REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 72 OF 2019

DANIEL GATANA NDUNGU...1ST APPELLANT

FRANCIS KIBE NGANGA..2ND APPELLANT

VERSUS

HARRISON ANGORE KATANA aka **HARRISON ANGORE** aka

HARRISON NGUMBAO..RESPONDENT

BETWEEN

HARRISON ANGORE KATANA aka **HARRISON ANGORE** aka

HARRISON NGUMBAO...PLAINTIFF

VERSUS

DANIEL GATANA NDUNGU...1ST DEFENDANT

FRANCIS KIBE NGANGA..2ND DEFENDANT

(Being an appeal from the Judgment delivered by the Learned Chief Magistrate Hon. Dr. Julie Oseko in Civil Suit No. 76 of 2018 in the Chief Magistrate's Court, Malindi on 10th day of September 2019)

CORAM: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocates for the Appellant

Wambua Kilonzo Advocates for the Respondent

JUDGMENT

This is an appeal by the appellant against the Judgment delivered by the Chief Magistrate **Hon. Dr. Oseko** in **CMCC NO. 76 OF 2018** on 10.9.2019 whereby she ordered that the respondent be paid Kshs.350,000/= as general damages for pain and suffering and loss of amenities.

Being aggrieved with the order the appellant preferred an appeal based on the following grounds:

1. ***That the Learned Chief Magistrate erred in awarding a sum of Kshs.350,000.00/= to the respondent (hereinafter referred to as the plaintiff) as general damages.***

2. ***That the said award of Kshs.350,000.00/= 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. Ajoni Adede in his medical report dated 7th December 2017.***

3. ***That the said award of Kshs.350,000/= 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 Chief Magistrate failed to give any or any adequate or credible reasons of how she arrived at the figure of Kshs.350,000.00/= general damages which she awarded to the plaintiff on the basis of 100% liability.

5. That the Learned Chief Magistrate erred in failing:-

a. To appreciate the significance of the various facts that emerged from Dr. Ajoni Adede's medical report dated 7th December 2019.

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

c. To make any or any proper findings on the aspect of quantum of damages on the evidence before her.

6. That the Learned Chief Magistrate erred in failing to adequately consider the written submissions filed by counsel for the appellant.

Background

The respondent **Harrison Angore Kataka** alias **Harrison Ngumbao** filed suit in a plaint dated 19.2.2018 alleging that on or about 12.8.2017 along Mombasa – Malindi Road, he was driving motor vehicle registration KTWB 590H when the 2nd defendant so negligently drove, managed and or controlled motor vehicle KBP 350D that the same collided with his motor vehicle from the rear, causing it to overturn. Whereof the respondent suffered injuries: cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. As a result of the accident the respondent blamed the appellants fully on negligence and breach of duty of care as particularized in paragraph 5 of the plaint. The appellants filed joint statement of defence in court on 10.4.2018 in which they denied occurrence of an accident, particulars of negligence and that the respondent suffered any injuries associated with the aforementioned accident.

Appellants, however in the alternative pleaded contributory negligence against the respondent as pleaded in paragraph 5 of the statement of defence.

Evidence at the trial

The trial commenced in earnest and both liability and award of general damages remained contested. Frankly stated at the hearing on oath the respondent – **Harrison Angore** explained to the trial court that the collision between his motor vehicle with that of the appellant happened on a straight road along Malindi – Mombasa Highway. On the said road, there were no unusual surroundings or circumstances within the road or around the scene that could have precipitated the accident. After the collision, the respondent stated in court that he sustained personal injuries which saw him treated at Malindi Hospital as evidenced by the treatment notes dated 12.8.2017, 14.8.2017 and 6.9.2017.

In the same vein the respondent also identified the P3 Form, the copy of records of registration of subject motor vehicle to give credence to his claim.

PW2 – CIP George Naibei, testified as the Base Commander attached to Malindi Traffic Base overseeing the enforcement of the Traffic Act within the Sub-County. According to PW2, on receipt of the accident report he proceeded to the scene and began correlating data and information on the accident. That is when it occurred to him that the 2nd appellant (2nd defendant) drove motor vehicle KPB 350B make canter which directly hit the respondent Tuktuk registration number KTWB 590H from the rear. He produced the P3 and police abstract as exhibits.

PW3 Dr. Adede medical practitioner based at Mombasa testified that he examined the respondent who came with a history of having been involved in a road traffic accident. According to **Dr. Adede**, the physical examination showed that the respondent suffered non-skeletal injuries to the head, right knee and upper limbs. In his prognosis he opined that residual scars to the head, trauma to the right knee, in all remained to be the physical impact of the injuries suffered by the respondent.

In her Judgment, the Learned trial Magistrate wholly appropriated liability at 100% against the appellant jointly and severally. On the same breadth, she awarded general damages of Kshs.350,000.00/=. This later order occasioned dissatisfaction by the appellants who asked this court to have a second look at it and if necessary interfere with it by substituting with a fair and just award.

