REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 115 OF 2018

DHIRAJ MANJI.....APPELLANT

VERSUS

TYSON OUMA.....RESPONDENT

JUDGMENT

BACKGROUND INFORMATION

This an appeal from the judgment and decree of the **Hon. C. Obulusta Chief Magistrate** in Eldoret, delivered on **21/9/2018** in Eldoret **CMCC No. 720 of 2017.**

In the lower court the Respondent vide plaint dated **7/7/2017** filed a suit for negligence against the Appellant herein seeking for general and special damages, costs and interest at Court rates.

The Respondent claimed that on or about **10/6/2017** the Respondent was lawfully riding motorcycle registration **KMDG 585M** along Eldoret-Kitale Road when the Appellant's driver, servant, agent and/or employee negligently drove, managed and/or controlled motor vehicle registration number **KBW 580R** and caused the aforesaid motor vehicle to knock down the motorcycle **KMDG 585M** and as a result of which the Respondent sustained severe injuries.

The Appellant filed his memorandum of appearance and defence on **2/10/2017** denying the Respondent's claim.

The matter proceeded to full hearing and on **21/9/2018** the trial court delivered its judgment whereby the respondent herein was awarded **Kshs. 1,200,000/=** as general damages, **Kshs. 53,490/=** as special damages and costs and interest of the suit.

By consent of parties, liability had been apportioned in the ratio **of 20%:80% in** favour of the Respondent herein.

Being dissatisfied with the trial court's judgment the Appellant has filed the instant appeal challenging both liability and quantum via his memorandum of appeal dated **26/9/2018** citing the following grounds of appeal;

> ***1. THAT the Learned trial Magistrate erred in law and fact in holding the Appellant herein 80% liable in negligence without considering the evidence which pointed to the fact that the accident was solely caused by the Respondent.***
>
> ***2. THAT the Learned trial Magistrate erred in law and in fact in holding that the Respondent had established a case against the Appellant contrary to the evidence on record.***
>
> ***3.THAT the Learned trial Magistrate erred in law and in fact in failing to make a finding as to whether or not the issue of liability was adequately proved considering the evidence on record which revealed that the accident was caused by the rider of Respondent.***
>
> ***4. THAT the Learned trial Magistrate erred in law and fact in entering judgment for the Respondent without considering the credible evidence by the defence witnesses who confirmed that the Respondent was liable for the accident.***
>
> ***5. THAT the Learned trial magistrate failed to consider the submissions and authorities filed by the Appellant hence an erroneous judgment.***

6. THAT the Learned trial magistrate erred in law and in fact in failing to hold the Respondent wholly liable for the accident

7. THAT the Learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's claim with costs for want of proof.

8. THAT the Learned trial Magistrate erred in law and in fact in awarding damages to the Respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.

9. THAT the Learned trial Magistrate erred in law and in fact in awarding damages to the Respondent without any basis and which damages were inordinately high considering the injuries sustained and the authorities cited for comparable injuries.

10. THAT the Learned trial Magistrate erred in law and in failing to capture and/or record all the evidence and/or testimonies adduced in Court thereby omitting important material which were necessary for determination of issues in question.

When the matter came up for mention for directions on how the appeal will proceed, it was agreed that the appeal be canvassed by way of written submissions. Both the Appellant and Respondent filed their respective submissions.

THE APPELLANT'S WRITTEN SUBMISSIONS.

On the issue of liability, counsel for the Appellant submitted that the learned magistrate erred in his judgment by finding that the respondent was to shoulder **20% contribution** to the said accident yet the Plaintiff/Respondent did not prove negligence on the part of the Appellant and thus failed to discharge the burden of proof as required by law.

Counsel further submits that the evidence tabled by the Respondent was not sufficient to shift the burden of proof to the Appellant hence the subordinate court had no basis for holding the appellant herein **80% liable** in negligence without considering the evidence which pointed to the fact that the accident was solely caused by the Respondent.

That during the hearing before the subordinate court the Respondent blamed the owner of the motor vehicle for the accident yeupon cross examination he testified that he did not have a driving license and that he is not the one who had been employed to ride the motorcycle but had borrowed the same from a friend.

