REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 518 OF 2016

BHATYANI RANDEEP.....1ST APPELLANT

DAVID N. WARUINGE.....2ND APPELLANT

-VERSUS-

JOHNSTONE KIANGA PAUL.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.W. Mburu(Mr.)

(Principal Magistrate) delivered on 8th July, 2016 in CMCC NO. 2073 OF 2011)

JUDGMENT

1. The respondent herein instituted a suit by way of the plaint dated 16th June, 2011 and amended on 11th September, 2012 in which he prayed for both general and special damages against the 1st and 2nd appellants for injuries sustained in a road traffic accident involving the parties, plus costs of the suit and interest thereon.

2. The 1st appellant was sued in his capacity as the registered owner of the motor vehicle registration number KBE 083U ("the subject vehicle") while the 2nd appellant was sued as the beneficial owner of the subject vehicle.

3. The respondent pleaded in his plaint that sometime on or about the 13th day of July, 2009 while he was lawfully walking long River Road in Nairobi, the appellants whether by themselves or through their agent/driver, negligently drove the subject vehicle and caused it to knock down the respondent.

4. The particulars of negligence and of the injuries sustained were set out in the plaint.

5. Upon service of summons, the appellants entered appearance and put in their joint statement of defence dated 21st February, 2013 to deny the respondent's claim.

6. When the matter came up for trial, the parties recorded a consent on liability in the ratio of 80:20 in favour of the respondent. Subsequently, the respondent gave his evidence on quantum and called an additional witness before closing his case, while the appellants summoned one (1) witness to testify for the defence case. The parties then filed and exchanged written submissions.

7. The trial court finally entered judgment in the following manner:

. Liability	**80:20**
b. General damages for pain	
and suffering	**Kshs.400,000/=**
c. Special damages	**Kshs.12,160/=**
Total	**Kshs.412,160/=**

Less20% contribution Kshs.82,432/=

Award Kshs.329,728/=

8. The aforesaid judgment now constitutes the subject of the appeal, with the appellants putting forward the following grounds in their memorandum of appeal dated 21st August, 2016:

> **i. THAT the learned trial magistrate erred in law and in fact in finding that the respondent was entitled to general damages that were too high in view of the injuries suffered by the respondent.**
>
> **ii. THAT the learned trial magistrate erred in law and in fact in finding that the respondent was entitled to an award for future medical expenses that was too high in view of the evidence tendered by the respondent.**
>
> **iii. THAT the learned trial magistrate erred in law and in fact in totally disregarding the evidence of "DW1" a consultant radiologist who is a more qualified medical practitioner in regards to the fractures than "PW1."**
>
> **iv. THAT the learned trial magistrate erred in law and in fact in failing to consider conventional awards for general damages in similar cases.**

9. This court invited the parties to file written submissions on the appeal. On their part, the appellants through their joint submissions dated 17th November, 2020 argue that the trial court erred and took into account irrelevant factors in making its award on general damages; namely, in finding that the respondent had proved the injuries sustained whereas the same had been disputed by way of evidence.

10. The appellants further argue that the award of Kshs.400,000/ made by the trial court on general damages is manifestly excessive.

11. According to the appellants, the trial court ought to have deemed the injuries soft tissue in nature and ought to subsequently have made an appropriate award commensurate to such injuries. In submitting so, the appellants refer this court to the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** in which the Court of Appeal reasoned thus:

> **"…in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases"**

12. Consequently, the appellants urge this court to interfere with the award on general damages made by the trial court and to substitute it with a more reasonable award of between Kshs.90,000/ and Kshs.120,000/.

13. They have cited *inter alia*, the case of **George Mugo & another v A K M (Minor suing through next friend and mother of A M K [2018] eKLR** where the court awarded a sum of Kshs.90,000/ and the case of **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** in which an award of Kshs.300,000/ made on general damages by the trial court was revised downwards to a sum of Kshs.100,000/ on appeal to the High Court. In both instances, the injuries sustained were categorized as soft tissue in nature.

14. In reply, the respondent in the submissions dated 20th November, 2020 contend that the appeal is incompetent for failure to attach the decree issued by the trial court, to the record of appeal. More specifically, the respondent cites the provisions of **Order 42, Rule 13 (4)** of the **Civil Procedure Rules, 2010** stipulating thus:

> **"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:**
>
> **…**
>
> **(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal"**

15. The respondent further relies on the Supreme Court case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR** where it rendered in summary, that the omission of mandatory documents to the record of appeal renders the appeal in question incompetent and incapable of being adjudicated upon.

