REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 34 OF 2019

NICKSON KAZUNGU KARISA..... 1ST APPELLANT

PRIME COMFORT HOTEL..... 2ND APPELLANT

VERSUS

EDWARD TSUMA MBARU..... RESPONDENT

(An appeal from the Judgment delivered by Senior Resident Magistrate Hon. L. N. Juma in Civil Suit No. 13 of 2016 in the Senior Principal Magistrate's Courts, Kilifi on 28th day of May, 2019)

Coram: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocates for the appellant

I R B Mbuya Advocate for the respondent

JUDGMENT

This appeal arises out of the Judgment and decree of the Magistrate Court by which the respondent was awarded Kshs.800,000/= as general damages for pain, suffering and loss of amenities for injuries he sustained in a Road Traffic Accident which occurred on 25.5.2015, involving motor vehicle registration KAV 451y. The motor vehicle in question was stated to be owned by the appellant.

The issue of liability in negligence which formed the basis of the claim was determined by the trial court at 100% as against the appellant.

In the same Judgment, the respondent was awarded Kshs.11,575/= as special damages.

Being aggrieved with the quantum on general damages, the appellant preferred an appeal on the following grounds.

> ***1. That the Learned Senior Resident Magistrate erred in awarding a sum of Shs. 800,000.00/= to the respondent (hereinafter referred to as the plaintiff) as general damages.***
>
> ***2. That the said award of Shs.800,000/= is, in the circumstances of this case, so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the plaintiff considering the injuries suffered by him and the opinion of Dr. Udayan Sheth, a consultant orthopaedic surgeon that the plaintiff has fully recovered from his injuries with no deformity and no permanent incapacity.***

3. That the said award of Shs.800,000/= is altogether disproportionate to the injuries sustained by the plaintiff and is not in keeping with other comparable awards made in respect of similar injuries.

4. The Learned Senior Resident Magistrate failed to give any or any adequate or credible reasons of how he arrived at the figures of Shs.800,000/= general damages which he awarded to the plaintiff on the basis of 100% liability.

5. That the Learned Senior Resident Magistrate erred in failing:-

a. To appreciate the significance of the various facts that emerged from Dr. Udayan Sheth's medical report dated 31st May 2016.

b. To consider or properly consider all the evidence before him and/or

c. To make any or any proper findings on the aspect of quantum of damage on the evidence before him.

6. That the Learned Senior Resident Magistrate erred in failing to adequately consider the written submissions filed by counsel for the appellants.

The evidence at the trial is such that not much is disputed. The respondent **Edward Tsuma Mbaru** testified as the claimant that on 25.7.2015 he was on board motor vehicle registration number KAV 451Y as a fare paying passenger along Mombasa – Kilifi Road when motor vehicle registration number KBQ 726K was negligently driven that it collided with the aforesaid motor vehicle.

Mr. Edward described the details of the accident and as the collusion occurred he sustained personal injuries being the fracture of the right ulna, deep cut wound on right elbow, and several lacerations on the right upper arm. It was further in his evidence that he was admitted at Kilifi hospital where an examination of the injuries were confirmed and appropriate treatment dispensed. After the treatment, he was to incur medical expenses as supported by the receipts issued by the hospital and other consultation fees.

In his further evidence and upon cross-examination, he told the court that the driver of the offending vehicle was charged with a traffic offence. On 13.11.2015 **Dr. Ndegwa (PW2),** examined the respondent. In his evidence **(PW2)** confirmed **Mr. Edward** had suffered injuries which he summarized as follows in his medical report:

(a). Compound fracture of the right ulna at the olecranon process.

(b). Deep cut wound on the right elbow.

(c). Several lacerations on the right upper arm.

(d). Foreign bodies in the right elbow.

In the doctors assessment Mr. Edward injuries had not fully healed but at the end of it all he was expected to suffer 8% permanent disability due to the large traumatic and graft scars that cause him cosmetic embarrassment, the restriction of movement of the right elbow. The weak bone union that can easily fracture over minor trauma.

