REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 141 OF 2015

GEOFFREY MARAKA KIMCHONG............................ APPELLANT

-VERSUS-

FRECHIAH HUGIRU..RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. T. W. Cherere, Chief Magistrate, delivered on 7 December 2015 in Eldoret CMCC No. 796 of 2014)

JUDGMENT

[1] This appeal was filed herein on **18 December 2015** by the Appellant, **Geoffrey Maraka Kimchong**, from the Judgment and Decree of **Hon. T.W. Cherere, CM,** (as she then was) delivered in **Eldoret Chief Magistrate's Civil Case No. 796 of 2014: Geoffrey Maraka Kimchong vs. Frechiah Hugiru**. The Appellant was the Plaintiff before the lower court and his cause of action was that, on or about the **9th September 2014**, he was lawfully travelling as a passenger in **Motor Vehicle Registration No. KBF 740U** when the Defendant's agent, driver, servant and/or employee so negligently and recklessly drove the said motor vehicle that he caused it to be involved in an accident.

[2] It was further the contention of the Appellant that he sustained serious injuries in the said accident, particulars whereof were set out in paragraph 5 of the Amended Plaint filed on **24 November 2014**. The Appellant, likewise, furnished the particulars of negligence as well as particulars of special damage suffered in his Plaint. He accordingly prayed for compensation in damages; and sought that the Respondent, who was the Defendant in the lower court suit, be held vicariously liable for his loss, pain and suffering.

[3] The claim was resisted by the Respondent vide the Statement of Defence dated **20 January 2015**. While admitting that she was the owner of the subject motor vehicle, **Registration No. KBF 740U,** and that it was involved in an accident on **9 September 2014,** the Respondent denied that the Appellant was a passenger in the said motor vehicle at the material time. She also denied the particulars of negligence set out in paragraph 4 of the Amended Plaint and averred that, if anything, the accident was inevitable. The Respondent similarly denied the particulars of injuries and special damage that were pleaded by the Appellant in paragraph 5 of the Amended Plaint and put the Appellant to strict proof before the lower court. In essence, the Respondent prayed that the Plaintiff's suit before the lower court be dismissed with costs.

[4] The matter was heard and four witnesses called in support of the claim. They included the Appellant as **PW4, Dr. Rono** of Moi Teaching and Referral Hospital **(PW1), Dr. Samuel Aluda**, a medical practitioner in Eldoret as **PW2** and **Cpl. James Momanyi** of Turbo Police Station as **PW3**. The Defence opted to rely on written submissions. Thus, the learned trial magistrate, upon considering and evaluating the evidence presented before entered Judgment in the Appellant's favour on **7 December 2015** as follows:

[a] Liability at 100%

[b] General Damages - Kshs. 80,000/=

[c] Special Damages - Kshs. 2,000/=

Total sum awarded - **Kshs. 82,000/=**

[d] Costs of the suit

[e] Interest at court rates.

[5] The Appellant was dissatisfied with the award. He consequently preferred this appeal, challenging the lower court's findings and award on quantum on the following three grounds:

> **[a]** That the Learned Trial Magistrate erred in law and in fact in awarding general damages that were inordinately low;
>
> **[b]** That the Learned Trial Magistrate erred in law and in fact in failing to award special damages as per the receipts produced as exhibits; and,
>
> **[c]** That the Learned Trial Magistrate erred in fact and in law in failing to consider the Appellants submissions on quantum of damages.

[6] Thus, the Appellant prayed for the setting aside of the subordinate court's award on quantum; and asked that the award be enhanced upwards. He also prayed that special damages be awarded as specifically pleaded and proved together with costs of the appeal; and that the Court be pleased to give any other relief it may deem fit and just to grant.

