



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 41 OF 2018

JAMES ITHALE AKOTHE.....APPELLANT

VERSUS

EDWIN SOYA BUSOLO.....RESPONDENT

(An appeal from the Judgement of Hon. R. K. Ondieki, SPM in Kilifi SPMCC. No. 32 of 2016)

CORAM: Hon. Justice R. Nyakundi

Isaac Onyango for the appellant

Sherman Nyongesa for the respondent

JUDGEMENT

The core issue in this first appeal is on assessment of general damages for pain, suffering and loss of amenities of Kshs.2,000,000 awarded to the respondent plus costs and interest.

Background

On or about the 30th July, 2015 the plaintiff **Edwin Busolu** was riding motorcycle Registration number KMCU 152H along Mombasa-Malindi Road, at Mtwapa, when the defendant (appellant) motor vehicle Registration KBW 920E being driven by the servant, agent or employer was negligently so driven and uncontrolled that it collided with the plaintiff (respondent) motorcycle occasioning serious bodily injuries. According to paragraph 5 of the plaint the particulars of negligence and or breach of duty of care on the part of the defendant (appellant) is as particularized and outlined to squarely occasion liability wholly by the defendant or his agent or servant.

In the instant case parties and on advise of their respective counsels appropriately recorded consent on liability at a ratio of 40% 60% as against the plaintiff and the defendants jointly and severally.

It was therefore the singular duty of the trial magistrate based on the submissions and evidence to assess and award quantum.

Further from the record that onerous task was faithfully discharged but as discernible from the appellant contention there are still issues required of this First appellate court to interrogate as premised in the memorandum of appeal:

1. ***THAT*** the assessment and award of general damages for pain, suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate.
2. ***THAT*** the learned trial magistrate in assessing, general damages for pain, suffering and loss of amenities applied the wrong principles by leaving out of account some relevant factors viz passage of time, precedent, inflation, length of suffering by the Defendant, his age, and the extent of recovery.
3. ***THAT*** the learned trial magistrate misapprehended the evidence and misapplied and or misunderstood the correct legal principles and judicial precedent that he made an award for general damages for pain suffering and loss of amenities was erroneous and inordinately high.
4. ***THAT*** the learned trial magistrate erred in failing to make an award on a wholesome basis before deduction of the

Respondent's agreed contributory negligence.

5. ***THAT*** the learned trial magistrate erred in law and fact in failing to appreciate that the Medical Report of Dr. Udayan R. Sheth constituted the latest report on the recovery status of the Plaintiff.
6. ***THAT*** the learned trial magistrate erred in law and fact in failing to exercise his discretion on assessment of damages with an impartial and independent mind.
7. ***THAT*** the learned trial magistrate erred in failing to consider, apply, distinguish and or circumvent on the written submissions and comparable case law tendered by the Appellant.
8. ***THAT*** the learned trial magistrate erred in law and fact in failing to appreciate that trite law has it that special damages must not only be pleaded with particularity but be strictly proved.

Submissions on Appeal

The appellant counsel **Mr. Onyango** in a ninety eight page document on submissions is aggrieved that the learned trial magistrate failed to appreciate the evidence on the gravity of the injuries suffered by the respondent, further medical evaluation and opinion given by **Dr. Ndegwa** and **Dr. Sheth** which by their very expert opinion confirmed the level of recovery of the respondent.

According to learned counsel those facts ought to have reasonably impacted on the assessment of damages. His main contention was to the effect that the learned trial magistrate overemphasized the medical report by **Dr. Ndegwa** in contrast with that of **Dr. Sheth** with regard to the injuries and prognosis.

Further counsel submitted that the issues as framed and considered by the learned trial magistrate entitles this court to re-examine the record and the judgement with a view to exercise discretion and interfere with the award. Whereas counsel is in agreement that the respondent was entitled to damages for pain and suffering, the question on the final award went against the laid down principles in similar cases, he urged this court to find as such.

Accordingly to buttress these differences on the injuries and the course taken by the learned trial magistrate the following authorities were cited as a plausible to invoke the appellate jurisdiction: **Michalle Njagi Karimi v Gideon Ndungu Nguriku & another (2013) eKLR, Desmond Kipruto v Brazzaville Musumba (2006) eKLR, David Kiplagat Saud v Richard Kipkoech Lungat & another (2008) eKLR, Gilbert Kinago Oloan v Richard Metet (2016) eKLR, Cecilia W. Mwangi v Ruth Mwangi (1997) eKLR and Ali v Mohozozo (1983) KLR 602.**

From the enumerated principles in the above cases learned counsel proposition was to have the Kshs.2,000,000 award for pain and suffering interfered with and substituted with a lesser award of Kshs.500,000.