Counsel referred to the Respondent's testimony at **page 67 of the Record of Appeal where he testified** ***"…. I was 17 years old. I do not have a license. A driver was at faults….."***

He therefore submitted that from his own testimony the respondent was not qualified to ride a motor cycle as he did not have a driving license hence, he was not lawfully riding the motor cycle as alleged in his statement and plaint.

He submitted that the Respondent was wholly to blame for the accident as he was overtaking a matatu through the pavement when he hit the Appellant's motor vehicle, according to **DW1and DW2's** evidence **on pages 24 to 46 of the Record of Appeal.**

He cited **Charlesworth and Percy on negligence, 9th Edition at page 387 which state that; -**

"***In an action for negligence as in every other action, the burden of proof falls upon the Plaintiff alleging it, to establish each element of the tort. Hence it is for the Plaintiff to adduce evidence of the acts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded two questions arise (i) Whether on the evidence, negligence may be reasonably inferred and (ii) Whether assuming it may be reasonably inferred, negligence is in fact inferred.*** **"**

That no fault was established against the Appellant warranting the trial magistrate's holding of **80% liability** and urged this Honorable Court to find that the liability should have been apportioned at **50%:50%** ratio.

He cited the case of **Kirugi and another vs Kabiya and 3 others [1987]** where the Court of Appeal held that the burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.

As to whether the award on general damages was excessively high, counsel submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors in awarding the sum of **Kshs. 1,200,000/=** and that the said amount was inordinately high.

That **(PW1) Dr. Rono** could not tell if the patient visited another facility apart from MTRH and that he did not also produce any x-ray report.

That the primary treatment documents produced by the Respondent i.e. Discharge summary, Radiology requests, Attendance card, Charge sheet, Receipts and invoice do not indicate that the Respondent had a fracture anywhere and that production of a Radiology Request does not mean that the Respondent suffered a fracture.

He cited the case of **Millicent Atieno Ochuonyo vs Katola Richard [2015] eKLR,** where **Onyancha J.** observed that;

"It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The Court has to strike a balance between endeavouring to award the Respondent a just amount, so far as money can ever compensate, and

entering a realm of very high awards, which can only in the end have a deleterious effect."

He further submitted that the award of **Ksh.1,200,000/=** was inordinately high as compared to an award for similar injuries in the case of **Zacharia Mwangi Njeru vs Joseph Wachira Kanoga [2014] eKLR,** where the ***Respondent sustained fracture of the left femur.***

He invites this Court to re-evaluate the evidence and facts on record, statutory law and case law and allow their appeal and set aside the award of **Kshs 1,200,000/=** as general damages and substitute the same with an award of between **Kshs. 500,000/= less 50% contribution**.

RESPONDENT'S WRITTEN SUBMISSIONS

Counsel for the respondent Mr. Mwinamo submitted that the appeal is premised on the issue of quantum of damages since a consent was recorded on liability in the ratio of **80%: 20%** in favour of the Respondent.

Counsel also submitted that this being a first appeal the court is obligated to review the evidence on record against the decision of the trial magistrate to see if the conclusion by the magistrate should stand and or be disturbed. On this he relied on the case of; **SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD (1968) E.A. 123**

Counsel further submitted that he supports the decision of the Subordinate court on the issue of quantum of damages and that this court ought not to interfere.

From the medical documents the Respondent sustained the following injuries: -**Fracture of right tibia and fibula and Bruises** on the right hand. The trial Court made an award of **Kshs 1,200,000/=** for General damages. **Kshs 53,940/=** Special damages and Costs and interest of the suit and that in view of the injuries sustained the award of **Kshs.1,200,000/=** as general damages is sufficient, just and adequate compensation to the Respondent for the injuries sustained.

He cited the cases of; **MOMBASA HCCC NO. 306 OF 1996 and MASHA KOMBO VS NICHOLAS NYANGE & ANOR** where the plaintiff sustained a fracture of the tibia/fibula and general damages were assessed at **Kshs.650,000/=** and **MOMBASA HCCC NO. 298 OF 1989; KOMBO AMANI VS ATTORNEY GENERAL & 2 OTHERS** where the Plaintiff sustained a **fracture of the tibia- fibula** of both legs and general damages were assessed at **Kshs.750,000/=.**

He finally reiterated that the sum of **Kshs.1,200,000/= less 20% liability** leaving **Kshs. 960,000/=** is sufficient, just and adequate compensation to the Respondent.

