REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. 5 OF 2016

TAHIR SHEIKH SAID t/a TSS BUS SERVICES.....1ST APPELLANT

TAHIR SHEIKH SAID TRANSPORTERS LTD.....2ND APPELLANT

SALIM HASSAN NASSIR.....3RD APPELLANT

VERSUS

MARIA NJERI MUTURI.....RESPONDENT

(Being an appeal from the whole Judgement delivered by Hon. J.M. Macharia

in Garsen PMCC No. 86 of 2010 delivered on 4th November, 2015)

Coram: Justice Reuben Nyakundi

Wambua Kilonzo & Co. Advocates

Kimondo Gachoka & Co. Advocates

JUDGEMENT

The point at issue in this appeal is whether the learned trial magistrate assessment of general damages at Ksh.100,000/= was erroneous and therefore excessive.

The reference facts which emerge are that on 2/6/2010, the respondent was a fare paying passenger in the appellants' motor-vehicle registration number KAZ 681L travelling along Mombasa-Lamu road. In the course of the journey an accident occurred while the driver was negotiating a corner at Kona Mbaya. As a result, the respondent sustained injuries to the ribs, back and neck. Hence, the respondent found himself at Mpeketoni Hospital where she underwent treatment as supported by her own treatment notes and the P3 form examination.

It is not in dispute that the occurrence of the accident was supported by a police abstract admitted as exhibit 4. Soon, thereafter a medical examination was undertaken by Dr. Adede, which was produced as exhibit 6 and corresponding receipts as exhibit 7. It is against this background the learned trial magistrate assessed an award of Ksh.100,000/= for pain and suffering and loss of amenities.

Being aggrieved with the judgement, appellants filed 6 grounds of appeal but all christened on the issue and exercise of discretion on the award of damages.

On those grounds the appellants' counsel sought leave of the court to set aside the judgement and order of a retrial to have the matter on quantum considered afresh.

In this state of affairs, the appellants filed and relied on the written submissions dated 6/1/2021. The appellants' counsel argument is that damages must be within limits set out in decided cases and also within limits that the Kenyan economy can afford.

The appellants' counsel further alleged that given the nature of the evidence the gravity of the injuries suffered by the respondent had not been proved to warrant an assessment carried out by the learned trial magistrate. Learned counsel objection to the award was on the principles stated in the cases of; **Abdi Werdi Abdullahi vs James Royo Mungatia [2019] eKLR**, **Kigaragari vs Aya [1982-1988] 1 KAR 768, Chege vs Vesters [1982-88] 1 KAR, 1021**, **Daniel Odhiambo Ngesa vs Daniel Otieno Owino, Timsales Ltd vs Wislon Libuywa**,

Fadna Issa Omar vs Malne Sirengo Chipo [2016] eKLR. It was therefore urged upon this court by learned counsel for the appellants to find that the learned trial magistrate erred in each of the aforesaid grounds requiring of the appeal court to interfere with the decision.

On the side of the respondent Mr. Wambua submitted in support of the learned trial magistrate findings made on quantum. Mr. Wambua asked this court to go into the evidence which is very clear that the accident occurred and the respondent did suffer injuries as documented in the treatment notes and the medical report by Dr. Adede. That is was on that evidence the trial court ruled in favour of the respondent on assessment of damages. That being so, Mr. Wambua cited the following authorities to distinguish the arguments put forth by the appellants; **Christine Wangari Kigor (Minor suing through mother and next friend Catherine Wanjiru Kigor vs Gibson Theuri Gichubi HCC No. 320 of 1998, Nyambati Nyaswambu Erick vs Toyota Kenya Ltd & 2 Others HCC No. 66 of 2018, Ratilal Govedhabhai Patel vs Lalji Makanyi [1957] EA 314, Prafulla Enterprises Ltd vs Norlake Investments Ltd CA No. 117 of 2006.**

The significance of this line of jurisprudence according to learned counsel is to support the correct standard of proof on the sufficient probative value of the evidence and the verdict of the trial court on damages. At the conclusion of the appellants' case, learned counsel contended that there is no error or misdirection for the court to interfere with decision on damages in favour of the respondent.

Determination

A number of primary and ancillary points were raised by the parties in their submissions and I will now address those in this appeal. The jurisdiction on the duty of an appellate jurisdiction over the judgment of a trial court which has been appealed against by an aggrieved party is now well settled. To this end an appellate court will not disturb an award of damages unless, it is inordinately high or low as to represent an entirely erroneous estimate. See in details the decisions in **Joseph Omondi Onyango vs Busia Outgrowers Co. Ltd** and **Butt vs Khan [1970] 1 KLR**.