[7] The appeal was urged by way of written submissions, pursuant to the directions given herein on **26 March 2019**. Thus, in the Appellant's written submissions dated **1 April 2019**, the lower court's decision on liability was defended. Counsel made it plain that the appeal is confined to quantum; in respect of which Counsel, **Mr. Mwinamo**, submitted that since the injuries suffered by the Appellant were quite serious in nature, the award of **Kshs. 80,000/=** was inordinately low. He proposed an award of **Kshs. 2,000,000/=** and relied on **Nakuru HCCC No. 780 of 1991: Mwangi Gachanjwa vs. Luka Kibe & Another** in which General Damages were assessed at **Kshs. 500,000/=** for a bilateral fracture of the acetabulum of both hip joints with head injury; **Mombasa HCCC No. 354 of 1996: Kisemei Mutua vs. Lucy Muhugo & 2 Others** wherein **Kshs. 700,000/=** was awarded for pelvic fracture involving the right ramii and acetabulum; and **Nairobi HCCA NO. 134 of 1998: Texcal House Service Station Ltd & Another vs. Timo Kalevi Jappinen & Another** where General Damages were assessed at **Kshs. 1,750,000/=** for comparable injuries.

[8] It was further the submission of **Mr. Mwinamo** that the learned trial magistrate misdirected herself in her Judgment at pages 63 and 64 of the Record of Appeal in so far as the Appellant's injuries were concerned, in indicating that the Appellant suffered a prick wound on the right leg yet **Dr. Aluda's** Medical Report indicated otherwise. Counsel further pointed out that at page 64 the learned trial magistrate took the view that the Appellant had asked for **Kshs. 200,000/=** yet in his written submissions, the Appellant had asked for **Kshs. 2,000,000/=** as General Damages. He urged the Court to look at the said submissions at pages 43 to 44 of the Record of Appeal and find that the Appellant is indeed entitled to **Kshs. 2,000,000/=.**

[9] As for the Special Damage component of the award, Counsel urged the Court to consider what was pleaded vis-à-vis what was proved, in line with the principle laid down in **Ouma vs. Nairobi City Council [1976] KLR 297** that special damages must not only be specifically pleaded but also proved. He also pointed out that whereas **Dr. Aluda** testified that he charged and was paid only **Kshs. 1,500/=** by the Appellant for medical examination and report, the lower court inexplicably awarded a higher sum of **Kshs. 2,000/=.** He called for a review of that aspect of the award as well.

[10] Counsel for the Respondent conceded that it is apparent from the record that there might have been a mix-up of files; and that the resultant judgment was evidently informed by an error apparent on the face of the record. Thus, he was of the view that, in line with the Overriding Objective, the most appropriate remedy ought to have been a review as opposed to an appeal. He urged the Court to look at **Francis Njoroge vs. Stephen Maina Kamore** [2018] eKLR. He further submitted that, since the Appellant had asked for only **Kshs. 200,000/=**, if there were to be any enhancement on account of the apparent error, then it should not exceed **Kshs. 200,000/=.** Reliance was placed on **Dr. Harish Cunilal Shah vs. Richard Kipkoech Sang & Another** [2004] eKLR wherein **Kshs. 150,000/=** was awarded for a fractured acetabulum of the left hip joint, among other injuries. Counsel further conceded that **Kshs. 61,516/=** is awardable as Special Damages, for this is what was proved before the lower court.

[11] This being a first appeal, I am mindful that it is my duty to re-evaluate the evidence adduced before the lower court and, on the basis thereof, come to my own conclusions; bearing in mind, however, that I did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."**

[12] As has been pointed out herein above, the appeal is only on quantum; and therefore the single issue for consideration is whether the award made by the trial magistrate is reasonable, taking into account the injuries suffered by the Appellant. In this regard, I must remind myself that assessment of damages is a matter of discretion; and that an appellate court will hardly disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages."**

[13] Hence, it is germane to set out, at this point, the particulars of the injuries that were suffered by the Appellant as pleaded and proved. At paragraph 5 of the Amended Plaint, the Appellant's injuries were set out as follows:

[a] Cut wound on the cheek which was tender.

