REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 7 OF 2017

(Being an Appeal from the judgment/decree of Hon. B. Omwansa,

Principal Magistrate at Sotik, delivered on 23 February 2017 in

Sotik PMCC No. 205 of 2015)

WALTER GEKOMBE OMARI .....APPELLANT

-VERSUS-

VINCENT KIPKIRUI..... RESPONDENT

JUDGMENT

1. The facts of this case are that on 12th June 2015, along Kaplong-Sotik Road near Total petrol Station, the Respondent was riding his motorcycle and was hit by a motor vehicle registration number KBL 847P belonging to the Appellant. He sustained serious injuries and was admitted at Tenwek Hospital between 13 June 2015 and 3rd July 2015. He was said to have suffered 60% permanent disability.

2. On 15th December 2016, the parties entered into consent on liability in the ratio of 60:40 in favour of the Plaintiff. The trial court was therefore left to assess damages.

3. In a judgment dated 23rd February 2017, the trial court awarded the Plaintiff Kshs.694,000 as general damages. The trial court also granted a 30 days stay of execution as consented by the parties.

4. The Appellant being dissatisfied with the decision of the trial court instituted the present Appeal. He raised the following grounds:-

(a) That the learned trial magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent which was manifestly excessive.

(b) That the learned trial magistrate erred in assessing damages and failed to apply the principles applicable in award of damages and comparable awards made for analogous injuries.

5. It was the Appellant's prayer that the Court reviews or sets aside the judgement/decree of the trial court and that the costs of the Appeal be awarded to him.

6. The Appeal was canvassed by way of written submissions.

Appellant's submissions

7. The Appellant submitted that the trial court misdirected itself when assessing the nature of the injuries in that, it did not properly analyze the facts and the evidence from both parties. He submitted that the trial court never made any finding on the injuries sustained by Respondent yet this was a matter in dispute. That the trial court failed to determine whether the injuries caused the Respondent permanent or temporary disability.

8. The Appellant also submitted that the evidence of Dr. M.S. Malik was weightier than that of Dr. Ezekiel Zoga because he was an orthopedic surgeon while the latter was an ophthalmologist. That he (Dr. Malik) gave a thorough and detailed analysis of the treatment records than his colleague. He cited on the case of **Felix Kilonzo Kieti vs. Kelvin Mutuku Katuku (2020) eKLR** and **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another (2016) eKLR** on reliance on expert evidence.

9. On the issue of 60% permanent disability assessment by Dr. Zoga, the Appellant stated that the same was excessive and exaggerated since he did not demonstrate that there were any permanent injuries on the spinal cord, the muscles or any other bones or limbs. That on the other hand Dr. Malik found that the Central Nervous System was operating normally and disclosed no abnormality. The Appellant therefore submitted that since the injuries healed, there was no permanent disability.

10. On the loss of future earning the Appellant submitted that the Respondent's age was misrepresented and recorded as 19 yet he was 23 and that the same was intended to increase the damages awardable under this claim. The Appellant therefore urged that the evidence of Dr. Zoga could not be relied upon as he was not truthful.

11. Lastly on the award being excessive, the Respondent submitted that the court misdirected itself in comparing the injuries in the present case to injuries in other cases that were not related. Instead, he stated that comparable injuries must be compensated by comparable awards and relied on **Sila Teren & Another vs. Simon Ombati Omiambo (2014) eKLR, Joseph Musee Mua vs. Julius Mbogo Mugi & 3 Others (2013) eKLR, West (H) Son Ltd. vs Shepherd (1964) A.C. 326 at page 345** and **Posta Corporation of Kenya & Another vs. Dickens Munayi (2014) eKLR.**

12. The Appellant further submitted that damages should do justice not only to a Respondent but to an Appellant and the general public. To this end, he relied on the Court of Appeal case of **Cecilia Mwangi & Another vs. Ruth Mwangi, C.A. No 251 of 1996** and **Mbaka Nguru & Another vs. James George Rakwar C.A. No. 133/1998**.

13. In his conclusion, the Appellant opined that an award of Ksh.300,000/= for injuries that healed within 9 months without any permanent disability was reasonable.

Respondent's submissions

14. The Respondent submitted that the medical examination conducted by Dr. Zoga was done a month after the accident when he was still using a feeding tube. That he had a head injury which was unlikely to heal well and this informed the doctor to assess permanent disability at 60%. He cited the case of **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another (2016) eKLR** in support.