That the sum of **Kshs.53,490/=** as special damages was specifically pleaded and proved by way of receipts hence the award was reasonable considering inflation and effluxion of time.

He urged the court to uphold the award on general and special damages and dismiss the appeal with costs.

ANALYSIS AND DETERNINATION

I have carefully considered the appeal, the evidence adduced before the trial court, the exhibits produced therein, the submissions in support of this appeal and the authorities relied on by the counsels on record for parties herein and do establish the following issues as emerging for determination.

1. Whether the trial court erred in apportioning liability at the ratio of 80%:20% in favour of the respondent herein.

2. ***whether the trial Court awarded damages that were inordinately high as to warrant interference by this Court.***

This being a first appeal, this court is obliged by the stipulation of **Section 78 of the Civil Procedure Act**, to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. This legal principal was pronounced in the case of; -

SIAYA CIVIL APPEAL NO. 5 OF 2017, FRANCIS NDAHEBWA TWALA VS BEN NGANYI, where R. E. ABURILI J. stated as follows;

"……. This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

ISSUE NO.1. WHETHER THE TRIAL COURT ERRED IN APPORTIONING LIABILITY AT THE RATIO OF 80%:20% IN

FAVOUR OF THE RESPONDENT HEREIN.

In opposing the appeal, learned counsel, **Mr. Mwinamo has** conceded that liability had been agreed upon by consent of the parties while the appellant's counsel seems to suggest that apportionment of liability was done by the court.

Upon evaluating the evidence on record, this court observes that on 8/8/2018, the parties herein in **ELDORET CMCC NO 720 OF 2017** recorded a consent judgment on liability whereby it was agreed that the appellant herein was to shoulder **80%** liability whereas the respondent was to shoulder **20%** liability. This information is found on **pages 66-67 of the record of appeal.**

Order 13 rule 2 Civil Procedure Rules states as follows:

> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."***

In the case of NAIROBI HIGH COURT CIVIL CASE NO. 2522 OF 1996, **Philip Kipchirchir Murgor & 2 others v Josiah Nyawara Ogina & 2 others [2020] eKLR, Thuranira J.** held as follows in respect of a situation where parties have entered into a consent;

> ***"……15. The recording of a consent/compromise on liability is a matter between the parties therein and the court would normally not go behind the consent/settlement by the parties to question the reasons behind the recording of the consent. It may as well be, as submitted by the Respondent, that a party can choose to adopt a position detrimental to it just for the sake of entering into an amicable settlement….."***
> ***ROBERT NGONDEKATHATHI VS FRANCIS KIVUVAKITONDE [202O] eKLR, Machakos Civil APPEAL No.57/2017,*** **Odunga J.** had the following to say on agreements by parties.

".15. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

> ***"The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."***

Based on the foregoing, the trial court needed not make its own finding on the issue of liability since the same had been settled by consent of parties, which settlement was recorded in court. The trial court was therefore right in adopting parties' consent in the apportionment of liability. I will therefore not disturb the issue of liability.

ISSUE NO. 2. WHETHER THE TRIAL COURT AWARDED DAMAGES THAT WERE INORDINATELY HIGH AS TO WARRANT INTERFERENCE BY THIS COURT.

Turning to quantum of damages, it is challenged by the appellant that the award of general damages of **kshs.1,200,000/=** was inordinately so high as to amount to an erroneous estimate of the loss suffered by the respondent. The respondent on the other hand is of the view that the trial Court's award is reasonable. In essence this Court is being called upon to interfere with the trial Court's judgment on the amount and replace it with **ksh.500,000/=**

It should be noted that the award of damages is a discretionary exercise that can only be disturbed by an appellate Court if established that the trial Court misdirected itself, or took into consideration irrelevant factors or omitted to take into consideration factors which it ought to and as a result ended up in a wrong conclusion.