From the appellant side **Dr. Sheth** examined Mr. Edward on 31.5.2016 and in the report he is stated to have suffered open injury right elbow with multiple glass pieces in the wound. Dr. Sheth pointed out that there was no fracture though Edward got admitted at Kilifi hospital for purposes of removing foreign bodies and skin grafting was done. In his opinion Edward had full recovery with no physical disability.

Its with this background that the Learned trial Magistrate awarded general damages of Kshs.800,000/=.

Mr. Gor on appeal submitted to the court that a sum of Kshs.800,000/= for pain and suffering on the basis of **Dr. Ndegwa** was erroneous as the extent of injuries suffered by the respondent were as closely stated by **Dr. Sheth**, an orthopedic surgeon.

According to **Mr. Gor** contention, the respondent never sustained any fracture as depicted in **Dr. Ndegwa's** report but multiple opaque foreign bodies. He also took issue with the prognosis by Dr. Ndegwa who opined that the respondent residual disability at 8%.

Mr. Gor further submitted that, to revert to the injuries and on the basis of the submissions before the trial court an award of Kshs.300 – 310,000/= as general damages for the respondent would have adequately compensated him for the loss and damage.

Mr. Gor argued and contended what the Learned trial Magistrate did was to take into account the compound fracture which in essence was not supported by the initial medical X-rays.

Further, **Mr. Gor** submitted that the Learned trial Magistrate did not take into account the principles in **(Tayab v Kimaru CA No 29 of 1982)** and the case of **West H & Sons v Shephard {1964} AC 326** which have settled the issue on assessment of damages in Kenya.

With this in mind Mr. Gor submitted that the particular circumstances of the case did not warrant the excessive award in terms of the Judgment of the trial court. Mr. Gor therefore argued that the appeal should be allowed because the Learned trial Magistrate erred in fact and Law in so far as the assessment of general damages is concerned.

Mr. Mbuya, counsel for the respondent submitted that the decision of the Learned Magistrate being one that she had reached in the exercise of her undoubted discretion, this court can only disturb it if she had misdirected herself in some matter and as a result arrived at a wrong assessment or unless it is manifest from the Judgment as a whole that she was clearly wrong in the exercise of her discretion. He cited the principles in **Kemfro Africa Ltd T/A Meru Express & Another v A. M. & Another NO. 2 {1987} KLR** cited in **Elizabeth Bosibori & Another v Damaris Moraa Nyamache {2017} eKLR, Sofia Yusuf Kanyare v Ali Badi Sabere & Another Nairobi HCCC 478 OF 2007.**

As regards the impugned award **Mr. Mbuya** set out the case of **Akamba Public Road Servides v Abdikadir Adan Galgalo {2016} eKLR** as the one which provided sufficient and substantial answer to the issue on assessment of damages for the respondent.

Regarding the issue of damages as submitted by Learned Counsel for the appellant, **Mr. Mbuya** took an adverse view, that the case as presented in the court below was substantially at variance with the injuries suffered by the respondent. He further contended that it is noteworthy that the appellant counsel based his submissions on old – precedents and the well over fourteen (14) years lapse before the current action by the respondent, rendered them in applicable. **Mr. Mbuya** in a nutshell prayed for the dismissal of the appeal.

I have very carefully considered the record and the whole of the evidence before the trial court including the memorandum of appeal and written submissions by both counsels for and against the appeal. At the heart of the appeal as urged upon this court is that I should interfere in the findings of fact made by the Learned trial Magistrate on assessment of general damages.

A review of the evidence and the Judgment of the trial court shows that she clearly and correctly dealt with the doctrine of negligence and the duty of care being owed by the defendants (appellants to this appeal), she noted the undisputed facts for the accident that occurred. In the circumstances, she noted and determined the breach of that duty by the defendant/appellants without contribution at 100%.

On appeal this court was not urged to determine causation and blameworthiness of the collision between

motor vehicle used by the respondent with that of the appellants. It is therefore a non-suited issue in this appeal. The appeal however, is vehemently contested with respect to the award on general damages.

