguru v Muranga Municipal Council & Another [2014] eKLR, Provisional Insurance Co. EA Ltd v Mordekai Mwanga Nandwa Kisumu CA Civil Appeal No. 179 of 1995 (unreported) and SDV Transami V Scholastica Nyambura [2012] eKLR to assert the principle that special damages must be specifically pleaded and proved. The court was thus urged to allow the appeal with costs.

12. The Respondent naturally defended the trial court's findings. As a preliminary issue, counsel for the Respondent submitted that the court lacks jurisdiction to entertain the instant appeal on the ground that no decree or an order appealed against was extracted and or formed part of the record of appeal before this court which omission was fatal. The decisions in Chege v Suleiman [1988] eKLR and Nancy Wamunyu Gichobi v Jane Wawira Gichobi [2018] eKLR were cited in support of the submission.

13. Addressing the issue of liability, counsel relied on the decision in Vivian Anyango Onyango & Another v Charity Wanjiku [2017] eKLR to submit that the Respondent was merely a passenger and despite blaming the rider of the said motorcycle, the Appellants never issued a third-party notice against the said rider. He asserted that the Respondent discharged her burden of proof as against the Appellants to warrant liability being assessed at 100%.

14. In response to the Appellants submission on the Respondent's failure to wear protective gear, it was contended that the said argument was disregarded by the trial court as the Appellants failed to enjoin the blamed third party meant hence liable to wholly shoulder the blame for the accident. The decision in Mohamed Muyunga v Vinoth Abwolet Eshepet [2020] eKLR was cited here, the Respondent urging the court not to disturb finding on liability.

15. Concerning damages, it was submitted that the trial court did not misdirect itself in assessing damages as the award was not inordinately high or erroneous but comparable with other decisions relating to injuries similar to those suffered by the Respondent. The decisions in Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi [2005] eKLR, Robinson Njoroge v Daniel Ombasa [2021] eKLR and Equity Bank Kenya Ltd & 2 Others v David Githuu Kuria [2019] eKLR were called to aid in urging the court to uphold the award of the trial court. In conclusion it was submitted that the Appellants' grounds of appeal did not challenge the award on special damages and the same ought not to be interfered with. The court was urged to dismiss the appeal with costs.

16. The court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. Before proceeding to consider the substantive matters raised in this appeal, it is necessary to address the preliminary issue raised by the Respondent concerning the jurisdiction of this court to entertain the instant appeal on the ground that no decree or an order appealed against was extracted and or formed part of the record of appeal.

17. In essence the Respondent is raising an issue of non-compliance by the Appellants with the requirements of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules. Order 42 Rule 13(4) of the Civil Procedure Rules provides that:-

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
>
> (a) the memorandum of appeal;
>
> (b) the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
>
> Provided that—
>
> (i) a translation into English shall be provided of any document not in that language;
>
> (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)".

18. This court having perused the Record of Appeal notes that indeed no copy of the certified decree of the decision appealed from was included. However, the record contains certified copies of the proceedings and the judgment of the lower court. Furthermore, the record of proceedings before this court indicates that, the appeal was certified ready for hearing and directions taken in the absence of counsel for the Appellants. The Respondent's counsel who was present did not raise any objection as to the contents of the Record of Appeal. The objection ought to have been raised at the time of taking directions under Order 42 Rule 13 of the CPR.

19. The thrust of the objection is that there is no competent appeal before the court, hence touches on the jurisdiction of the court. The objection ought to have been raised at the time of directions pursuant to the provisions of Order 42 Rule 13 (2). This notwithstanding, it is the court's considered view that in this case, the inclusion of a copy of the judgment of the lower court satisfies the requirements of sub-rule 4 (f) of Rule 13 of Order 42 of the Civil Procedure Rules, and that the Judge who certified the appeal ready for hearing in the absence of counsel for the Appellants and in presence of the Respondent's counsel gave directions on 07.10.2022, was so satisfied. See also the definition of decree

in Section 2 of the *Civil Procedure Act* and the proviso thereto which inter alia states that " for the purposes of appeal, , "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up." It is too late in the day for the Respondent to raise the objection and it is hereby rejected.

20. Moving on to the substance, the appeal turns on the twin issues of liability and damages. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of 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 necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanor of a witness is inconsistent with the evidence in the case generally."

