REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 132 OF 2017

BLUE HORIZON TRAVEL CO. LTD……...……APPELLANT

VERSUS

KENNETH NJOROGE…….……..…….……..RESPONDENT

(Being an Appeal from the Judgment of Hon. G.M Mutiso (PM) in the Principal Magistrate's Court at Makindu, Civil Case No.140 of 2016, delivered on 9th May 2017)

JUDGMENT

1. The Respondent filed a suit in the lower court seeking general damages for personal injuries sustained from a road accident on 31/12/2015 along the Nairobi-Mombasa road. He also prayed for special damages, costs of the suit and interest.

2. The Respondent filed a statement of defence and denied all the averments in the plaint. After the preliminaries, the parties consented on liability in the ratio of 90:10 in favour of the Respondent and the matter proceeded for assessment of damages. Judgment was entered for the following awards.

Special damages……...…….Kshs.4,600/=

General damages……Kshs.650,000/=

Total…….…...…Kshs.654,600/=

Less

10% contribution……..…….....…..Kshs.65,460/=

Net award……..……...Kshs.586,140/=

3. Aggrieved by the decision, the Appellant filed this appeal and listed 6 grounds as follows: -

a) The learned Magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and fact.

b) That the learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles on law and has occasioned a miscarriage of justice.

c) The learned Magistrate erred in law and fact in awarding general damages of Kenya shillings 650,000/= that was excessive and unjust in the circumstances considering the nature of injuries sustained and the conventional awards in relation to such injuries.

d) The learned Magistrate erred in awarding general damages for injuries that were not pleaded in the plaint and more specifically 3rd-9th left rib fractures and cut wounds on the left foot near the ankle joint.

e) The learned Magistrate erred in law and fact in duly disregarding the judicial authorities cited by the Appellant and by instead relying on the authorities cited by the Respondent which were unrelated to the actual injuries sustained by the Respondent.

f) The learned Magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions made by the defendant's counsel on quantum.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellant in its submissions reiterates its reliance on the submissions filed before the trial court and condensed all the grounds of appeal into one issue *to wit* quantum.

6. It submits that the learned trial Magistrate erred in principal by finding that the Respondent sustained fractures of the 3rd and 9th ribs yet the injuries were neither pleaded nor proved. That according to DW1's medical report, the chest and shoulder x-rays were normal. The Appellant also submits that according to the pleadings and evidence, the Respondent sustained only soft tissue injuries which had healed without permanent consequences or incapacities.

7. It relies on the case of **Ndung'u Dennis –vs- Ann Wangari Ndirangu & Anor (2018) eKLR** where it was held as follows;

> *"27. It might be fair to say that the learned trial Magistrate based his finding on quantum on his report by Dr. Mwaura. I however, find the report less reliable than the treatment notes, the discharge card and P3 form which are all consistent. The treatment notes were filled immediately after the accident by treating the medical practitioner without any interests in the case."*

8. The Appellant has also cited the case of **Denshire Muteti Wambua –vs- Kenya Power & Lighting Co. Ltd (2013) eKLR** where it was held that the general method of approach for assessing damages 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. The

Appellant cites the following decisions as being comparable to the instant case;

a) Godwin Ireri –vs- Franklin Gitonga (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs.300,000/= was reduced to Kshs.90,000/= on appeal.

b) George Mugo & Anor –vs- AKM (2018) eKLR where the claimant sustained soft tissue injuries to the left shoulder, blunt chest injury interior, bruises of left wrist region and blunt injury left arm. An award of Kshs.300,000/= was reduced to Kshs.90,000/= on appeal.

c) Lamu Bus services & Anor –vs- Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kshs.200,000/= was reduced to Kshs.130,000/= on appeal.

d) George Kinyanjui t/a Climax Coaches & Anor –vs- Hussein Mahad Kuyale (2016) eKLR where the claimant sustained injuries on his chest, neck, knees and lost two teeth. The award of Kshs.650,000/= was reduced to Kshs.109,890/= on appeal after the Judge made a finding that the loss of teeth was unrelated to the accident.

e) Ndung'u Dennis –vs- Ann Wangari Ndirangu & Anor (2018) eKLR where the claimant sustained injuries on the right lower leg and bruises on the back. An award of Kshs.300,000/= was reduced to Kshs.100,000/= on appeal.

9. The Appellant contends that the award of Kshs.650,000/= is inordinately high and submits that an award of not more than Kshs.100,000/= is fair, reasonable, just and adequate.

10. The Appellant also submits that even if this court finds that the Respondent sustained the said fractures, the award is still inordinately high. The court has been invited to consider the following decisions;

a) Mwavita Jonathan –vs- Silvia Onunga (2017) eKLR where an award of Kshs.400,000/= was made for left hip comminuted intertrochanteric fracture, blunt chest injury dislocation right knee joint, sprain of the cervical spine of the neck and the lumbar sacral spine of the back.

b) Gabriel Kariuki Kigathi & Anor –vs- Monica Wangui Wangechi (2016) eKLR where the plaintiff suffered a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands, injuries to both legs, fracture C2, fractured cervical spine and fracture of right ankle. An award of Kshs.800,000/= was reduced to Ksh.400,000/= on appeal.

11. In response the Respondent submits that in addition to the consent on liability, parties consented to file written submissions and enclose their documents to enable the court ascertain quantum. He notes that the record of appeal does not include the 2nd pages of the medical report and P3 form and attributes the omission to the Appellant's oversight, mistake or deliberate motive.

