REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 120 OF 2019

JACKSON MBALUKA MWANGANGI.....APPELLANT

-VERSUS

ONESMUS NZIOKA.....1ST RESPONDENT

LAWRENCE KIVINDYO.....2ND RESPONDENT

(*Being an appeal from the judgment and decree of the Resident Magistrate Hon. Analo delivered on 21st August 2019 in Machakos CMCC No. 400 of 2018*)

BETWEEN

JACKSON MBALUKA MWANGANGI.....PLAINTIFF

-VERSUS

ONESMUS NZIOKA.....1ST DEFENDANT

LAWRENCE KIVINDYO.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 24th June, 2018, the Appellant herein instituted a suit against the Respondents for damages arising from road traffic accident which allegedly occurred on 22nd August, 2015 when the plaintiff who was a riding his motor cycle registration no. KMDM 735E was hit by motor vehicle registration no. KBH 315M which the Appellant claimed was registered in the name of the 1st Respondent and was beneficially owned by the 2nd Respondent. According to the Appellant, the accident was caused by the negligence of the driver of the said vehicle. As a result of the accident, the Appellant sustained blunt injury to the right shoulder and fracture of the femur. He also incurred Kshs 42,020/- in special damages.

2. The Respondents neither appeared nor filed their defences and as a result an interlocutory judgement was entered and the matter was fixed for ex parte hearing. In his evidence the Appellant testified that he had a fracture on his right leg and was treated at Machakos. He produced inter alia, the P3 Form, Discharge Summaries from Machakos Level 5, Bishop Kioko Hospital and Kijabe Hospital as well as the medical report prepared by **Dr John Mutunga**. According to **Dr Mutunga's** Report, the Appellant sustained blunt injury to the right shoulder and fracture of the right femur and at the time of the examination was still complaining of the healing right femur. In the opinion of the doctor, the Appellant suffered severe skeletal injuries and though complete healing was anticipated, he would suffer from degenerative osteoarthritis at a later stage. It was his opinion that further surgery was necessary to remove the nail at an estimated cost of Kshs 100,00.00

3. In his judgement, the learned trial magistrate, after setting out the principles that guide award of damages in such cases, found that an award of Kshs 350,000.00 was sufficient in the circumstances. This award was based on the decisions in the cases of **Philip Musyoka Mutua vs. Leonard Kyalo Mutisya [2018] KLR** and **Gogni Rajope Construction Company Limited vs. Francis Ojuok Olewe [2015]**

eKLR.

4. This appeal is against the said award and it is based on the grounds:

> **1) THAT the learned trial magistrate erred in fact and in law by awarding quantum of general damages at Kshs. 350,000/= which is considerably low compared to the skeletal injuries sustained by the appellant without applying proper principles and precedent as required by law.**
>
> **2) THAT the learned trial magistrate erred in law and in fact in failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.**
>
> **3) THAT the learned trial magistrate erred in fact and in law by failing to consider appellant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination especially on issues of quantum.**
>
> **4) THAT the learned trial magistrate erred in law and in facts by applying wrong and inapplicable principal of law in civil case and which did not form any basis to warrant his determination of general damages.**

5. It is submitted that the trial magistrate erred by awarding general damages that were manifestly low noting the evidence tendered during trial and the advocate's submissions. It was submitted that as per the nature of injuries sustained by the appellant as pleaded and proved during the hearing conducted by the trial court, the appellant sustained very serious injuries and was also affected both psychologically and emotionally and he continues to suffer now and, in the future, and thus an award of Kshs. 350,000/= cannot be said to be enough at all. This being the first appellate court, it was submitted that the court has power to re-evaluate the evidence and make a just determination. Accordingly, the court was urged to consider the injuries sustained by the appellant and revise the award upwards in its determination.

6. According to the Appellant, an award of Kshs. 750,000/= for general damages for pain and suffering and loss of amenities would be ideal and is reasonable compensation in this case for pain, suffering and loss of amenities. In support of his submissions, the Appellant relied on **Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR** where **Kamau, J** reduced the lower court award of Kshs. 800,000/= to Kshs. 500,000/=. According to the Appellant, considering the inflation, the Court ought to have awarded Kshs. 750,000/= as reasonable and meritorious and this Court was urged to proceed to award the same**.**

Determination

7. I have considered the submissions filed herein.

8. 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. In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body. However, the decisions which the learned trial magistrate relied upon were in respect of fractures to the radius bone. The radius is one of the two bones that make up the forearm, the other being the ulna. It is the smaller of the two bones. In my view a fracture of the femur is a more serious injury than a fracture of the radius and the authorities in respect of a fracture to one cannot be used as the basis for awarding damages to the other. I therefore agree that the learned trial magistrate erred in relying on the decisions relating to fracture of the radius in awarding damages to the Appellant herein who had sustained a fracture to the femur.

15. While I find that the award was not commensurate with the injuries sustained, the Appellant's proposal is on other hand, on the higher side. Having considered the injuries sustained by the Appellant it is my view and I find that an award of Kshs 600,000.00 is reasonable.

16. Consequently, this appeal succeeds, the judgement of the trial court is hereby set aside and is substituted therefor an award of Kshs 600,000.00 in general damages. There will be no order as to costs as this appeal was not opposed.

17. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Nthiwa for Mr Musembi for the Appellant

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