This principle of the law was enumerated by the Court of Appeal in the case of ***Child Welfare Society of Kenya Vs Republic, Ex-parte Child in Focus Kenya & AG & Others [2017] eKLR*** per **Waki, Nambuye & M'noti JJA** held as follows, citing ***Mbogoh & Another Vs Shah [1968] EA 93***, on the power of the appellate Court in matters of discretion exercised by the Court as below: -

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have taken into consideration and in doing so arrived at a wrong conclusion."***

The court President, **Sir Charles Newbold** in the same case stated:

> ***"For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice."***

Subsequently, **Madan JA** (as he then was) in ***United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General***

Insurance Co. Ltd Vs East African Underwriters (K) Ltd (1985) eKLR developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members of the trial court. He thus stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following mattes are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

Appraising the evidence before the trial court on quantum, the Respondent who was the plaintiff, testified as **PW3** and called two (2) other witnesses to support his case on the injuries that he sustained following the undisputed accident.

He testified that he was injured though he did not specify the injuries that he sustained.**PW1, Dr. Rono** from Moi Teaching and Referral Hospital produced a **discharge summary** as **PEX1, Radiology request** as **PEX2, Attendance card** as **PEX3, Particulars of charge sheet** as **PEX4** and a **report of Ksh.47,490/= as PEX5** respectively. On cross examination, he stated that an x-ray was conducted on the respondent, however he did not produce an x-ray report and films.

PW2 Dr. Sokobe of Eldoret hospital stated that he examined the respondent and that he saw a discharge summary and Xray. However, he admitted that he did not have the report and films in court.

Though **Dr. Rono** in his evidence does not indicate the specific fracture sustained by the Respondent, **PEX1** the discharge summary from Moi Teaching and Referral Hospital indicates that the Respondent had sustained a fracture of the **right tibia- fibula.**

Besides the discharge summary, no other treatment notes and to be specific the initial treatment notes were not produced which notes would have guided the Court on the daily routine and management that the patient received since **11/6/2017** to **17/6/2017** when he was discharged from the hospital.

It is also clear from the discharge summary that there is no indication of any treatment for a fracture. On the discharge summary under the clause ***"discharge medication"*** what has been indicated is prescription for medication and upon a close scrutiny, there is no prescription for instance for a plaster or dressing of a wound or insertion of a metal implant which are consistent with the treatment for a fracture.

As such the medical report prepared by **Dr. Joseph Sokobe** and the discharge summary from Moi Teaching and Referral Hospital does not help this Court establish whether the respondent had sustained a fracture since they are only speculative. The P3 form was also not produced as an exhibit in Court.

I have also noted and as contended by the appellant that the Respondent has never indicated to the court whether he had received any treatment in any other facility apart from Moi Teaching and Referral Hospital. The discharge summary indicates that the Respondent was first treated at Moi Teaching and Referral Hospital on **11/6/2017** a day after the occurrence of the accident. This in essence means that the respondent never produced any initial treatment notes.

Initial treatment notes indicates where treatment was done and the treatment received immediately after an injury. The respondent's failure to produce initial treatment notes is a fatal omission to his case.

I am also in agreement that a radiology request is not sufficient prove of the existence of a fracture. Ordinarily after a request is made, an x-ray is conducted and the doctor who conducts the x-ray does a comprehensive report on the outcome of the x-ray. In this particular case such doctor's report has not been produced.

Further still, no x-ray film was produced in court to confirm that indeed the respondent herein sustained a fracture. No expert and/or specialist in fractures was called to adduce evidence in Court to the effect that the respondent had sustained a fracture. In absence of such crucial piece of evidence, it is hard for the Court to rule out the presence or otherwise, of a fracture.

This was the position in the case of;

SIAYA CIVIL APPEAL NO. 39 OF 2019 PITALIS OPIYO AGER VS DANIEL OTIENO OWINO & ANOR where **R. E. ABURILI J.** stated;