The Respondent's Submissions

In contrast with the appellant counsel ninety eight page submissions, the respondent counsel put up a rejoinder of a six page written submissions to oppose the appeal on quantum. Analogously, on submissions to borrow a leaf from **Winston S Churchill** "A good submission should be like a miniskirt as short as possible to catch the judges attention and just long enough to cover what the case is all about."

Learned counsel urged this court to evaluate the totality of the evidence and exercise of discretion by the learned trial magistrate, which shows no shortcomings capable of inviting the wrath of this court over the assessment of damages. Learned counsel's argument and submissions was based on the following principles of law as demonstrated in the cases of: **Ugenya Bus Service v James Kango Gachohi, Maynard v West Midlands Regional Health Authority, Kigaragari v Agripana Mary Aya 1982-1988 KAR 768, Gitobu Imanyara 82 others v A.G. (2016) eKLR, Butt v Khan (1981) KLR 349 Kemfro Africa Ltd T/A Meru Express Services and Gathogo Kamau v A.M Lubia & Olwe Lubia 1982-88 I KRA 727.**

According to learned counsel the question as to whether the learned trial magistrate directed himself on the evidence and applicable principles has not been discharged by the appellant.

On his part learned counsel relying on the distillation of key principles in **Zipporah Nangila v Eldoret Express Ltd. & 2 others 2006 eKLR and Gabriel Mwashana v Mohamed Sujjad & another (2015) eKLR** rooted for an award of Kshs.3,000,000 but in that case the trial court assessed the claim at Kss.2,000,000. Learned counsel urged the court to remain alive with this initial submission and the parallel contention by the appellant counsel without interfering with the final award for lack of merit ostensibly from the nature of the appeal itself.

Determination

I will commence with the very salutary principles on the duty of the first appellate court to re-evaluate the evidence of the trial court, appreciate the findings of the court below, bearing in mind the advantage of observing the demeanour and impression formation as to their credibility remains within the purview of a trial court. That the jurisdiction of an appeal court is not meant to merely substitute its own decision with that of the trial court in absence of very clear reasoning and principles. The cases at bar and the principles of law are to be found in **(Peters v Sunday Rose Ltd 1958 EA 424, Selle & another v Associated Motor Boat Company Ltd & others (1968) EA 123.** The other instrumental principles applicable on the duty of the First Court are the one illuminated in **Kigaragari v Agripana Mary Aya 1982-88 KAR 768 and Butt v Khan (1981) KLR 349.**

The touch stone of these two authorities are as restated herein under:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 so arrived at a figure which was either inordinately high or low.”

These principles would remain to be the yardstick in which the appellant particularized grounds of appeal can be measured in the re-assessment of damages.

It is also a well settled principle that the discretion to re-assess and re-evaluate general damages already awarded by the trial court the fundamental principles are as stated in the cases of **Dharamshi v Karban (1974) EA 40** where the guide in awarding damages is **restitutio in intergrum**; which means **“the plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred”**.

I must also add what the court said in **Kimatu Mbuvi T/A Kimatu Mbuvi & Boros v Augustine Munyao Kioko CA No. 203 of 2001**, the court citing with approval the case of **H. West & Sons Limited v Shepherd 1964 A.C. 326** where it was stated inter alia:

“That difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgement and of experience.” In a sphere in which no one can predicate with complete assurance that the award made by another is wrong, the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to which award he himself would have made. Having done so and remembering “that in this sphere, there are inevitably difference of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his assessment”.

Within this jurisdiction besides the aforesaid principles, I think I am of the view that the court should bear in mind what **Author Mankman** in the text **“Damages for injuries and death 10th Edition”** said:

“There is no doctrine of precedent in fixing the quantum of damages. The court does not look for precedents but for a general guide and the current range of damages. It looks for assistance in difficult problems not for an inflexible pattern which would confine the courts within fixed limits.”

From these principles I would direct my analysis to the evidence, and the impugned final award. The plaintiff (respondent) evidence on the injuries suffered was well documented in the discharge summary and medical report dated 22nd January, 2015 and 12th September, 2014 respectively from Coast Province General Hospital.

At that time x-ray taken showed fracture of the right femur tibia and fibula. He was admitted on 30th July, 2014 and got discharged on 22nd January, 2015. The medical evidence by Dr. Ndegwa dated 28th April, 2015 tendered in evidence showed the plaintiff (respondent) injuries suffered to involve the following: comminuted and displaced fracture of the right femur compound upon comminuted and displaced fracture of the right lower tibia extending into the ankle joint. Comminuted and displaced fracture of the right lower fibula extending to the ankle joint, Degloving injury to the right upper arm with several lacerations on the forearm and right shoulder, Blunt injury to the right knee joint, lacerations to the right eye.

In addition, the plaintiff also produced medical reports from Mombasa Hospital dated 30th July, 2014, 4th August, 2014, 8th September, 2014, 25th August, 2014 and 3^{1st} August, 2014 which must have formed part of review undertaken by Dr. Ndegwa in his report.