Crucially, moreover there are numerous and well established authorities that clearly show that the amount awarded to the claimant remain solely discretional on the part of the trial court. In **Wells v Wells [1998] 3 ALL ER 481**

> **"The amount of the award made for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the courts best estimate of the plaintiff's general damages."**

In **CCA Limited vs Julius Jeffery CA No. 10 of 2003 SVG** the court held that:

> **"It is my view, a function of the law as far as possible, to be predictable, given the definite variety of the affairs of human and in the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain and suffering and loss of amenity. That discretion could be wholly subjective and hence unpredictable, or it could be precedent based, that is to say, the trial judge, having considered all of the evidence led before him would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale."** This is not a precise science, leaving much room for the trial judge's discretion **Papana Yiotau vs Health [1970] ALR 105, "what is a reasonable sum for general damages for personal injuries cannot be measured and tested as a reasonable. Price can be, by the experience of the market place."**

The stakes on assessment of damages are undoubtedly high here, given its complexity and substantive requirement that such an approach is a measure of discretion and reasonableness. Almost every assessment and awards made by courts involve some form of differences and inequality. It is not any inequality of the personal circumstances of the relief seeker but lack of tactical evidence of persuasion to discharge the burden of proof on a balance of probabilities against the adverse party to secure a fair and proportionate judgement of assessment in that regard.

The basis upon which damages are assessed by courts is purely discretionary followed by the already established principles which helps the court to stay within the bounds of its jurisdiction to a portion a fair and reasonable compensation. This is what the court have stressed in the following cases that it should not be interfered with by an appellate court unless the criterion clarified herein exist. Thus in **Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge proceeded on a wrong principle or misapprehended the evidence in some material respect….A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."**

Similarly, in **Jane Chelagat Bor v Adnrew Otieno Onduu [1988-92] 2 KLR 288; [1990-1994] EA 47,** the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether the ground of excess or insufficiency,"**

The tenor of the applicable law as deduced from the foregoing cases as I understand them, in the context of the award by the learned trial magistrate, the respondent was injured in accident involving the appellants motor-vehicle. In that trial she produced oral evidence, combined with treatment notes on the nature of injuries as an aftermath of the accident. The same was backed with the medical report exhibit 6 by Dr.

Adede.

With all that the appellants' argument advanced is on a collateral line on the fact that the respondent did not go to the hospital on the same day. In that case the appellants have not adduced evidence on appeal with credibility and reliability likely to overturn the impugned judgment.

The role of the treatment notes was to dispel any doubt as to the treatment of the respondent at a given hospital as well as the nature of injuries. In that trial the doctor who attended the respondent had his report adopted as expert evidence in support of the claim. In the circumstances there are no doubts then and even now in regard to the injuries, nature of treatment and prognosis as against the respondent. The appellants tendered no evidence at all to controvert or rebut the subsequent findings made by the trial magistrate. In the case at hand the respondent suffered soft tissue injuries to the chest, thoracic region, and right shoulder. From the past awards as shown in the cases of **Josephine Angwinyi vs Samuel Ochulo [2010] KLR** - Ksh.70,000/= was awarded. In **Mokaya Mrehama vs Jathell Momanyi [2013] eKLR – Ksh.70,000/=** was awarded for soft tissue injuries.

It is important to bear in mind, that at the trial, the appellants were represented by counsel. The arguments in 2021 with regard to assessment of damages introduces no new matter of evidence to change the trajectory before the trial court in 2016.

In my judgment being guided by the principles in **H. West & Son vs Shephard [1963],** it was perfectly reasonable here for the trial court to award the respondent an award of Ksh.100,000/= for pain and suffering and loss of amenities.

As regards the ground that the appellants were never heard at the trial, it's not a serious argument, when one goes through the record, I can detect no error in the entire record that shows any iota of evidence to the effect of denial of a right to a fair hearing **under Article 50 of the Constitution.** It cannot be said that the appellants have considerable difficulty to understand the findings made by the trial magistrate, in his judgement on assessment of damages by the mere fact was Ksh.100,000/= could not be said to differ widely from the amount given in similar cases.

I entirely agree with the principles in **Obongo v Municipal Council of Kisumu [1971] EA 91**

> **"An appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."**

It follows that I would not interfere with the award for pain, suffering and loss of amenities. It cannot be fairly said that the learned trial magistrate's reasoning was such as to warrant a variation of quantum awarded. He considered the factors in aggravation and in mitigation of the serious nature of the injuries and the undeniable consequential effects of the injuries on the personal life of the respondent. In all respects, I agree with the judgement of the trial court and I do hereby dismiss the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (wambuakilonzoadvocates@gmail.com)