12. The Respondent has also decried the non-inclusion, in the record of appeal, of all the documents he produced before the trial court as well as his submissions. He wonders about the coincidence that only caused interference with his documents yet those of the Appellant are complete. According to him, the record of appeal is incomplete and was prepared maliciously with intent to mislead this court.

13. The Respondent submits that there is no cogent rebuttal evidence to show that he did not suffer the said dislocation of the left shoulder and fractures of the 3rd and 9th ribs to warrant interference with the award of the trial court.

Analysis and determination

14. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Another –vs- Associated Motor Boat Company Limited & Others 1968 E.A 123.**

15. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a) Whether the learned trial Magistrate erred by considering fracture injuries.

b) Whether the quantum of damages should be disturbed.

First I do note the issues raised by the Respondent's counsel on omitted documents. It was his duty to go through the Record of Appeal and point out any errors before directions were taken. To allay his fears, this court has the original file which has the exhibits.

16. **Issue (a) Whether the learned trial magistrate erred by considering fracture injuries.**

The injuries sustained were pleaded as follows: -

a) Bruises on the scalp

b) Bruises on the neck

c) Bruises on the abdomen

d) Bruises on the lower back

e) Cut wound on the left thumb

f) Cut wound on the left palm

g) Sublaxation of the left shoulder joint

17. In the judgment, the injuries which informed the learned trial magistrate's award on quantum are listed as follows;

a) Bruises on the scalp

b) Bruises on the neck

c) Bruises on the abdomen

d) Bruises on the lower back

e) Cut wound on the left thumb

f) Cut wound on the left palm

g) Sublaxation of the left shoulder joint

h) Fractured 3rd and 9th ribs

i) Cut wound on the left foot near the ankle joint.

18. From the above, it is evident that the fracture injuries were not pleaded. I have however looked at the medical evidence on record and it is clear that the injuries were captured at page 2 of Dr. Ndeti's medical report which was omitted by the Appellant in the record of appeal. Dr. Ndeti examined the Respondent on 15/01/2016, approximately two weeks' after the accident. Indeed, the totality of the medical evidence on record proves, on a balance of probability that, the Respondent sustained the said fractures.

19. Further, and as correctly observed by the learned trial Magistrate, the medical report by the Appellant's doctor is inconclusive and states as follows;

> "*Initial chest and left shoulder x-rays dated 31/12/2015 to be availed for Dr. Muruka's opinion on the alleged rib fractures and left shoulder dislocation."*

20. The recommendation section of the report indicated as follows;

"*To be concluded after Dr. Muruka's report"*

21. Despite the *'findings'* section of the report indicating that the chest and shoulder x-rays were normal with no fracture or dislocation noted, it is evident that the report as presented did not rule out the fractures. In any case, the Appellant's doctor examined the Respondent on 18/04/2016, approximately four months after the accident and its probable that the fractures had united by that time. So, why were the fracture injuries not pleaded yet the plaint was filed on 15/03/2016, two months after examination of the Respondent by Dr. Ndeti?

22. It is my considered view that failure to plead was purely an error on the part of the Respondent's counsel. Ordinarily in *'running down'* claims such as this one, all a claimant does is to deposit the relevant documents with his/her advocate and await instructions on the way forward. The claimant has legitimate expectation that such an advocate, being an expert in legal matters, will represent and pursue the claim as expected. Therefore, in as much as the Respondent's counsel is decrying the incomplete Record of Appeal, he should have at the very least acknowledged his mistakes.

23. It is unfortunate that counsel did not even realize the omission on time to amend the pleadings. It is trite that parties are bound by their pleadings but I am of the view is that mistake of counsel should not be visited on the Respondent and justice will be best served if all the legitimate injuries are considered. Accordingly, I do not agree with the Appellant that the injuries sustained by the Respondent were purely soft tissue. I take it that the fractures were healed with time.

Issue (b) Whether the Quantum of damages should be disturbed

24. Award of damages is largely a question of discretion and the principles which should guide an appellate court in deciding whether to interfere with such an award are well settled. The appellate court should be satisfied that in assessing the damages, the trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

25. In his submissions before the trial court, the Respondent relied on **Nairobi HCCC No. 1127 of 1993; Miriam Njeri Murimi –vs-Kenya Broadcasting Corporation (2009) eKLR** where the plaintiff was awarded Kshs.450,000/= for the following injuries;

a) Cut wounds on the head

b) Cut wounds on right forearm

c) Bruising on both head and right forearm

d) Fractured ribs L1-6 and R11-12

e) Right haemothorax

f) Fracture dislocation of the right hip

g) Fracture dislocations of right shoulder joints.

26. The plaintiff in the above case was also awarded 12% permanent incapacity. In my view, the injuries sustained in the cited case were more severe than those of the Respondent herein and considering that it was decided in 2009, the award must have been quite substantial. I find the case of **Gabriel Kariuki *(supra)*** quite relevant and comparable though the fractures in it were several. My considered view is that the award in this case was inordinately high and should be substituted with Kshs.380,000/=. There was no dispute with regard to special damages.

27. The award should therefore be as follows: -

Special damages……..…. Kshs.4,600/=

General damages……Kshs.400,000/=

Total…….…..…Kshs.404,600/=

Less

10% contribution……..…….…....Kshs.40,460/=

Net award…….……...Kshs.364,140/=

28. I therefore set aside the judgment of Kshs.586,140/= and substitute it with a judgment of Kshs.364,140/= ***(Three hundred and sixty four thousand, one hundred and forty shillings)*** plus costs and interest. Half costs of appeal to the Appellant.

Orders accordingly.

Delivered, signed & dated this 14th day of February, 2020 in open court at Makueni.

…….……

Hon. H. I. Ong'udi

Judge