REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 227 OF 2014

LYNN KAMBUA ENTERPRISES---------- APPELLANT

VERSUS

EDITH VAATI SIMON KASIKA----------RESPONDENT

(*Being an Appeal from the whole of the judgement delivered by Honourable J. Nyaga at Machakos Law Courts on 30th September 2014 Machakos CMCC No. 947 of 2010)*

BETWEEN

EDITH VAATI SIMON KASIKA---------- PLAINTIFF

VERSUS

LYNN KAMBUA ENTERPRISES----------DEFENDANT

JUDGEMENT

1. By a plaint dated 13th May, 2010, the Respondent herein instituted a suit for damages arising from road traffic accident which occurred on 13th April, 2010. According to the plaint, the Respondent sustained blunt trauma to the neck, blunt trauma to the chest, blunt soft tissue injuries to the left shoulder, fracture of the left clavicle and blunt soft tissue injuries to the right lower rib.

2. In her evidence, the Respondent testified that as a result of the said accident, she sustained injuries to the neck, left shoulder, chest, left thigh and left leg. According to her evidence, she sustained a fracture of the shoulder. She was admitted to Machakos general Hospital for one day. She was also examined by **Dr Mukhwana**.

3. According to **Dr Mukhwana's** report, the Respondent sustained the injuries as pleaded in the plaint.

4. After considering the evidence on record, which was only in support of the Respondent's case, the learned trial magistrate found that based on the only evidence on record which was given by the Respondent, as to how the accent occurred, the Appellant's driver was entirely to blame for the accident. As regards the quantum, she awarded Kshs 350,000/- as general damages with costs and interests.

5. In this appeal, the appellant is only challenging the award of damages. According to the appellant, the said award was inordinately excessive; disregarded the provisions of Cap 405, Laws of Kenya on quantum; and that in arriving at its decision the trial court ignored the submissions and authorities cited by the appellant.

6. The appellant submits before this court that the Appellant sustained multiple soft tissue injuries, blunt soft tissue injuries and fracture of the left clavicle. It was therefore submitted that in awarding Kshs 35,000.00, the learned trial magistrate erred. In support of the submissions, the appellant relied on **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd. [2013] KLR** where the award was reduced from Kshs 350,000/- to between Kshs 200,000.00 and Kshs 250,000.00. It was the appellant's view that Kshs 250,000.00 would have adequately compensated the Respondent for the injuries sustained.

7. In opposing the appeal, the Respondent submitted that the amount of Kshs. 350,000/- awarded by the trial court was commensurate to the nature of injuries suffered by the Respondent since the Respondent not only sustained soft tissue injuries but also fracture of the left clavicle. In support of this submission the Respondent cited the case of **Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs Adano Isacko (2019) eKLR** where the High Court sitting at Marsabit upheld an award of Kshs. 700,000/- in the case where the Plaintiff sustained fracture of the clavicle. She also relied on the case of **H. Young & Company E. A Limited vs Edward Yumatsi (2013) eKLR** where the High Court on appeal upheld an award of Kshs. 500,000/- as general damages where the claimant sustained *inter alia* deep cut wound on the head and fracture of the right clavicle bone. Based on the authorities submitted by both parties and the nature of injuries suffered by the Plaintiff, it was submitted that the amount of Kshs. 350,000/- was fair in the circumstances of this case and that there was no evidence to show that the trial court applied the wrong principles or took into account irrelevant factors in arriving in the assessment of damages. The Respondent therefore prayed that the appeal be dismissed with costs.

Determination

8. In this appeal, it is clear that the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general 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 it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.**

9. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

10. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. 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…"**

11. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 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 damage 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 on the ground of excess or insufficiency."**

12. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. 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…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

13. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural**

and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

14. I have considered the submissions made on behalf of the parties herein. The only evidence as regards the injuries sustained by the Respondent emanated from the Respondent and there is no dispute that the Respondent sustained both soft tissue and blunt injuries. She also fractured her clavicle. I agree with the Respondent that the injuries sustained by the plaintiff in the case of **Odinga Jactone Ouma vs. Maureen Achieng Odera (2016) eKLR** are not comparable to those sustained by the Respondent herein since there was no fracture in that case. I also find that the injuries sustained in **Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs. Adano Isacko (2019) eKLR** were slightly more serious than in the present case.

15. Accordingly, while I reaffirm the judgement and dismiss the appeal with costs to the Respondent.

16. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 2nd day of June, 2021.

G V ODUNGA

JUDGE

In the presence of:

Ms Kabute for Mr Kariuki for the Appellant

Mr Musyoka for the Respondent

CA Geoffrey