REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 8 OF 2018

NJERU JIM KENNEDY .....APPELLANT

VERSUS

STEPHEN NGURURU KARANJA.....RESPONDENT

(Appeal from the judgment and decree of (Hon. M. Chesang, RM) delivered on 11th September, 2017 in Kajiado

CMCC No. 233 of 2015 at the Chief Magistrate's Court Kajiado)

JUDGMENT

1. The Respondent filed a suit before the Chief Magistrate's Kajiado claiming general damages, special damages and future medical expenses for injuries he sustained in a road accident which occurred on 16th December 2014 along Kitengela–Isinya road involving motor cycle registration number KMCS 211 K owned by the respondent and motor vehicle registration No. KBP 430 L, owned by the appellant. The respondent attributed occurrence of the accident to the appellant's or that of his driver, servant or agent.

2. The appellant filed a statement of defence dated 4th April 2016 admitting occurrence of the accident. He however denied any negligence on his part. He also denied particulars of special damages. He attributed the accidence to the respondent's negligence or contributory negligence. He sought for the dismissal of the suit with costs.

The matter proceeded for hearing on 2nd May, 2017 and judgment delivered on 11th September, 2017

3. By a judgment delivered on 11th September, 2017 the trial court apportioned liability at 95%:5% in favor of the Respondent and awarded general damages of Kshs. 800,000, future medical expenses of Kshs. 150,000, special damages as pleaded and proved, costs of the suit and interest at court rates.

4. The appellant was aggrieved with the judgment and filed a memorandum of appeal dated 3rd April, 2018, raising the following grounds, namely:

> ***a. THAT the learned magistrate erred in law and fact in by failing by awarding the Respondent damages which are inordinately high considering the nature of the injuries sustained.***
>
> ***b. THAT the learned magistrate erred in law and fact by failing to appreciate the submissions filed by the Appellant on liability.***
>
> ***c. THAT the learned magistrate erred in law and fact by failing to find that the Respondent was substantially to blame for causing the accident and the resultant injuries considering the totality of evidence given.***
>
> ***d. THAT the learned magistrate erred in law and fact by failing to appreciate that the Respondent had recovered from his injuries substantially.***
>
> ***e. THAT the learned magistrate erred in law and fact by departing from the conventional awards of damages for similar injuries.***

5. Parties agreed to dispose of this appeal by way of written submissions.

6. The appellant submitted through his submissions dated 9th March, 2021 and filed on 11th March, 2021 that the trial court awarded inordinately high damages considering the nature of the injuries the respondent sustained. He argued that it was unlikely that the respondent suffered fractured incisors that would have escape notice by the court. He further argued that the report the Kenyatta National Hospital and

the medical examination report did not mention that the respondent had fractured incisors.

7. The appellant relied on ***Patrick Kiniti Miguna v Peter Mburunga G. Muthamia*** [2014] eKLR where an award of Kshs. 300,000 general damages was upheld on appeal for a bruise on the right parietal region, two loose lower incisors, dislocation of the right shoulder, cut on the left leg and bruises on the right leg and dorsum of the right hand. He also relied on ***Paul Kipsang Koech & another v Titus Osule Osore*** [2013] eKLR where the court awarded of Kshs. 200,000 for bruises on the lower lip, right cheek, left elbow left knee, blunt injuries to the neck and abdomen fracture of the right upper incisor tooth, loosening two other teeth and post-accident pain on the left elbow and abdomen.

8. The appellant argued that the trial court erred in awarding future medical expenses of Kshs. 150,000 given that the medical report by **Dr. Wokabi** was clear that the pain in the left molars would disappear with time since the molars appeared healthy, and that the scars the respondent sustained "will not require plastic surgery."

9. On the issue whether the respondent was substantially to blame for the accident and the resultant injuries, the submitted in the affirmative. According to the appellant, it was unlikely that the respondent would have suffered the nature of the injuries if he had worn a helmet. The appellant also argued that the respondent did not show that he was a competent rider and the police abstract was silent on who was to blame for the accident.

10. Based on the foregoing, the appellant argued that liability should have been apportioned equally between the appellant and the respondent. He prayed that this court to assess damages at Kshs. 300,000 and subject the award to 50% contribution.

11. The Respondent filed his submissions dated 21st January, 2020 on 27th January, 2021. On liability, he submitted that the trial court was right and its decision should be upheld. According to the respondent, he was the only person who testified on how the accident occurred and therefore, he was the only one who could give a true account on the occurrence of the accident.

12. The respondent relied on the principle that where evidence exists and the same is not adduced in court the court may presume that it is unfavourable to the party withholding it. He also argued that the occurrence book, treatment notes and the documents he produced during trial confirmed that the accident occurred and that he sustained injuries.