In his later report of 21st April, 2016, Dr. Sheth made the following remarks: The plaintiff sustained injury of the comminuted displaced fracture right femour, compounded comminuted fracture right lower end of the tibia/fibula, lacerated wound over right arm and forearm, cut wound near right eye, Right femur fracture was fixed with nail and screws. Present complaints chronic would lower end of right leg, pain right leg. At present, he has permanent incapacity due to surrounding and stiff right ankle of 10%. He need skin grafting for the wound over right leg.

Prima facie from the above medical reports, further period of hospitalization at coast General Hospital on 30th July, 2014 to the 22nd January, 2015 is a clear demonstration that the respondent went through a harrowing experience as a result of the injuries suffered in the aforesaid traffic accident. All these matters of pain and suffering, discomfort, trauma, psycho-traumatic, and emotional disturbance cannot be measured by way of an award of general damages. It has been held again and again that damages cannot restore the impaired human frame. The award of damages remains to be a way of saying sorry for the loss arising out of a breach of the duty of care in negligence. In **Cornilliac v St. Louis {1965} 7 W.I.R Pg 491**:

“the extent to which the Court can strengthen the inference against assessment of damages depends upon various considerations as follows:

(1). The nature and extent of the injuries sustained.

(2). The nature and gravity of the resulting disability.

(3). The pain and suffering which had to be endured.

(4). The loss of amenities suffered and the extent to which consequently, the appellant pecuniary prospects have been materially affected.”

Learned counsel for the appellant point is all about the learned trial magistrate ignoring the medical report by **Dr. Sheth** and sought to rely heavily on **Dr. Ndegwa's** medical report and as a consequence arrived at an erroneous quantum.

I have an answer for learned counsel. First the test here is not on the prognosis and level of disability as opined by the two doctors but on the principle in **Pogas Distributors Ltd Etal v Mckitty SCCA 13/1994** where the court stated interalia:

“The impairment rating is not the litmus test to be used to determine the level of damages to be awarded.”

Secondly, the statutory provisions of Section 48 of the Evidence Act on expert evidence and the importance of it in the final decision of the court is a matter purely within the realm of that trial court discretion. In so doing the court in **Stephen Kinini Wangondu v The Ark Limited 2016 eKLR** held that:

“Expert testimony like all other evidence must be given only appropriate weight. It must be as influential in the overall decision making processes 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. While there are numerous authorities asserting in the 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:

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 formulae against hence actions are the n to be rigidly judged with a mathematical rescission.

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 finding 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.

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.

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.”

In the wake of this the set guidelines is left for the trial judge or magistrate to examine and assess the reliability, testability, materiality, reliability, probative value, relevance and reasonability of scientific expert evidence to establish existence or non-existence of facts as stipulated in Section 107(1) of the Evidence Act.

What makes the medical report by **Dr. Ndegwa** erroneous and that of **Dr. Sheth** of probative value category on expert evidence credible enough to produce answers as to the best opinion on the injuries suffered by the respondent has not been defined by the appellant counsel.

From the taxonomy and importance of expert evidence in the principles stated in **Stephen case (supra)** the degree of its admissibility quite appropriately as the basis of the decision has been left to the discretion of the trial magistrate/judge as trier of facts.

Moving down to the decision of the learned trial magistrate, there is no evidence that expert opinion did not follow the well-known accepted paths to bolster the character of evidence on which the judgement of the court was based.

In this appeal I have reviewed the evidence and impugned judgment of the trial court on assessment of damages, the grounds of appeal and submissions by both counsels, and court record remained to be the yardstick in which this appeal court was to consider matters of law and facts. Whereas, sometimes, the appellate court can be led into temptation to interfere with the decision of the trial court and have it substituted with its own but in the circumstances of this case I resist to be tempted by the appellant counsel.

Relief by this court is only available where the appellant has satisfied the threshold laid down in **Dainty v Haji and another Civil Appeal Number 59 of 2004 1KLR (2005) 1 EA 43** and **Hassan v Nathan Mwangi Kamau Transporters (1985) LLR 250 CAK**.

In this connection the appellant counsel did not improve on what was said by the trial court in its judgement subject matter of this appeal, respectfully for me to agree to subscribe to the views that the learned trial magistrate exercised the discretion wrongly on assessment of damages.

The conclusion I reach based on the evidence and guideline reasoning by a reasonable tribunal duly constituted under Article 50(1) of the Constitution, the appellant has not shown that the findings of the trial court are erroneous in law and fact. This renders the appeal incompetent and I am pleased to dismiss it with costs to the respondent.

For all those reasons the judgement of the trial court be and is hereby affirmed.

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

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mwanja for Onyango for the appellant