15. On the nature of injuries, the Respondent submitted that injuries in comparable cases can never be the same but the resultant effects can be the same hence the awards should also be similar. He submitted thus that the trial court's award was too low. He relied on the case of **Joseph Kimanthi Nzau vs. Jonathan Macharia (2019) eKLR** where an appellate court enhanced an award of Kshs.450,000 to Ksh.800,000 for similar injuries.

16. Lastly, on the nature of injuries suffered by the Respondent, it was submitted that the court actually considered the same and that the purported failure to make a finding on the same did not occasion any miscarriage of justice. In his conclusion he urged the court to dismiss the appeal since the Appellant did not in any way demonstrate the manner in which the trial court acted on the wrong principles or misapprehended the facts in making the awards as it did.

17. This is a first appeal. It is trite that the duty of a first appellate court is to examine and analyze evidence afresh and to make its own independent determination, separate from that of the trial court. In drawing its own conclusion, it must bear in mind that it lacks the advantage of seeing the witnesses and observing their demeanor. (See **Mark Oiruri Mose vs. R, [2013] eKLR** and **Shantilal M. Ruwala vs. Republic [1975] E.A., 57**).

18. From my consideration of the Grounds of appeal analysis of the submissions of the parties above, the only issue for my determination is whether the damages awarded to the Respondent were excessive.

Whether the damages awarded to the Respondent were excessive.

19. It has been argued in this case that the court relied on an inaccurate expert report to award high damages. The trial file contains a medical report by Dr. Ezekiel Ogando Zoga dated 21 July 2015 (the 1st medical report). The said examination was conducted 18 days after the Respondent had been discharged from Tenwek hospital. The report lists the following injuries:-

(a) Severe cerebral trauma and head concussion

(b) Fracture base of the skull

(c) Penetrating abdominal wound with foreign body retention

(d) Fracture of the left clavicle

(e) Severe head injury accompanied by left ear ontohoce, facial lacerations and subgaleal hematoma.

In general, the report stated that the Respondent had sustained a very severe head injury which was unlikely to fully recover and finally assessed the patient at 60% permanently disability.

20. From the proceedings of the trial court there was a second medical examination report (the 2nd Medical report) by Dr. M.S. Malik in which the Respondent was examined on 2nd March 2016, a year after the accident. In this report, the doctor stated that the Respondent was in good general health and listed the same injuries as in the Discharge Summary from Tenwek and the first report. He however indicated that

the Respondent was first admitted in a semi-comatose state due to the head injury and the fact that he had alcohol in his system. This was also outlined in the Discharge summary from Tenwek where he was first treated. It was Dr. Malik's assessment that for a period of 6 weeks after the accident, the Respondent suffered total incapacity of a temporary nature followed by a partial incapacity of a temporary nature for a further two weeks. There was no permanent physical or mental disability according to this second report.

21. The divergence of these two medical reports was based on the degree and effect of injuries. While the first medical report indicated that the Respondent had a severe head injury with 60% permanent disability without a chance of recovery, the second one indicated that there had been progressive recovery within the year from the date of the accident and the Respondent was not permanently disabled. It is noted however that the injuries sustained by the Respondent were not in dispute from the two doctors' reports. What is in dispute is the extent of the injuries as presented by the two medical practitioners.

22. The court is required to view evidence adduced by experts in the context of all other pieces of evidence adduced before it. The principles relating to expert evidence were eloquently elucidated in the case of **Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR (Civil Appeal 2 of 2014, High Court at Nyeri)** where Mativo J stated that:-

> ***"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.***
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> ***While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this:***
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> ***(a) Firstly, expert evidence does not 'trump all other evidence'. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.***
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> ***(b) Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.***
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> ***(c) Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.***
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> ***(d) Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."***

23. Similarly, the Court of Appeal stated as follows in the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139**:-

> ***"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."***

24. It follows then that in considering which of the medical reports to rely on, the court must weigh the other evidence before it. Presently, the discharge summary from Tenwek Hospital demonstrated the presence of alcohol in the Respondent and this could have contributed to his comatose state. I am also inclined to consider with more value the evidence of Dr. Malik in respect of the extent of the injuries because he is an orthopaedic surgeon and also because he was thorough enough to outline all relevant information from the discharge summary including the aspect of intoxication. On the other hand, Dr. Zoga left out this material fact and only pointed the Respondent's disability. It is also significant that Dr. Zoga examined the patient a month after the accident while Dr. Malik did so a year later when the Respondent had made significant recovery. The court could not therefore authoritatively rely on either report to the exclusion of other evidence.