13. According to the respondent, the appellant did not lead any evidence and, therefore, his testimony on how the accident occurred was uncontroverted. He relied on ***Grace Nzula Mutunga v Joyce Wanza Musila*** [2017] eKLR to support his argument that where evidence is not controverted, the statement of defence remains a mere allegation and sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.

14. The respondent also relied on ***River Bank Academy & v Anthony Maina Gacheru & Another*** [2015] eKLR that that evidence must be led in rebuttal and ***Kaburu Munyoro v Joseph Ndumia Murage & Another*** (Nyeri HCCC No. 95 of 1988), that uncontroverted evidence remains credible and it is the kind of evidence that a court of law should be able to act upon.

15. Regarding quantum, the respondent argued that the award was reasonable considering the injuries the respondent suffered and the decisions cited before the trial court. He relied on ***Akamba Road Services Limited v Maureen Akinyi Abok*****.** (Kisumu HCCA No. 94 of 2014). He urged this court not to disturb the award and relied on ***Butt v Khan*** [1977] eKLR; ***River Bank Academy & Anthony Maina Gacheru v Another*** **(supra),** and ***Loice Wanjiru Kagunda v Julius Gachau Mwangi*** (CA No. 142 of 2003(UR), on the principles upon which an appellate court may interfere with discretion of a trial court. He urged the court to dismiss the appeal with costs.

16. I have considered this appeal, submissions by parties and the decisions relied on. I have also gone through the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

17. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal held that:

> ***This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.***

18. In ***Nkube v Nyamiro*** [1983] KLR 403, it was held:

> ***A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.***

19. The respondent testified and adopted his witness statement. In the statement, he stated that on 16th December 2014, at 800pm, he was riding a motor cycle along Kajiado road near Kitengela area when the motor vehicle which was coming from Kajiado direction being driven at high speed lost control and veered off the road and knocked him down. He sustained serious injuries on the lips, teeth and a deep cut on the left side of the cheek. Police officers who were near took him to Kajiado health services where he received first aid before he was referred to Kenyatta National Hospital where he was admitted up to 16th December 2014. He stated that he used to operate boda boda but he was had not been able to resume work due to the injuries. He blamed the driver of the motor vehicle for the accident.

20. In cross examination, he stated that he had a driver's a license but he had left it at home and that he had ridden the motor vehicle for more than 8 years. He got injuries on the face as a result of the accident and he had a scar on the face. He also stated that he could not chew properly as his jaw was affected. He however stated that the accident had not affected his life in anyway.

21. The medical reports by Dr. Karanja and Dr. Wokabi were produced by consent of both parties.

22. The trial court considered the evidence and stated in its judgement regarding liability:

> ***The only dispute between the parties was whether the plaintiff was negligent or that the accident was caused by the defendant's negligence. The defendant has argued that the fact that the plaintiff sustained facial scars indicates that the plaintiff was not wearing a helmet. The assertions by the defence in its submissions concerns matters of evidence which ought to have been dealt with at the hearing and not submissions…I believe the plaintiff's version of events, seeing as it is, no defence witness was called to controvert the plaintiff's evidence. Therefore, liability is apportioned at 95% to 5% in favour of the plaintiff against the defendant.***

23. I have considered this appeal and the arguments by parties. The appellants. The appellant filed five grounds of appeal which in my view, raise two issues for determination. First, whether the trial court erred in its finding on liability. Second, whether, the trial court's award was inordinately high considering the nature of the injuries sustained.

Liability

24. The appellant's argument regarding liability was that the respondent was substantially to blame for the accident and the resultant injuries. According to the appellant, the respondent could not have suffered the nature of the injuries he sustained if he had worn a helmet. The appellant further argued that the respondent did not show that he was a competent motor cycle rider and the police abstract was silent on who was to blame for the accident.

25. The respondent on his part contended that, he was the only person who testified and he was the only one who could give a true account on how the accident occurred. According to the respondent, the appellant did not adduce any evidence and therefore, his evidence was not controverted.

26. The respondent testified that the motor vehicle was being driven at high speed and veered off the road and hit him as he rode his motorcycle The appellant did not call evidence to challenge what the respondent told the court. The respondent's evidence that the motor vehicle veered off the road was not, therefore, controverted.

27. There was no argument that only the respondent testified before the trial court on how the accident occurred. It was on that basis that the trial court concluded that the respondent's evidence on how the accident occurred was uncontroverted. The appellant was not able to point out where the trial court went wrong in its conclusion that the evidence was not controverted and therefore, the respondent had proved that the driver of the motor was at fault. On my part, I also do not find merit in the argument that the trial court was in error. The trial court apportioned liability which it was entitled to, based on its assessment of the evidence.