[b] Blunt trauma to the pelvis which was tender.

[c] Fracture of the right acetabulum.

[14] In proof of his injuries, the Appellant called two doctors, namely, **Dr. Paul Rono (PW1)** of Moi Teaching and Referral Hospital and **Dr. Aluda (PW2),** a private medical practitioner based in Eldoret. The evidence of **Dr. Rono** was that the Appellant was admitted at their facility on **9 September 2014** after a road accident in which he suffered a fracture of the right hip joint. He further stated that the Appellant was discharged on **7 October 2014** after an operation in which the fracture was fixed with a plate. **PW1** produced the Discharge Summary as the **Plaintiff's Exhibit No. 1** along with the P3 Form and Radiology Request Form. **PW1** also produced a bundle of receipts for **Kshs. 60,616/=** issued by Moi Teaching and Referral Hospital for the costs incurred in the Appellant's treatment. They were marked as the **Plaintiff's Exhibits 2 to 4** before the lower court.

[15] Dr. Aluda, on his part, testified that he examined the Appellant on **2 November 2014**. He presented a history of having been injured on **9 September 2014** in a road accident; and that on examining him he confirmed that he had suffered a cut wound on the cheek, blunt trauma to the pelvis which was tender; and a fracture of the right acetabulum. He noted that the Appellant was still experiencing tenderness on the cheek and pelvis. His prognosis and opinion was that the Appellant had sustained very severe injuries which were continuing to heal; and that he would still require the use of analgesics to manage the pain he was experiencing. **Dr. Aluda** also testified that he was paid **Kshs. 1,500/=** for his services. He produced both the Medical Report he prepared in respect of the Appellant and his receipt as exhibits before the lower court. They were marked the **Plaintiff's Exhibit 5(a) and (b).**

[16] No evidence was presented by the Respondent to rebut the medical evidence adduced by the Appellant's witnesses. It was therefore a misapprehension of the evidence for the trial magistrate to conclude that:

> **"The Plaintiff in this case suffered soft tissue injuries. Treatment notes PEXH. 1(a) and (b) show that the plaintiff went to hospital only once. There was no evidence that he had not fully recovered. I therefore find that an award of Kshs. 80,000/- general damages would be adequate compensation.**

[17] It is also manifest from the Judgment of the lower court (at pages 63 to 65 of the Record of Appeal) that the learned trial magistrate referred to Dr. Aluda's Report as the **Plaintiff's Exhibit No. 1(a),** instead of **Exhibit No. 5(a);** and that she indicated that the Appellant suffered a prick wound on the right leg (shin) which was tender, as opposed to a fractured acetabulum. She also indicated in her Judgment that the Appellant had asked for only **Kshs. 200,000/=** and had cited **NBI HCCC No. 597 of 2008: Saj Ceramics vs. Robinson Mongare** in which the plaintiff was awarded **Kshs. 130,000/=** for an injury to his leg. The fact of the matter is that the Appellant had asked for **Kshs. 2,000,000/=** in his written submissions dated **2 November 2015** and had relied on the same authorities that he cited before this Court.

[18] Thus, it could very well be true that there was a mix-up of files before the learned trial magistrate; and therefore that a review would have been the best recourse. Nevertheless, an appeal having been filed, it is imperative that a decision be rendered on the basis of the Grounds of Appeal proffered herein by the Appellant; and from a consideration thereof in the light of the lower court record, it is manifest that, on account of the misapprehension aforementioned, the learned trial magistrate arrived at a figure which was so inordinately low as to be an erroneous estimate of the damages due to the Appellant herein; and therefore the award ought to be set aside.

