Zebedeo v Ontere (Civil Appeal E481 of 2021)
[2024] KEHC 14395 (KLR) (Civ) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14395 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E481 OF 2021

TW OUYA, J

NOVEMBER 18, 2024

BETWEEN

BENARD ONITTA ZEBEDEO ..... APPELLANT

AND

JULIUS NYAMWEGA ONTERE ..... RESPONDENT

(Being an appeal against the judgement and decree of the Hon. D.O. Mbeja (PM) delivered on 7th July, 2021 in Nairobi Milimani CMCC No. 2449 OF 2020)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 07.07.2021 by the lower Court in Nairobi Milimani CMCC No. 2449 OF 2020. Julius Omwenga Ontere, (hereinafter the Respondent), the Plaintiff before the lower Court, initiated Nairobi Milimani CMCC No. 2449 OF 2020 (hereinafter lower Court suit) as against Benard Ontita Zebedeo, (hereinafter the Appellant), the Defendant before the lower Court by way of plaint on 24.07.2020 claiming general and special damages in respect of a road traffic accident that occurred on or about the 06.10.2019.

2. It was averred that at all material times to the suit. That the Appellant was the registered owner of motor vehicle registration number KCU 642L (hereinafter the suit motor vehicle). That on the date in question the Respondent was lawfully and carefully traveling on board the suit motor vehicle along Jogoo Road when the said motor vehicle was so recklessly and carelessly driven that the driver drove over a bump at high speed occasioning the Respondent severe bodily injuries, loss and damage. The doctrine of Res Ipsa Loquitor was equally pleaded by the Respondent.

3. The Appellant filed a statement of defence denying the key averments in the plaint and liability. He went on to aver that in the alternative and without prejudice to the denials in his statement of defence, that if the alleged accident occurred, which was denied, then it was solely caused by or substantially contributed to by the negligence of the Respondent. In the further alternative, it was averred that the occurrence of the accident was inevitable and occurred despite the exercise of reasonable skill, care and attention of the owner and or driver of the suit motor vehicle.

4. The suit proceeded to full hearing, during which only the Respondent called evidence in support of the averments in his pleadings. In its judgment, the trial Court found that the Respondent had established a prima facie case as against the Appellant on a balance of probabilities and consequently entered judgment in favour of the Respondent as against the Appellant at 100% on liability, general damages for pain and suffering of Kshs. 800,000/-, special damages of Kshs. 8,580/-costs of the suit and interest at Court rates.

The Appeal

5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in his memorandum of appeal as itemized hereunder: -

> " 1. That the trial Magistrate erred in law and in fact by finding the Appellant 100% liable when the testimony and the pleadings by the Respondent did not agree.
>
> 2. That the trial Magistrate erred in law and in fact by failing to find that the Respondent had not established his case against the Appellant to the required standard.
>
> 3. That the trial Magistrate erred in law and fact by failing to find that the Respondent had substantially contributed to the accident for failing to buckle up and standing in a moving motor vehicle.
>
> 4. That the trial Magistrate erred in law and in fact by failing to find that the Respondent did not prove the occurrence of the accident, his injuries and ownership of the subject motor vehicle.
>
> 5. That the trial Magistrate erred in law and in fact by failing to find that the Respondent did not prove his case by failing to produce treatment notes or hospital attendance notes for 06.10.2019 and instead produced documents with other dates.
>
> 6. That the trial Magistrate erred in law and in fact by awarding manifestly excessive general damages of Kshs. 800,000/- to the Respondent.
>
> 7. That the trial Magistrate erred in law and in fact by failing to consider conventional awards in cases of similar injuries.
>
> 8. That the trial Magistrate erred in law and in fact by relying on an authority with manifestly excessive injuries with potential lifelong complications to make an award on general damages.
>
> 9. That the trial Magistrate erred in law and in fact by failing to be guided by the medical reports, especially the 2nd Medical report by Dr. Maina Ruga dated 11.11.2020 that showed the injuries had healed thus leading to an excessive award on general damages.