Assessment of damages

Analysis

As was observed by the court in **Bhatt v Khan {1977} IKAR** which I respectively agree that the jurisdiction of an appellate court is based on the following guiding principles:

> ***"An appellate court will not disturb on award of damages unless it is inordinately high or low as to represent on 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 also arrived at a figure which was either accordingly high or low."***

According to the submissions by both counsels certain key issues were raised with corresponding authorities supporting the two perspective on the assessment of damages. **Mr. Mbuya** submitted and received an amount of Kshs.1,000,000/= for the head on pain and suffering and loss of amenities. He relied mainly on the authority of **Akamba Public Road Services v Abdikadir (supra)** where the claimant stated to have suffered multiple injuries involving a fractures to right tibia, malleolus, right fibular and blunt injury to the right ankle. The award made in favour of the respondent was Kshs.500,000/=.

Mr. Gor for the defendants (appellants) to this appeal submitted and purported an award of Kshs.350,000/=. He relied on the case of **Kimaru T/a Kimaru Mbuvi & Brothers v Anguisuece Munyao Kioko CA NO 203 OF 2001.**

In this cited case the appellant suffered multiple bruises on forehead, deep cut on palm of left hand, fracture on left radius and ulna bones. Severe injuries on left arm, thumb, index – middle finger of the left arm and injuries to the left forearm.

In the instant case, as deduced from the medical reports by **Dr. Ndegwa** dated 13.10.2015 prepared slightly over two and half months from the date of the accident significantly identifies compound fracture of the right ulna, deep cut wound on right elbow and several lacerations as evidence in support of the direct injury to the respondent with regard to the scope of injuries which the respondent sustained.

Dr. Sheth medical report of 31.5.2016 best describes the injuries as multiple radio opaque foreign bodies with no fracture of any bones. The sum total of **Dr. Sheth's** opinion was that the respondent had recovered with no permanent incapacity.

In assessing the opinions taken by the two consultants and the categories of injuries together with the prognosis. It becomes quite apparent that they were not reading from the same script. It is also significant to note that whenever the court is faced with two expert witnesses at variance in their respective opinions, the power is conferred upon the court in terms of Section 48 of the Evidence Act to receive such evidence on oath in matters that affect its validity.

The point was buttressed in the leading text on expert witnesses **"Expert evidence – Law and practice by Tristation Hodguisain** where he observed that:

> ***"It is relevant to the question of expertise that an expert witness is usually called for the purpose of drawing inferences from given facts expressing opinions about matters before the court, unlike lay witnesses. It is the ability of the witnesses to do this, within a particular specialized field, which justifies the distinction between expert and lay witnesses for evidential purposes."***

While in **Whitehouse v Jordan {1981} IWLR 246** the court held that:

> ***"The expert evidence presented to the court should be and should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies is of the litigation. Independent assistance should be provided to the court by way of objective and unbiased opinion regarding matters within the expertise of the expert."***

The strand of what the expert evidence brings to a judicial proceeding was succinctly stated by **Lord Justice Brown** in **Mutch Allen {2001} EWCA CIV 70 (2001)** where he stated:

> ***"This new regime is designed to ensure that experts no longer serve the exclusive interests of those who retain them, but rather contribute to a just disposal of disputes by making their expertise available to all. The overriding objective requires that the court be provided with all relevant matter in the most cost effective and expeditious way. This policy is exemplified by provisions such as 35 . 11 which allows one party to use anexpert's report disclosed by the other party even if that other party has decided not to rely on it himself"***

Going by the above principles, it appears that in the instant case, expert medical report by **Dr. Sheth** was typically at variance with that of **Dr. Ndegwa** on the same patient, the respondent herein. The reliability of **Dr. Sheth's** opinion remains unclear and indeed he ignored **Dr. Nondi's** X-ray report dated 19.10.2015 on the key issue of the fracture of the olecranon process with partial detached main fragments the basis of **Dr. Ndegwa's** report. There is an enhanced danger for an expert of the same scientific standing to take a completely different position about the relative valuation of the same type of data.