[19] Having given due consideration to the two authorities cited by Counsel for the Appellant, all of which involved fracture of the acetabulum the following observations can be made:

[a] In **Nakuru HCCC No. 780 of 1991: Mwangi Gachanjwa vs. Luka Kibet & Another**, the Plaintiff, a minor, had sustained slightly more serious injuries in the form of bilateral fracture of the acetabulum of both hip joints along with head injury. The injuries healed with post-traumatic arthritis in both hip joints, especially on flexion and abduction. The Plaintiff also suffered severe mental impairment due to brain concussion. As a result, he was unable to remember past events. He was awarded **Kshs. 500,000/=** on **7 May 1998** for pain suffering and loss of amenities.

[b] In **Mombasa HCCC No. 534 of 1996: Kisemei Mutua vs. Lucy Muhugo & 2 Others**, the plaintiff therein sustained a fracture of the right pelvic ramus and acetabulum as well as whip-lash injury to the neck with fractures of the spine. His urethra was also affected and he had to undergo 2 operations. He was awarded **Kshs. 700,000/=** on **14 December 2000** for his pain suffering and loss of amenities.

[c] In **Nairobi HCCA No. 134 of 1998: Texcal House Service Station Ltd & Another vs. Timo Kalevi Jappinen & Another**, the Plaintiff was awarded **Kshs. 1,750,000** by the High Court for dislocation of the right hip joint, with comminuted fractures of the posterior rim of the acetabulum, compound comminuted fracture of the lower left tibia and fibula with bruises over the right side of the forehead. He had undergone five operations under general anaesthesia and was severely affected psychologically. The Court of Appeal reduced the award to **Kshs. 750,000/=** on **23 April 1999**.

[d] In **Dr. Harish Cunilal Shah vs. Richard Kipkoech Sang & Another** [2004] eKLR, which was cited herein by Counsel for the Defence, the Plaintiff lost consciousness, having suffered cerebral concussion, laceration of the forehead, fracture of four ribs on the left side of his chest, as well as fracture of the acetabulum of the left hip joint. He was awarded **Kshs. 150,000/=** on **20 May 2004** as General Damages for his injuries.

[20] I have endeavoured to look for more recent comparable awards and found instructive the following two authorities:

[a] In **Cold Car Hire Tours Limited vs. Elizabeth Wambui Matheri** [2015] eKLR wherein the Respondent suffered a

comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the lower court award of **Kshs. 1,400,000/=** as general damages was upheld by the High Court on appeal in a decision delivered on **11 February 2015**.

[b] Similarly, in **Kennedy Ouma Dachi vs. Joseph Maina Kamau & Another** [2018] eKLR an award of **Kshs. 1,000,000/=** was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to **Kshs. 1,400,000/=** on the grounds that:

"A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility… the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis."

[21] It is in the light of all the foregoing authorities aforementioned that I find an award of **Kshs. 1,000,000/=** to be fair and reasonable in the circumstances under the General Damages head, considering that there was no specific indication in the Medical Reports that the Appellant would require hip replacement. In terms of Special Damages, the same erroneous approach aforementioned was employed by the trial magistrate, such that, whereas the Appellant asked for **Kshs. 61,516/=** in his Plaint which was proved by the documents produced by **Dr. Rono (PW1)** and **Dr. Aluda (PW2),** he was awarded only **Kshs. 2,000/=,** ostensibly for **Dr. Aluda's** Medical Report, for which he paid only **Kshs. 1,500/=.** Hence, Counsel for the Respondent conceded that the Appellant is, indeed, entitled to the aforementioned sum of **Kshs. 61,516/=** as Special Damages. He is accordingly awarded that sum.

[22] In the result, the Appellant's appeal succeeds and is hereby allowed and an order made that the Judgment and Decree of the lower court in **Eldoret CMCC No. 796 of 2014** dated **7 December 2015** be and is hereby set aside and substituted with Judgment in the Appellant's favour for:

[a] Kshs. 1,000,000/=, being General Damages for his pain, suffering and loss of amenities;

[b] Kshs. 61,516/=, being Special Damages;

[c] Interest at court rates from the date of the lower court judgment;

[d] Costs of both the lower court suit and this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF MARCH 2020

OLGA SEWE

JUDGE