10. That the trial Magistrate erred in law and in fact by misapprehending the evidence while assessing damages thus arriving at a bad decision." (sic)

6. In light of aforecaptioned itemized grounds of appeal, the Appellant seeks before this Court orders to the effect that: -

"i) the trial Court's judgment be reversed and the suit against the Appellant be dismissed

ii) the trial Court's judgment on general damages be reversed and re-assessed

iii) Costs of this appeal and of the trial suit be awarded to the Appellant." (sic)

7. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Submissions

8. On the part of the Appellant, counsel condensed his submissions on the twin issues of liability and quantum. Addressing grounds 1, 2, 3, 4, & 5 of the memorandum of appeal on the question of liability, counsel anchored his submissions on the provisions of Section 107 & 109 of the *Evidence Act*, the decisions in Alexander Mwendwa Mwova & others v Attorney General [2021] eKLR, Francis Mburu v Moses Omuse & 3 others [2015] eKLR, David Ogol Alwar v Mary Atieno Adwera & another [2021] eKLR, Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR, Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR, Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR and Rose Wanjiru Njiga [Suing as the legal representative & administrator of the Estate of the late Edwin Gachoki Njiga [Deceased] v Packson Githongo Njau & another [2019] eKLR to submit that the Respondent completely failed to substantiate his allegations of negligence against the Appellant and or the Appellant's authorized agent and thus the trial Magistrate erred in law and in fact by failing to dismiss the entire suit for want of proof.

9. It was further submitted that the Respondent failed to call the investigating officer whereas the police officer who appeared before Court only referred to documents which were neither filed nor produced into evidence as per law. That the Respondent equally did not demonstrate how he was able to fracture his ribs, if at all he had not fastened his safety belt. Therefore, if this Court were not to reverse and or set aside the trial Court's decision by dismissing the Respondent's case in its entirety, the decision ought to be disturbed apportioning liability as against the Respondent because from the evidence presented before the trial Court it is clear that he had not fastened his seat belt.

10. Concerning damages, counsel referred to the two (2) rival medical reports adduced before the trial Court in urging this Court that an award of Kshs. 150,000/- was a sufficient assessment on damages for the injuries sustained by the Respondent. In so urging, counsel relied on the decisions in Elizabeth Wanjira Ngure & Another V Nyaka Agencies Limited & Another [2008] eKLR and John G. Mbuthia & Another V Stephen Muiruri Njenga [2008] eKLR. On special damages it was summarily posited that it is trite law that the latter must be specifically pleaded and strictly proved before being awarded. That the trial Magistrate awarded the Respondent special damages beyond what was specifically pleaded and proved therefore the award ought to be disturbed. This Court was therefore urged to allow the appeal as lodged.

11. On the part of the Respondent, responding to the Appellant's submissions on liability, counsel equally cited Section 107 of the *Evidence Act* meanwhile revisited the evidence before the trial Court to assert

that it is only an eye witness who can testify on the circumstances of an accident. That the Appellant failed to call any evidence on the question of liability as such the Respondent's testimony before the trial Magistrate stood uncontroverted meanwhile the Respondent's evidence was corroborated by both the oral and documentary evidence adduced before the trial Court. The decision in Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR was cited in the forestated regard. As to the question of the Respondent's failure to fasten his safety belt, as argued by the Appellant, while calling to aid the decisions in *Boniface Waiti & Another v Michael Kariuki Kamau, Civil Appeal No. 705 of 2003* and Rose Makombo Msanju v Night Flora alias Nightie Flora & Another [2016] eKLR it was submitted that the former cannot be penalized for the poor workmanship or control of the suit motor vehicle since he was lawfully aboard the same. That in totality of the above, the Respondent had proven his case on a balance of probabilities thus based on the available facts and evidence, the learned Magistrate did not err in apportioning liability at 100% as against the Appellant.

12. On quantum of damages, counsel restated the Respondent's pleadings and evidence meanwhile particularized the 2nd medical report prepared at the behest the Appellant's to submit that the latter confirmed that the Respondent sustained multiple rib fractures and blunt chest injury. That despite urging the trial Court to award Kshs. 1,200,000/- in damages, premised on the decisions in A.M (minor suing through his next friend M.A.M) v Mohamud Kahiye [2014] eKLR and Timothy Wafula v Sietco Development Africa Limited [2005] eKLR, the trial Court having considered the injuries and authorities before it, awarded of Kshs. 800,000/-, which was reasonable and appropriate in the circumstance. Therefore, the Appellant has not demonstrated that the learned Magistrate's assessment was either based on the wrong facts or too high to warrant interference. The decision in Peter Namu Njeru v Philemone Mwagoti [2016] eKLR was cited in the forestated regard. In summation, counsel urged the Court to dismiss the appeal with costs.

Analysis And Determination

13. The Court has considered the record of appeal, the pleadings and original record of the proceedings. 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. Further, it is trite that 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. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the twin issues of liability and awardable damages.

14. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court had earlier in this judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court gyrated on, the key question for determination is whether the trial Court's findings on the issues falling for determination therein were well founded. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it, addressed itself on liability as follows; -

> ...."After the close of pleadings this suit was fixed for hearing on 15/3/2021.....I have also considered the testimony of Police Constable Edwin Angaya who testified as PW2 and produced and undated as exhibit 2. The Plaintiff also testified as PW3 and adopted contents of a witness statement he wrote dated 14/2/2020 which was filed in these proceedings as part

of his evidence in chief, which I have considered. The defendant did not adduce any evidence to challenge the evidence so far adduced by the plaintiff on liability. I have considered the dictum of the learned Justice A. Visram in the case of Unreek Electrical Company Limited v Joseph Fanuel Alela [2005] eKLR.....

In the absence of any evidence to challenge the evidence so far adduced by the plaintiff this Court is satisfied that the plaintiff has established a prima facie case against the defendant at 100% on liability all circumstances of this case considered in the absence of any evidence to the contrary." (sic)

15. As aptly submitted by respective counsel in the matter, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondent vice versa with respect to the averments contained in the Appellant's statement of defence. 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)

16. Further, this Court has repeatedly observed that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The Court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated position that: -

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

17. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs 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."

18. Before the trial Court, the Respondent testified as PW3. He began by adopting his witness statement dated 14.02.2020 as his evidence in chief and adduced into evidence the documents as they appear in his list of documents of even date as PExh.3 – 10. On cross-examination he asserted being seated in middle of the suit motor vehicle he was aboard. That as a result of the accident he sustained rib fractures and was later taken to Samaritan Hospital and later Kenyatta National Hospital. It was his evidence further that he reported the accident at Makongeni Police Station meanwhile spent some money in hospital and paid for his treatment.

19. PC Edwin Angaya - No. 93593, testified as PW2. He adduced the police abstract appearing in the Respondent's list of documents as PExh.1. He confirmed that an accident occurred on 06.10.2019 at 8.30pm along Jogoo Road involving the suit motor vehicle, a Mazda Axela that was being driven by the Appellant. That as a result of the accident the Respondent sustained harm injury. He further stated that PC Yoris visited the scene of the accident whereas the latter was a self-involving accident that is still pending under investigation (PUI). On cross-examination he confirmed to not being the investigating office and that PC Yoris was at Kiganjo on a promotional training. That his evidence was entirely premised on the police abstract.

20. Evidently, from the aforecaptioned, PW2 did not witness the accident. He equally was not the Investigating Officer nor did he adduce the Police file nevertheless confirmed that his evidence was entirely premised PExh.1 in respect of the accident in question. He further went on to state that the matter was still PUI. From the above it can purposefully be stated that his evidence was entirely garnered from the contents of the Police Abstract and was not in any way instructive on the issue of liability other that confirming that an accident occurred involving the suit motor vehicle of which the Respondent was aboard. Thus, PW2's testimony merely lent credence towards confirming the occurrence of the accident.

21. The Respondent on the other hand – PW3 –, stated in his witness statement that on the date in question he was travelling aboard the suit motor vehicle when the same was so recklessly and carelessly driven by the driver of the suit motor vehicle as he failed to slow down while approaching bumps consequently running over them as high speed causing him to be violently tossed and as a result occasioned him serious bodily injuries. Palpably, the Respondent was the only eye witness to the accident given that the Appellant did not call any eye witness to rebut the Respondent's evidence on the issue. The Respondent oral evidence was in respect shoring up the itemized particulars of negligence a paragraph 4 of his plaint.

22. At the risk of repetition, no evidence was tendered to rebut or discredit PW3's narration of events. Meanwhile, this Court has repletely held that the police abstract while useful cannot in the circumstances displace the direct eyewitness account by the Respondent which in this case was unchallenged. Nevertheless, the uncontested fact remains that the Respondent was a passenger aboard the suit motor vehicle and invariably had no control of the same. The Appellant appears to advance the defence of contributory negligence through the narrative that the accident if not wholly then was partial occasioned by the Respondent's failure to buckle his seat belt while aboard the suit motor vehicle. In advancing the forestated narrative, they offered no evidence. Therefore, it is this Court's contemplation that such line of defence cannot sustain.