16. On the merits of the appeal, the respondent who stood in support of the award by the trial court submits that the trial court was guided on credible evidence which was adduced at the trial indicating the nature of injuries sustained by the respondent and that the evidence presented by the appellants was unreliable.

17. The respondent also submits that the sum awarded by the trial court on general damages is reasonable and within comparable limits of awards previously made in instances of similar injuries.

18. To buttress his argument above, the respondent quotes *inter alia*, the case of **Ambrose Micheni Kinyamu v Gilbert Bundi & another [2012] eKLR** where the High Court sitting on appeal enhanced an award of Kshs.150,000/ made by the trial court on general damages for pain and suffering and loss of amenities, to one of Kshs.400,000/ for fracture of the right leg on the ankle; and the case of **Lucy Muthoni Mucaki v Fridah Nyaguthii [2015] eKLR** in which an award of Kshs.450,000/ was made to a plaintiff who had suffered bruises at the base of the left big toe medially, spiral fracture of the tibia at left ankle joint and dislocation of the left ankle joint.

19. In the end therefore, the respondent is of the view that the instant appeal ought to be dismissed with costs for want of merit.

20. I have considered the rival submissions on appeal and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

21. Before I delve into the substratum of the appeal, I will first address the preliminary issue specifically raised by the respondent regarding whether the appeal ought to be struck out on grounds of incompetency for failure to include a decree in the record of appeal.

22. Upon considering the various authorities and provisions cited by the respondent in this respect, and upon my perusal of the record of appeal, I note that while the decree does not form part of the record of appeal, the appellants have attached a copy of the judgment giving rise to the decree, therein. In my view, it was not necessary for the decree to similarly constitute the record. I am satisfied that the appellants complied with the proviso of **Order 42, Rule 13 (4)** of the **Civil Procedure Rules, 2010.**

23. In essence therefore, to strike out the appeal at this late stage on the basis of the grounds laid out by the respondent would be draconian to say the least and would serve no useful purpose.

This is the position taken in the case of **Nyota Tissue Products v Charles Wanga & 4 Others (2020)** cited in the authority of **Paul Lawi Lokale v Auto Industries Limited & another [2020] eKLR** where court determined that:

> **"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from" and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."**

24. Consequently, there is no basis on which to deem the appeal incompetent and I therefore decline to strike it out. I will now consider the merits thereof.

25. It is clear that the appeal is challenging the trial court's finding on quantum, specifically the award made under the head of general damages for pain and suffering and loss of amenities. From my reading of the grounds, there is nothing to indicate that the award on special damages is contested. I therefore deem it practical to address the four (4) grounds of appeal contemporaneously.

26. This being an appeal in the first instance, it is worth bearing in mind that this court can only interfere with the trial court's award of damages if it can either be shown that an irrelevant factor was taken into account, or that a relevant factor was disregarded, or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out in the renowned case of renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** and were echoed by the court in the case of **Butt v Khan (1977) 1 KAR.**

27. From the perusal of the appeal, I note that the appellants are challenging the award by the trial court on the grounds that the learned trial magistrate took into account irrelevant factors and that he entered an inordinately high award.

28. I further note that the injuries sustained by the respondent as particularized in the amended plaint are fractured left calcaneus and pains/soft tissue injuries.

29. Upon my re-evaluation of the medical evidence tendered at the trial, I note that the P3 form; the police medical report dated 30th June, 2009 and the medical report dated 24th February, 2011 prepared by Dr. Cyprianus Okoth Okere are consistent and confirm the injuries pleaded.

30. Furthermore, Dr. Okoth Okere who was PW1 stated in his evidence that upon examining the respondent, he was able to ascertain the injuries as fracture of the left calcaneus bone-heel bone and classified the injuries as grievous harm in nature. He produced his medical report and receipts as P. Exh 1(a), (b) and (c).

31. In cross-examination, the doctor stated that he did not refer to any x-ray films or take any x-rays while examining the respondent, but relied on the earlier reports and conducted a physical examination.

32. The respondent who was PW2 stated that following the accident, he was taken to Mbagathi Hospital for treatment and that a plaster cast was applied. The respondent went on to give evidence that x-rays which were taken revealed a cracked bone.