21. As rightly asserted by the Appellants an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

22. The trial court after restating the evidence tendered before it addressed itself as follows concerning liability in its judgment; -

> " There was no dispute as to the occurrence of the accident. The defendant driver was blamed for the accident. There was submissions that there was a 3rd party that was involved but there was no 3rd party application taken by the Defendants to enable the court apportion liability. I therefore find that the Defendants driver was to blame for the accident. He was joining

the highway and he ought to have been more careful. The defendant is 100% to blame for the accident." (sic)

23. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

24. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondent. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

25. As held by the Court of Appeal in Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the "determination of liability in a road traffic case is not a scientific affair". The court proceeded to quote Lord Reid in Stapley v Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

26. During the trial the Respondent testified as PW1, adopting her witness statement as her evidence- in-chief while also producing the documents appearing in her list of documents as PExh.1-7. The gist of her evidence was that on the material date she was going to work and boarded the suit motorcycle which was hit by the suit motor vehicle and consequently she sustained injury. She blamed the driver of the suit motor vehicle for the accident. In cross-examination she stated that the accident occurred at the junction.

27. On the part of the Appellants, the 2nd Appellant testified as DW1 and equally adopted his witness statement as his evidence -in- chief. It was his evidence that he was driving along Makini Road. Concurrently there was a matatu overlapping and a Boda-Boda (motorcyclist) overtaking. He confirmed that the point of impact was on the front bumper and that the Respondent sustained injuries. It was his evidence further that the Respondent was neither wearing a reflective jacket nor helmet and that the police did visit the scene of the accident.

28. In cross examination, he did confirm being the driver of the suit vehicle owned by the 1st Appellant. He asserted that the suit motorcycle was on the main road, and he was joining the highway at the time. It was his evidence further that he did not enjoin a third party and blamed the Respondent for the accident.

29. According to the accounts by the Respondent and DW1, the accident occurred at an intersection between Ngong Road and a minor road (described as Makini Road), the latter which DW1 was driving on while intending to go towards Dagoretti Corner direction. Hence, he needed to cross over to the left side of Ngong Road to the lane heading to Dagoretti Corner direction, while the minor road he was on joined the lane of Ngong road headed to City Centre direction.

30. Although DW1 claimed in his written statement that he joined the major road upon being given right of way by a matatu to his right and on the major road heading to City Centre, he stated during his oral evidence that the matatu was itself overlapping other traffic to his right, while the motorcycle carrying the Respondent and seemingly headed to City Centre Direction, appeared on the right of the matatu in an overtaking bid. The collision with the overtaking motorcycle apparently occurred as DW1 entered the major road in front of oncoming town bound traffic, intending to cross over to the lane of Ngong Road heading towards Dagoretti Corner.

31. So that while the Respondent's account on the accident was vague and scanty, it seems that DW1 moved onto the major road from a minor road when it was not safe to do so; the matatu allegedly giving him right of way was itself overlapping, which meant that it hindered visibility of oncoming vehicles coming down Ngong Road present to the DW1's right side. DW1 ought to have joined the main road only after ascertaining that it was safe to do so, as the traffic already on the major road had the right of way. He did not and is not a surprise then that the collision occurred between the motorcycle and DW1's vehicle, but not having enjoined the driver of the motorcycle, DW1 must bear full liability.

32. The Respondent was a pillion passenger aboard the suit motorcycle, so she had no effective control over the motorcycle. Matters relating to PW1's failure to wear a helmet and or reflective gear are of no consequence here. Hence it is the court's determination that the trial court did not misdirect itself in finding that the Appellants were liable in negligence for causing the accident. The trial court's finding on liability cannot be faulted.

33. Regarding quantum, it was held in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

> " 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 high or low".

34. In Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia [1987] KLR 30, it was held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that 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 damages." see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR."

35. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that "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 in the first instance". That said, as earlier captured herein, apposite to the issue, are the pleadings. The Respondent particularized her injuries in the plaint as follows;-

> " 6. By reasons of the matters aforestated, the Plaintiff herein sustained serve injuries and has suffered loss and damage and he claims both general and special damages against the Defendants.
>
> Particulars of injuries
>
> a. Blunt injury (tender) - left shoulder.
>
> b. Blunt injury (tender) – left elbow" (sic)

36. In its judgment, the trial court went on to express itself on the issues of damages as follows: -

> " On the issue of quantum, the plaintiff medical report by Dr. Mwaura G.K the plaintiff sustained blunt injuries to the left shoulder and left elbow. The injuries were soft tissue.....Guided by these cases cited by the Plaintiff and defendant. I award the Plaintiff Kshs. 220,000/= (two hundred and twenty thousand) for general damages. Special damages pleaded and proved of Kshs. 16,864/= pleaded and proved. The Plaintiff is awarded costs of the suit and interest at court rates..." (sic)

37. PW1 testified that she sustained injuries on the right hand and pelvis region. She produced the Medical Report by Dr. G.K Mwaura & receipt thereof as PExh.1, Medical Summary from The Nairobi Hospital as PExh.2 and P3 Form as PExh.6. The earliest documentation of the Respondent's injuries was PExh.2 prepared roughly four (4) days after the accident. It essentially captured the Respondent's injuries as "No swelling, no bruises. Some pain noted on moving left hand. X-rays were done and were all normal". From the record of proceedings these injuries appear to have been disputed and the Appellants though subjecting the Respondent to a second medical examination, the subject report was never produced.