25. On the issue of assessment of the injuries that the Respondent sustained, I note from the trial record that the court stated that it noted the injuries sustained by the Respondent through viva voce evidence and the medical reports that were produced even though they were conflicting. It was the trial court's conclusion that the Respondent suffered disability of some kind, as to the nature in terms of it being permanent or temporary, this remained unstated.

26. Looking at the Discharge Summary marked as P-Exhibit-1, the injuries sustained were clearly outlined. The first Medical Report (P-Exhibit - 5 and the second Medical Report (D-Exhibit - 1) also outlined the same injuries. Since these injuries were not in dispute, I shall assess them alongside cases in which similar injuries were recorded.

27. The Court of Appeal gave guidance when determining how to assess injuries and award damages in the case of **Denshire Muteti**

Wambua vs. KPLC Ltd (2013) eKLR, by stating that:-

> ***"Further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd. vs Bimomo & 2 Others (2004) 2 KLR 101)"***

28. In this case, I have considered awards made in comparable cases. In **Telkom Orange Kenya Limited vs. I S O (minor suing through his next friend and mother J N) [2018] eKLR**, the Plaintiff sustained the following injuries: depressed fracture of the skull, loss of consciousness, scars on the left tempo-parietal area and bruises of left leg. The court awarded the Plaintiff Kshs.500,000. In **Justus Kaibunga Laichena vs. Erustus M. Mureithi [2001] eKLR** Kuloba J. (*as he then was*) awarded a sum of Kshs.1,200,000/- to a plaintiff who had suffered fractures of skull and zygoma. In this decision, he also cited the case of **Isaac Waweru Mundia vs. Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR** where the sum of Kshs.1,000,000 was awarded for fracture of the zygoma (cheek bone).

29. Similarly in **Maintenance Ltd & Another vs. W A (A minor suing through next friend and father S K H) [2015] eKLR, the court awarded Ksh.1,000,000** for fracture at base of the skull, comminuted complex mandibular fracture, loss of incisor tooth and right eye vertical dystopia. Also in **Peter Gicharu Ngige vs. Charles Daudi Onderi {2012} eKLR** a sum of Kshs.800,000/- was awarded for fracture of the base of the skull on left side, perforated left ear drum, haematoma, fracture of mandible of right side.

30. Based on the foregoing, I am guided by the principle in **Kigaragari vs. Agripiana Mary Aya {1982 – 88 KAR 768}** where the court stated that, ***"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford..."***

31. It is trite that the exercise of assessing general damages is at the discretion of a trial court and an appellate court cannot be justified to substitute a figure of its own on the premise that it would have obviously awarded a different figure, had it been the one trying the case in the first instance. The authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. vs. M Lubia and Olive Lubia [1982 – 88) 1 KAR 727 at page 730** was express in this regard when Kneller J. A stated:-

> ***"The principles to be observed by the 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."***

(See also **Stanley Maore & Geofrey Mwenda at Nyeri Civil Appeal No.147 of 2002).**

32. It follows that an appellate court ought not to interfere with the decision of a trial court unless that decision was founded on a wrong conclusion arising from a failure to consider matters that it ought to have considered. This was the principle in **Mbogo vs Shah [1968] E.A. at page 94** where it was stated as follows:-

> ***"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 the present I have already considered the injuries sustained by the Respondent and the damages awarded by the trial court. I have paid in depth consideration to comparable awards as demonstrated in this judgment. I find that the award of Kshs.694,000/= was well within comparable awards. In my analysis, I have found no evidence that the trial court took into consideration an irrelevant factor or failed to take into consideration any relevant factor in assessing damages.

34. Bearing in mind the rates of inflation and the fact that the parties apportioned liability by consent, I am of the view that the award is justified under the circumstances and should not be disturbed. I find no justification to disturb the award.

35. If find that the Appeal lacks. It is dismissed with costs to the Respondent.

36. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 16TH DAY OF NOVEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Judgement delivered to the parties electronically as per their consent at the following email addresses:-

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