33. In cross-examination, it was the evidence of the respondent that he could not recall the facility in which the x-rays were taken and did not produce the said x-ray films. It was also his evidence that at the time of giving his testimony, he still experienced pain in his leg and could not walk long distances.

34. For the defence case, Dr. Joseph Muthoka who was the sole defence witness testified that he is a consultant radiologist and that he examined the respondent and referred to x-ray film which was not well-labelled but that he noted no fractures or dislocation of the ankle. The doctor produced his medical report as D. Exh 1.

35. In cross-examination, the doctor indicated that he did not perform any actual examination on the respondent but relied upon the x-ray films which he saw on 18th July, 2015. He further indicated that he had the other medical evidence on the date of the examination.

36. In his judgment, the learned trial magistrate reasoned that whereas the appellants were disputing the injuries sustained, he was convinced that the documentary evidence adduced indicated that the respondent had sustained a fracture.

37. From my study of the record, I observed; as the learned trial magistrate did; the conflicting medical evidence tendered by the respective parties as relates to the injuries sustained. Be that as it may, I note on the one hand that the respondent was able to produce various medical reports and call medical evidence to confirm the injuries pleaded.

38. On the other hand, I observed that DW1 purely based his findings on the x-ray films and admitted to not carrying out his independent examination before preparing his report. It is also noteworthy that the x-ray films were not produced by either party.

39. That notwithstanding, I concur with the finding of the learned trial magistrate that the respondent had proved to the required standard the injuries he suffered.

40. Further to the foregoing, there is nothing to indicate that the learned trial magistrate considered any irrelevant factors or failed to take into account any relevant factors. I am satisfied that he considered the totality of the evidence which was placed before him.

41. This brings me to the final principle concerning whether the award made on general damages for pain and suffering and loss or amenities was reasonable and comparable to awards previously made in respect to similar injuries.

42. The respondent suggested a sum of Kshs.700,000/ and cited the case of **Anne Muriithi, Lilian Kathoki, Naomi Nzisa, Mary Nzomo, Anne Njeru & Jane Syombua Sammy v The Headmistress Mks Girls, The Chairman, Board Of Governors & Wambua Makau [2003] eKLR** where the court made various awards ranging from Kshs.250,000/ to Kshs.1,250,000/ on general damages to the respective plaintiffs for a variety of injuries suffered. The appellants proposed a sum of Kshs.60,000/ with reliance on the case of **Ziphorah Wambui Wambaira and 17 Others v Gachuru Kiogora & 2 others [2004] eKLR** in which the Court of Appeal awarded the various plaintiffs sums ranging between Kshs.50,000/ and Kshs.100,000/ for soft tissue injuries.

43. Ultimately, the learned trial magistrate awarded the sum of Kshs.400,000/ without disclosing the authorities, if any, that guided his assessment.

44. Upon my study of the record, I find that the authorities cited by the parties before the trial court did not constitute comparable injuries and awards, and were decided many years back.

45. Suffice it to say that I note that the authorities cited on appeal by the respondent were decided over five (5) years ago and involved slightly more serious injuries than those suffered by the respondent. The authorities cited by the appellants constituted less severe injuries than those sustained here.

46. I therefore considered the more recent authority of **Gerald Oyugi v Evans Okeyo Mochere [2019] eKLR** where the High Court sitting on appeal revised downwards an award of Kshs.800,000/ with one of Kshs.300,000/ on general damages for pain and suffering and loss of amenities, in the instance of fracture of the foot bone among other related injuries, with 10% degree of permanent incapacity.

47. In view of the foregoing, I am convinced that the award by the learned trial magistrate was on the higher side. In my view, given the absence of any degree of permanent disability assessed, the passage of time and inflationary trends, an award of Kshs.300,000/ is more appropriate under this head.

48. In the end, the appeal succeeds in respect to the award made on general damages for pain and suffering and loss of amenities. Consequently, the trial court's award of Kshs.400,000/ under that head is set aside and is substituted with an award of Kshs.250,000/. The judgment on appeal shall now read as follows:

a. General damages for	
pain and suffering	**Kshs.300,000/=**
b. Special damages	**Kshs.12,160/=**
Total	**Kshs.312,160/=**
Less 20% contribution	**Kshs.64,232/=**
Award	**Kshs.256,928=/**

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

Parties shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants

.....for the Respondent