23. It is equally notable that the Respondent pleaded the doctrine of Res Ispa Loquitor to shore up his case. The Court of Appeal in Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo while addressing itself in a matter where the claimant was a passenger aboard an accident causing vehicle correspondingly addressed itself to the forestated doctrine as follows: -

> " 29. In the persuasive case of Jackline A. Obondo –vs- Kenya Bus Services & Another (2007) eKLR, Kimaru, J observed as follows: -
>
> "However, upon evaluating the evidence on record, it is clear that when the plaintiff boarded the said motor vehicle at Bondo, she expected to be ferried safely to her destination, Nairobi. She did not reach safely to her destination. The bus which she was travelling in was involved in an accident as a consequence of which she was injured. I agree with the finding of the Court of Appeal in the case of Embu Public Road Services Ltd. –Vs-Riimi (1968) EA 22 where it was held that where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitur and hold the defendant liable in negligence." (See also P I - v - Zena Roses Ltd & another [2015] e KLR)
>
> 30. In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle.
>
> 31. .....
>
> 32. For the foregoing reason, we find the judge erred in finding that the doctrine of res ipsa loquitor did not apply in this case. We find that the principle of res ipsa loquitor was applicable and negligence on the part of the respondents was proved. We accordingly set aside the decision of the learned judge in dismissing the appellant's suit and find that liability on the part of the respondents was proved."

24. Similarly, to the instant matter, the Respondent did not offer any alternative facts or shore up the itemized particulars of contributory negligence as against the Respondent as pleaded in paragraph 7 of the statement of defence, compounded by the fact that the Respondent pleaded the doctrine Res Ipsa Loquitor meanwhile was a passenger aboard the suit motor vehicle. The trial Court though appreciative of the facts and evidence before him, applied a tangential approach at arriving at the decision it did. The learned Magistrate applied himself to the dicta in Unreek Electrical Company Limited (supra) at arriving at the conclusion that the Respondent's evidence was uncontroverted and therefore found the Appellant 100% liable. This Court reasonably believes the forestated determination ought to be conjoined with the dicta in Karugi (supra) wherein the Court must satisfy itself that the claimant has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. In the instant matter, it would appear that the Respondent satisfied both requirements, by establishing a case on balance of probabilities as against the Appellant. The Appellant cannot be heard on a defence of contributory negligence without an iota

of evidence to shore up the same. Therefore, notwithstanding the trial Court's approach at arriving at its determination on liability as it did, the same cannot be faulted and a challenge on the same by the Appellant automatically fails.

25. Regarding the challenge on awarded damages, 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".

26. 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."

27. 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 issues, are the pleadings. The Appellant particularized his injuries in the plaint as follows; -

> " 5.....
>
> Particulars of injuries Compound (open) fracture of the left tibia and fibula.
>
> i. Multiple rib fracture on the right side (3rd, 4th, 5th, 6th, 7th, & 8th)
>
> ii. Blunt chest injury
>
> iii. Right hemothorax
>
> iv. Chest is tender on the right chest wall on palpation." (sic)

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

> " I have considered the medical evidence so far on record. I have considered the case of A.M (minor suing through his next friend MAM v Mohamud Kahiye [2014] eKLR. Guided by the circumstances obtaining in the instant case, the injuries suffered by the plaintiff, the evidence so far adduced together with the submissions filed, judgment is entered in favour of the plaintiff against the defendant for Kshs. 800,000/- general damages for pain and suffering, the plaintiff is also awarded special damages of Kshs. 8,580/- as pleaded and proved all the circumstances of the case considered." (sic)

29. Dr. Okere testified as PW1 and identified himself as a private medical practitioner. This gist of his evidence was that he examined the Respondent on 19.11.2019 and confirmed that the latter sustained multiple rib fractures on his right side meanwhile he relied on the P3 to prepare his report. He produced the medical report dated 19.11.2019 as PExh.1(a), receipt thereof as PExh.1(b) and receipt for his attendance PExh.1(c). In cross-examination, he maintained that Respondent sustained multiple fractures (6) ribs on the right side and equally sustained a hemothorax. The Respondent on his part stated that his ribs were fractured meanwhile was treated at Samaritan Hospital and Kenyatta National Hospital.

30. The earliest documentation of the Respondent's injuries were treatment notes from Samaritan Hospital and Kenyatta National Hospital, which recorded the interventions in respect of the Respondent's injuries with earliest therein being prepared a day after the accident. The former document stated the Respondent injuries as "....sustained multiple thoracic rib fractures...".