> ***"…… 64. In the instant appeal, I have considered other evidence on record being that following the material accident, the appellant was treated as an outpatient and released to go home and that there is no evidence of inpatient or treatment for fractures and or dislocations that he alleges he sustained. Further, I have found that despite the initial requests for X-rays in the supposedly injured areas, no X-ray films were produced and or evidence that the said X-rays were done and what followed in the management of the alleged fractures or dislocation, after the said X-ray films if at all the X-ray reports ever proved or confirmed the alleged fractures or dislocations.***
>
> ***65. This court observes and takes judicial notice of the fact that body parts allegedly fractured or dislocated such as the neck, elbow, head left shoulder and left elbow joints are sensitive areas. The P3 form was not produced as an exhibit even after being marked for identification. But that aside, there is no mention of any fracture, or treatment that involved plaster paris cast or immobilization of the neck, shoulder or elbow joints etc. as a form of management of the fractured areas. No treatment plan for***

the alleged fractures such as plaster cast or immobilization or physiotherapy was mentioned in the treatment notes and even Prof. Okombo in his medical report only mentioned the need for an orthopedic surgeon and physiotherapy as being for the future. He never mentioned what had been done on the fractured or dislocated sites immediately after the accident on 10/7/2015 yet he was examining the patient on 20/1/2016 nearly six months later.

66. For all the above reasons, I am inclined to reject the medical report, the injuries pleaded and testimony by Prof. Dr. Okombo as being speculative……."

In his plaint, the respondent alleged to have sustained the following injuries; **Right tibia, fibula fracture and bruises on the right hand**. In his witness statement filed together with the plaint, the respondent stated as follows as far as the injuries are concerned:

"as a result of the accident, I sustained serious injuries and was taken to Moi Teaching and Referral Hospital where I was admitted, treated and discharged……."

I reported the accident at Eldoret police station where I was issued with a P3 Form which I went to fill at Dr Sokobe's clinic……."

I must therefore re-assess the damages only on the basis of soft tissue injuries to wit: **bruises on the right hand** as the respondent herein never availed even an iota of evidence to prove that he sustained a fracture.

For the above reasons, the question is whether I have grounds to interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages, or that it was inordinately low.

In assessing appropriate damages, this Court, like the trial Court, takes cognizance of the fact that such an exercise is not a mathematical exercise and the Court in doing the best that it can, takes into account the nature and extent of the injuries sustained in relation to awards made by the Courts in similar cases.

In the instant appeal, the appellant was awarded **Kshs.1,200,000/=** as **general** damages less agreed **20% contribution, leaving Kshs.960,000/=.** However, I find that in principle, the trial court erred in awarding the Respondent **ksh.1,200,000/=** especially after having failed to establish that the respondent had sustained a fracture of the right tibia/fibula as alleged.

In **KIAMBU CIVIL APPEAL NO. 54 OF 2016 NDUNGU DENNIS VS ANN WANGARI NDIRANGU & ANOR EDDAH MWIHAKI [2018] eKLR,** the respondent had sustained minor bruises on the back with no fractures on the tibia or fibula area of the right **leg and the court awarded kshs.100,000/= in the year 2018.**

Further, Njagi J. in KAKAMEGA HIGH COURT CIVIL APPEAL NO. 59 OF 2018, WEST KENYA SUGAR CO. LTD VS STEPHEN NASIALI NYIFU, [2019] eKLR cited the case of Hantex Garments (EPZ) Ltd –Vs- Haron Mwasala Mwakawa (2017) eKLR where an award of **Ksh.100,000/=** was upheld for bruises, blunt trauma and tenderness on right leg. In **Ndungu Dennis –Vs- Ann Wangari Ndirangu & Another [2018] eKLR,** the award was reduced from **Ksh.300,000/=** to **Ksh.100,000/=** where the respondent had sustained soft tissue injuries to the lower leg and soft tissue injuries to the back.

The Learned Judge adopted the lower Court's award of **Ksh.90,000/=**

The upshot herein, is that the appeal is allowed partially and the Court sets asides the assessment of general damages by the Lower Court. In its place, the Court substitutes an assessment of quantum for general damages from 1,200,000/= to 300,000/= having taken into account the current inflation rates in the country and the passage in time less 20% its 240,000/=

The amount awarded in special damages was not challenged and it is not affected.

For equitable reasons, I will award half costs of this appeal since the appeal has succeeded partially.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **12th day** of **April,** 2021.

In the presence of:-

Mr. Malekwa holding brief for Mr. Mwinamo for the Respondent.

Mr. Kemboi for the Appellant

Gladys - Court Assistant