Determination

Duty of the appellate court is well spelt out in the case of **Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR.**

The other critical point of convergence for the court is to bear in mind that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. **(See Simon Tavera v Mercy Mutitu Njeru {2014} eKLR).**

Notably, of greater significance is the acknowledgment that the court does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though there are no sufficient grounds. The rationale is both constitutional and statutory that where a Judgment has been made by a competent court an appellate court is estopped from asserting the contrary position unless on the well settled principles as propounded in **Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470).**

> ***"Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low."***

It was noted in a comparative jurisdiction in the case of **Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294** being guided by the principles enunciated by both **Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J** stated as follows:

> ***"The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."***

The import of discretion by an appellate court to further interfere with a decision of an order or Judgment of another court exercising a judicial function is a weighty matter only to be done within the confines of the principles in **Price and Another v Hilder {1996} KLR 95** which laid down the following guidelines that:

> ***"In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."***

Primafacie in that trial properly conducted by the Learned trial Magistrate the respondent was and is entitled to an award of general damages both on the objective and subjective strands. There is no question that the respondent evidence was sufficiently presented with no rebuttal from the appellant to contravene it on the assessment of damages. so to what extent of the award, did the appellant get dissatisfaction.

According to Learned counsel when the Learned trial Magistrate became over-generous and awarded Kshs.350,000.00/= far beyond the principles on similar injuries go hand in hand with similar awards. While I must exercise restraint at all times from interfering with the exercise of discretion of a trial court. Its not lost on me that appellate jurisdiction is an upper layer of system of court to correct any errors, misdirections or acts done in excess of jurisdiction.

I have reviewed both Learned counsels submissions before the trial court to satisfy myself on the pathway chosen by the Learned trial Magistrate to award damages of Kshs.350,000.00/= for pain and suffering. I went further to establish whether any of the authorities cited stands within the general rules of application on injuries and awards similar with those suffered by the respondent. Indeed, in the case of **Fred Barasa Matayo v Channan Agricultural Contractors {2013} eKLR:**

> ***"The court reviewed downwards an award of Kshs.250,000/= to Kshs.150,000/= to moderate soft tissue injuries that were expected to heal in eight months' time."***

In **Dickson Ndungu v Theresia Otieno & 4 Others {2014} eKLR:**

> ***"The court reviewed the award of Kshs.250,000/- to Kshs.127,500/= for soft tissue injuries which produced no complains."***

Further, in **Purity Wambui Muriithi v Highlands Mineral Water Company Ltd {2015} eKLR**:

> ***"The award of Kshs.700,000/= was reduced to Kshs.150,000/= for injuries to the left elbow, pubic region, lower back and right ankle."***

Applying these cases and the illuminating principles in the cases discussed elsewhere in this Judgment, I am satisfied and do concur with the appellant counsel that this is one of those cases with greatest respect, I must interfere with the award of damages. With respect to the exercise of discretion by the Learned trial Magistrate she misdirected herself on the appropriateness and reasonableness of the award for injuries basically described as soft tissue with no residual permanent disability. Into this message in **Lim v Camden HA {1980} AC 174:**

> ***"Even in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to mulct the tortfeasor for the injury he has caused."***

There is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low level soft tissue injuries. In **Mcgregor on damages 15th Edition 1988 paragraph 153**, its observed as follows:

"pain and suffering is now almost a term of art. In so far as that can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it.

It thus includes the pain caused by any medical treatment which the plaintiff, might have to undergo. Suffering on the other hand denotes the mental or evidential distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like, it is not however, usual for Judges to distinguish between the two elements?

Whereas loss of amenity is deprivation of the plaintiff of the capacity to do the things which before the accident he was able to enjoy, and due to the injury he is fully or partially prevented from participating in the normal activities of life."

(See Cook v Jlkier & Co. Ltd {1970} 1WLR 774) In this appeal I must emphasize as other courts have done before me that the

"discretion necessary involves a latitude of individual choices according to the particular circumstances and differs from a case to case basis" **(See Evans v Barrlam {1937} AC 473)**

I have once remarked elsewhere that the determination of the claimants rights and obligations in any legal proceedings as postulated in our constitution and enabling statutes, which may result in a Ruling, order or a Judgment. Its all an exercise of discretion throughout the hierarchy of courts under Article 162 of the Constitution.

As it transpires in matters of discretion in the context of judicial hierarchy and the issuing of decisions from the superior courts to the trial courts for guidance this metaphor sums it all:

"The relationship between the Supreme Court and the lower courts, is in some ways like that of persons walking their dogs. The dog on a leash is free to lead, or follow the owner. The dog's position is not congruent with that of the owner, but the degree of incongruence is limited by the length of the leash selected by the owner. And when the owner changes direction and pulls on the least, the dog follows it is responsive to changes in the owner's position." By deciding cases, the Supreme Court directs the work of the lower courts, but the inevitable ambiguity of the courts precedents permit them to exercise a measure of discretion where still complying with its basic directions." In this metaphor, the High Court opinion to the Learned trial Magistrate can be said to be the leash which defines a zone of discretion in which the court may legimately exercise of discretion." (attributable to Song and Cameron.)

Going to the core in the present case, the Learned Magistrate reached an erroneous decision and the assessment can be best described as inordinately high.

Accordingly and for reasons stated, I would allow the appeal, and set aside the award of Kshs.350,000.00/= by substituting it with Kshs.140,000.00/=, taking into account the salvage of inflation as an additional factor. The costs of this appeal be equally shared by the appellant and respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. Mr. Atiang holding brief for C. B. Gor for the appellant

2. Mr. Mulwa holding brief for Wambua Kilonzo for the respondent