31. The Respondent was subjected to a second medical examination, at the behest of the Appellant. The medical report was tendered through the Respondent by consent of the parties. This was the most recent medical report on the Respondent and was prepared by Dr. Ruga. It was dated 11.11.2020. It confirmed the Respondent's injury as "blunt chest injuries with multiple rib fractures (right 3rd – 8th ribs) and hemothorax". It proceeded to state that: -

> " He was treated at Samaritan Medical Clinic and at KNH. X rays of chest were done and they confirmed the rib fractures. He was given medications and advised to rest.
>
> Present condition
>
> He gets pain on right side sometimes.
>
> Examination findings
>
> He is in good general condition
>
> Chest
>
> There is no swelling and no deformity. There is no pain or tenderness. Air entry into the lungs is good bilaterally.
>
> Opinion
>
> This man suffered severe harm. He sustained multiple rib fractures on right side 3rd – 8th ribs and hemothorax. The fracture has now healed and the hemothorax has cleared." (sic)

32. The medical report marked PExh.1(a) was prepared more than 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 stated in extenso therein as follows; -

> " He was involved in a road traffic accident on 06.10.2019 along Jogoo Road and sustained the following injuries: -
>
> 1. Blunt chest injury
> 2. Multiple rib fracture on the right side (3rd, 4th, 5th, 6th, 7th & 8th)
> 3. Right hemothorax
>
> .....

Physical examination

Chest is tender on the right chest wall on a deep palpation.

Opinion and prognosis

He sustained multiple rib fractures on the right side with a hemothorax. The injuries cane be classified as grievous harm." (sic)

33. Thus, from the foregoing, the most significant injury suffered by the Respondent was the multiple fracture of the right ribs which must have caused him significant pain, discomfort and attendant sequela. Meanwhile only Dr. Ruga's reports appear to indicate that the Respondent has since recovered. 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.

34. As important as consistency in awards for similar injuries might be, this 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. As earlier noted, the trial Court despite proposing a potential award on general damages did not address itself in any detail on the issue and or analyse the respective parties' submissions and authorities. It appeared to reference a singular authority at arriving at its determination. Nevertheless, from the medical evidence presented before the trial Court, the Respondent's injuries seemed relatively severe with no residual incapacitation being occasioned.

35. The Appellant's complaint before this Court is that the trial Court's award on damages was excessive, not conventional in comparison to cases with similar injuries, did not pay due regard to the medical evidence before it therefore it ought to be substituted. Before the trial Court, though substantively addressing the Court on the question, no proposed figure was advanced.

36. The Respondent urged this Court to maintain the trial Court's award having earlier proposed before the lower Court an award of Kshs. 1, 200,000/-. In support of their submissions, counsel relied on the decisions in A.M (minor suing through his next friend M.A.M) v Mohamud Kahiye [2014] eKLR wherein the Claimant sustained multiple fracture of the left side rib, friction burns on the chest & abdomen and Timothy Wafula v Sietco Development Africa Limited [2005] eKLR wherein the Claimant sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg. The claimants therein were awarded Kshs. Kshs. 800,000/- in general damages respectively.

37. Despite the foregoing, there was no in-depth analysis and or consideration of the submissions by the trial Court on the issue. 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 Appellant's complaint in regard

of the awarded damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available. Reviewing the cases cited in the lower Court by the Respondent, the Court considers the cases rather dated.

38. Although the Respondent must have endured much pain in the period of morbidity, the Respondent appears to have sufficiently recovered from his injuries with little or no attendant sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded to disturb the award by the trial Court and decreasing it to the sum of Kshs. 600,000/- being general damages for pain and suffering.

39. The award of special damages was not specifically challenged by reading to the Appellant's grounds of appeal whereas it is well-trodden that the issues for determination before a Court are delineated in pleadings. Therefore, this Court will not address or interfere with the learned Magistrates award on the same despite the Appellant's tacit invitation to do so through his submissions before this Court.

Determination

40. In the result, the appeal succeeds solely on the question of general damages, and the same will be varied and or set aside in the following terms: -

    a. The appeal hereby partially succeeds.

       The trial Court award on general damages for pain and suffering hereby set aside and substituted with an award of Kshs. 500,000/-.

    b. Being that the appeal partially succeeds each party to bear their own costs of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2024

HON. T. W. OUYA

JUDGE

For Appellant.....kabita

For 1St Respondent.....Ms Omwenga

Court Assistant.....Martin

ROA 14 days.