28. The appellant did not deny occurrence of the accident. The only contention was that the respondent could not have sustained the kind of injuries he did if he had a helmet on. This with great respect would amount to speculation. The driver of the motor vehicle did not testify on whether or not the respondent had a helmet. That argument has no merit. This court is therefore unable to fault the trial court on its finding on liability.

whether the award was inordinately high

29. The appellant argued that the trial court's award was inordinately high taking into account the injuries the respondent sustained. In his view considering the nature of injuries and the fact that they had no lasting impact on the respondent's life, as well as comparable decisions on similar injuries, an award of Kshs. 300,000 would be reasonable. The respondent on his part maintained that the award was reasonable and there was no reason for this court to interfere with the trial court's exercise of discretion.

30. I have considered the respective parties' argument on this issue. According to the plaint, the respondent sustained degolving of the left side of the mouth and cheek, fracture of upper incisor teeth, soft tissue injury on the scalp and soft tissue injury of the left hand. According to the medical report by **Dr. George Karanja** dated 14th February 2015, which was done about two months after the accident, the doctor noted that the respondent had an ugly unhealed wound running from the left side of the mouth to the area below the left ear and he was not able to open the mouth fully; two cracked teeth on the upper jaw; multiple small scars on scalp and a superficial scar on the left hand palm. According to the doctor, the respondent was still recovering and would need up to two more months to recover. The cheek and mouth scars would require cosmetic surgery to repair at a cost of Kshs. 150,000, otherwise the deformity would be lifelong.

31. The respondent was reexamined by **Dr, Wokabi** on 15th December 2015 and in his medical report dated 21st December, 2015, about ten months after the first examination and one year after the accident, Dr. Wokabi stated that his examination confirmed presence of a scar on left side of the cheek and left angle of jaw. The left side molars were all present, were not broken or loose and the respondent was able to open the mouth fully. There was a small circular scar on the back of the right hand measuring 3cm by 2cm across. He concluded that the respondent sustained lacerations on the left side of the face. The wound had however healed leaving permanent scars. He was of the opinion, however, that the scars would not any plastic surgery because they were not in any way disfiguring, contrary to the first report by Dr. Karanja.

32. It is settled law that an appellate court will not interfere with exercise of discretion by a trial court unless the trial court acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors or misdirected itself and arrived at a wrong

decision. This position was aptly put by ***De Lestang***, Ag. VP. in ***Mbogo v Shah*** [1968] 93 at page 94, thus:

> ***I think it is well settled that this Court will not interfere with the exercise of its 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 acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.***

33. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated:

> ***[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.***

34. The principle had earlier been stated in ***Butt v Khan*** [1981] KLR 349, where the Court (***Law. J.A***), held 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.***

35. In ***Kemfro Africa Limited t/a Meru Express Service (1976) & Another Lubia & Another (No.2)*** [1985] eKLR, ***Kneller. J.A,*** stated:

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage.***

36. Assessment of damages involves exercise of discretion, and as already pointed out, the principles on which this court, sitting on appeal may interfere with exercise of that discretion are clear. *It must be satisfied either, that the trial court in assessing damages, took into account an irrelevant factor, or failed to take into account a relevant one, or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage the plaintiff was entitled to.*

37. n this appeal, the trial court awarded general damages of Kshs. 800,000. In doing so, it stated that the plaintiff suffered the injuries stated in the plaint and that it had read the submissions on quantum by both sides and was guided by the authorities by parties. The court did not give reasons for making that award. It did not make any reference to any particular comparable awards arising from similar or fairly similar injuries. The trial court did not even make reference to the medical reports and what it thought about the injuries at the time it heard the case, bearing in mind that there were two medical reports with different conclusions. This is so because in assessing damages, the effect of injuries on the person concerned must be looked into. (See. ***Millicent Atieno Ochuonyo v Katola Richard*** [2015] eKLR).

38. In the suit before the trial court, the respondent sustained multiple injuries that were not fairly serious with any significant level of permanent disability. The appellant's doctor **(Dr. Wokabi)**, confirmed that the respondent's injuries had healed and did require any surgical intervention. There is nothing on record to show that the trial court observed anything abnormal when the respondent testified before it. There is no observation by the trial court on what it thought of the post-accident effects on the respondent as he testified.

39. In ***Gicheru v Morton & another*** **[2005] eKLR**, the Court of Appeal stated that *in order to justify reversing of the trial court's amount of damages, it is generally necessary that the appellate court should be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded is so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.*

40. In ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd*** [2013] eKLR, the Court of Appeal stated that:

> ***[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness***. (emphasis)

41. Similarly, ***Lord Morris*** of ***Borthy-Gest*** stated in ***West (H) & Son Ltd v Shepherd*** [1964] A.C. 326 at page. 345, that:

> ***[M]oney 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 the endeavor 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 conventional***. *(emphasis)*

42. Flowing from the above principles, it is my finding that given the nature of injuries the respondent sustained, the trial court's award of Kshs, 800,000 was inordinately high as to represent an erroneous estimate of what he was entitled.