I see the position of the course taken by the trial court to be in consonant with legal position in the case of **R v Turner {1975} 1 ALL ER 70:**

> ***"Before a court can assess the value of an opinion it must know the facts upon which it is based, if the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless in our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination."***

In this case, the appellants counsel wants this court to consider with care that the Learned trial Magistrate ignored the expert input by **Dr. Sheth.** In matters of expert evidence unlike **Dr. Ndegwa** who was called upon to give his medical examination and findings about the respondent, unfortunately that was never with **Dr. Sheth's** opinion. This is one of those cases where there was need for the trial court to have **Dr. Sheth** be called for purposes of cross-examination on the view taken and conclusions reached which completely disapproved his colleague **Dr. Ndegwa.** The admissibility and reliability of the second medical repot was therefore of little probative value to the case.

The doctor purported to express an opinion on injuries which the respondent sustained over one year since occurrence of the accident. The primary rule therefore as laid down in **Mbogo v Shah {1968} EA 93** is whether in this appeal the appellant has demonstrated that the exercise of discretion by the Learned trial Magistrate was wrong in principle or perversely on the facts of the case in regard with the award of damages. The test to be applied is now well stated as held in the cases of **West (E) Sons Ltd v Shephard Lim Poh Choo v Camden {1979} 1 ALL ER 332.**

On account of this, the evidence and the cases referred to in persuading the trial court to assess, general damages for the respondent. I am of the view that:

Counsel for the respondent cited the case of **Akamba Public Road Services (supra),** which happened to have carried the day in so far as the decision by the Learned trial Magistrate is concerned. The reading of the principles and facts in the case.

Specifically, on the nature of injuries presumed to flow with that of the respondent to me is substantially unresponsive. In the **Akamba case (supra)** the claimant suffered multiple fractures compared with one

fracture of the right ulna, by the respondent to this appeal.

In addition, the respondent also suffered several abrasions to the upper arm and elbow. The award to the appellant in **Akamba case (supra)** made in 2016 was Kshs.500,000/= what I am trying to say is that there is no similarities with respect to the main authority relied upon by the trial court to assess general damages. It is distinguishable based on that fact.

It is also observed that the appellant counsels cited **Kimaru case (supra)** decided in 2006. In my judgment, I have faulted **Dr. Sheth's** medical opinion, therefore leaving this court the examination and diagnosis by **Dr. Ndegwa**. Moreover I hold the view that Learned Magistrate in exercising discretion to enter Judgment, on awarding quantum should as much as possible appreciate the nature and awards arguably of recent times to avoid arbitrary discretion.

On this I rely on the persuasive authority by the privy council in **Seepersad v Treophilus & Capital Ins Ltd UKPC 86 of 2002** where **Lord Carswell** pointed out as follows:

> ***"Their Lordships entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extra polate, the amounts awarded into modern values, it is an inexact science and one which should be exercised with some caution. The more so when it is important to ensure that the comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is showed, but when they are of some antigutity such comparison can do more than demonstrate a trend in very rough and general terms."***

All in all, it seems to me that the reasonable approach to this appeal is to interfere with the award on grounds that the Learned trial Magistrate misdirected herself in importing extraneous matters as to the injuries suffered by the respondent which caused a miscarriage of justice. In determining the award, in light of the prevailing facts and circumstances, the authorities on the subject to my view would have made the Learned trial Magistrate arrive at a more moderate award commensurate to the injuries suffered by the respondent.

That being the position on appeal, the award of Kshs.800,000/= is therefore varied to the extent of substituting with Kshs.450,000/= for pain and suffering and loss of amenities.

In the result then, I would partially allow the appeal with the following declarations in mind:

(1). Liability still at 100%

(2). General damages now substituted with Kshs.450,000/=

(3). Specials affirmed at Kshs.11,575/=

(4). Costs of the appeal be equally shared by both parties to the appeal.

(5). Interest on General damages from the date of Judgment at the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF JANUARY 2020

…….

R. NYAKUNDI

JUDGE