38. The report marked PExh.1 was prepared almost a month after the accident. The report set out in detail the Respondent's injuries as captured in the plaint and their attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

> " Ann Olisa was involved in a road traffic accident on 19/6/017. She sustained injuries and received treatment at The Nairobi Hospital.
>
> Healing is fair but:
>
> I. She experiences pain-left shoulder on exertion.
>
> II. She sustained soft tissue injuries, moderate in degree.
>
> III. Prognosis fair "(sic)

39. The most significant injury suffered by the Respondent was the blunt injury to the left arm which must have caused her some pain and discomfort. Further, both PExh.1 and PExh.2 appear to indicate that the Respondent would recover fully from the injuries. As observed by the English Court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 and echoed by Potter JA in Tayab v Kinany (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Shepard (1964) AC 326, at page 345:

> " But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."
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> See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Kigaraari v Aya [1982-88] 1 KAR 768.

40. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The trial court, while seemingly alive to relevant principles, analyzed in brief the evidence and submissions placed before it regarding the Respondent's injuries and eventual award. According to the medical evidence presented before the court, the Respondent's injuries were not severe and did not result in any form of permanent incapacitation.

41. The decision in Johnstone Kilango v Elijah Wambua & Another [2016] eKLR and Francis Ochieng v Alice Kajimba [2015] eKLR cited by the Respondent at the trial court, appears to relate to slightly more severe injuries. The injuries of the plaintiffs therein involving inter alia blunt trauma on the right knee, blunt trauma on the right ankle, 3x4 cm bruises on the right shin just below the knee, blunt trauma on the right hip, blunt trauma on the lower back; and headache, back pain, bleeding from the left ear, mild head injury with bilateral temporo–parietal scalp hematoma, head injuries, sub-conjunctival hemorrhage, periorbital ecchymosis on both eyes respectively. These injuries were comparatively severe, and the claimants therein were awarded Kshs. 250,000/- and Kshs. 350,000/- in general damages each.

42. The Appellants complaint on the award of damages was that it was inordinately high; that the trial court proceeded on wrong principles and misapprehended the evidence on record; that purpose of awarding damages is not to punish the Appellants or to enrich the Respondent but rather to compensate the Respondent for the loss occasioned on account of the injuries sustained; and that the court should equally be guided by the doctrine of precedents in awarding damage by keeping in mind similar awards for like injuries.

43. The Appellants relied on decisions in Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi [2013] eKLR and George Mugo & another v A K M (Minor suing through next friend and mother of A M K [2018] eKLR before the trial court. These cases involved more comparable injuries to those sustained by the Respondent. Nonetheless, the proposed award of Kshs. 70,000/- appears too low given inflationary trends since the decisions.

44. The Respondent has before this court cited a raft of decisions that were not relied on before trial court hence it did not have the benefit of said decisions. Here, the court entirely agrees with the disapproval expressed towards such conduct by Ochieng J (as he then was) in his judgment in Silas Tiren & Another v Simon Ombati Omiambo [2014] eKLR. The learned Judge taking exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> " None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."

45. From a reading of the trial court's judgment, the Court relied on the decisions in Kiwaniani Hardware Ltd v Laban Kiilu Muthoka [2008] eKLR and Joseph Wamburu Tumbu & Anor v Muthini Musyoka

[2017] eKLR in awarding Kshs. 220,000/- as general damages. Evidently the claimant in the said decision sustained relatively more severe injuries than the Respondent herein. It thus appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal, that the Appellants complaint in that regard is merited and the court does feel justified to interfere given the nature of injuries disclosed in the medical evidence placed before the trial court.

46. Reviewing the cases cited in the lower court by both parties, the court considers the case of Johnstone Kilango v Elijah Wambua & Another [2016] eKLR cited by the Respondent, and by the Appellant, namely, George Mugo & another v A K M (Minor suing through next friend and mother of A M K [2018] eKLR as most relevant. Although she must have endured much pain in the period of morbidity, the Respondent appears to have sufficiently recovered from her injuries with no attendant sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded that an award of Kshs. 150,000/- is adequate as general damages for pain and suffering.

47. Special damages as awarded in the lower court amounting to Kshs. 16,864/- have not been specifically challenged in the grounds of appeal. The court will thus not consider the said award.

48. The appeal therefore partially succeeds, and the judgement of the lower court is varied to the extent that the award of general damages is hereby set aside and substituted with an award of Kshs. 150,000/- (One Hundred and Fifty Thousand). The other awards remain undisturbed. Parties will bear their own costs on this appeal.

DELIVERED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Muthomi

For the Respondent: Mr. Kiptanui h/b for Mr. Waiganjo

C/A: Carol