43. In this appeal, the appellant relied on ***Patrick Kiniti Miguna v Peter Mburunga G. Muthamia*** [2014] eKLR where an award of Kshs.

300,000 general damages was upheld on appeal for a bruise on the right parietal region, two loose lower incisors, dislocation of the right shoulder, cut on the left leg and bruises on the right leg and dorsum of the right hand. He also relied on ***Paul Kipsang Koech & another v Titus Osule Osore*** [2013] eKLR where the court awarded of Kshs. 200,000 for bruises on the lower lip, right cheek, left elbow left knee, blunt injuries to the neck and abdomen fracture of the right upper incisor tooth, loosening two other teeth and post-accident pain on the left elbow and abdomen.

44. The respondent argued that the award by the trial court was reasonable and should not be disturbed and relied on ***Akamba Road Services Limited v Maureen Akinyi Abok*****.** (Kisumu HCCA No. 94 of 2014).

45. Before the trial court, the respondent relied on the same case ***Akamba Road Services Limited v Maureen Akinyi Abok*** **(supra),** where an award of Kshs. 3,000,000 was made for degolving scalp injury, a fracture of C1 vertebra and right temporal wound on 5th August 2014. (Appeal was dismissed on 29th June 2016) ; ***Nicholas Mwania Musau v Eliud Kioko & Another*** (MKS HCCA 42 OF 1995**),** where an award of Kshs. 120,000 was made for loss of one upper incisor tooth, multiple lacerations over the forehead, neck, and left hand on 16th December1998 and ***Lucy Ntibuka v Benard Mutwiri & Others*** (Meru HCCC 17 OF 1993) where Kshs. 500,000 was awarded for head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm(elbow) on 8th February, 2007.

46. The appellant had relied on ***Patrick Kinoti Miguna v Peter Mburunga G Muthamia*** [2014] eKLR, where the court awarded Kshs. 300,000 for bruises on the right pariental region, two loose lower incisors, dislocation of right shoulder, cut on the left leg and bruise on the right leg, bruise on the dorsum of right hand. He also relied on ***Paul Kipsang Koech & another v Titus Osule Osore*** [2013] eKLR, where an award of Kshs. 200,000 was made for bruises on the lower lip, right cheek, left knee, blunt injury to the neck and abdomen, fracture of the right upper incisor tooth, loosening of other teeth and post-accident pain on the left elbow and abdomen.

47. Taking into account those decisions, the dates they were decided and the level of inflation, I consider an award of Kshs. 500,000 reasonable compensation in the circumstances of this case.

48. Regarding future medical expenses, Dr. Karanja opined that the respondent would require Kshs. 150,000 post accident corrective plastic surgery. Dr. Wokabi was of the opinion that the respondent had healed and would not need corrective plastic surgery. The trial court awarded Kshs. 150,000 for future medical expenses as recommended by Dr. Karanja. The appellant has argued that the respondent was not entitled to this award.

49. The two doctors differed in opinion. Whereas Dr. Karanja who saw the respondent two months after the accident was of the opinion that the respondent would require plastic surgery, Dr. Wokabi who saw the respondent ten months later was of the contrary opinion, that there was no need for such a procedure. The trial court never addressed its mind on the differing medical opinions. It did not also give reasons why it agreed with Dr. Karanja and not Dr. Wokabi.

50. Given that the two doctors did not agree in opinion; the trial court was in error in allowing the claim for future medical expenses without assigning reasons for its decision. Since there was a divergence in opinion, the proper approach is to allow half the amount claimed for future medical expenses instead of the whole amount. Consequently, the amount of Kshs. 150,000 is set aside and replaced with Kshs. 75,000 as the award for future medical expenses.

51. In the end, this appeal partially succeeds. Appeal against liability is dismissed. Appeal against quantum is allowed. The award of Kshs. 850,000 is hereby set aside and replaced with an award of **Kshs. 500,000.** The award on future medical expenses of Kshs. 150,000 is also set aside and replaced with an award of **Kshs. 75,000.** The net award is **Kshs. 575,000.** To this, add special damages of **Kshs. 51,569,** since there was no appeal against special damages bringing **Kshs. 626,569.**

52. The amount of **Kshs. 626, 569** when subjected to the liability contribution allowed by the trial court, comes to the net award of **Kshs. 595,240.55.** The respondent shall therefore have a judgment for **Kshs. 595,240.55** plus costs and interest as ordered by the trial court.

53. Since this appeal has substantially succeeded, each party shall bear their own costs of the appeal.

54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 2ND DAY OF JULY 2021.

E C MWITA

JUDGE