REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 56 OF 2019

NICKSON KAZUNGU KARISA.....1ST APPELLANT

PRIME COMFORT HOTEL.....2ND APPELLANT

VERSUS

ISAAC SOLFA MUYE.....RESPONDENT

(Being an appeal from the judgement delivered by the Learned Senior Resident Magistrate

Hon. L.N. Juma in Civil Suit No. 9 of 2016 in the Principal Magistrate's court,

Kilifi on 11th day of July 2019)

Coram: Hon. Justice R. Nyakundi

Mr. Gor for the Appellant

Mr. Mbuya & Co. for Respondent

JUDGEMENT

This appeal has been authored against the award of general damages of Kshs.40,000 by the Senior Resident Magistrate Kilifi Hon. L.N. Juma dated 11th July, 2019.

In general the appellant counsel Mr. Gor as expected on appeals of this nature has broken down the dissatisfaction with the order into six grounds of appeal particularized as follows:

1. That the Learned Senior Resident Magistrate erred in awarding a sum of Shs.400,000.00 to the Respondent (hereinafter referred to as the plaintiff) as general damages.

2. That the said award of Shs.400,000.00 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 juries suffered by him. juries

3. That the said award of Shs.400,000.00 is altogether disproportionate to the injuries sustained by the plaintiff and is not in keeping with other comparable aw2ards 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 figure of Shs.400,000.00 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 consider or properly consider all the evidence before him and/or***

b. To make any or any proper findings on the aspect of quantum of damages 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 first most important matter to be remembered on appeal is to recapitulate the summary of the evidence which gave rise to the impugned order or judgement.

It is quite plain from the issues arising from the pleadings that on 15th January, 2016 the respondent filed a claim for compensation as a result of the injuries sustained on 25th July, 2015 when lawfully travelling on board motor vehicle registration number KAV 451Y along Mombasa-Kilifi Road. That on the material date, the 1st defendant drove, managed and or controlled motor vehicle registration KBQ 726K in such reckless, careless and negligence manner, that led to the collusion with motor vehicle KAV 451Y. Thereafter the respondent sustained concussion, blunt trauma to the right jaw and blunt trauma to the right side of the face.

The appellant/defendant filed their statement of defence on 5th April, 2016 admitting occurrence of an accident but on negligence put the respondent to strict proof, in a manner that each particular of negligence averred in the plaintiff was denied seriatim. As to the findings on the nature and gravity of injuries sustained by the respondent, the appellants cast a doubt and intended to challenge them at the hearing of the suit.

Turning to the issue on liability, nevertheless inspite of the defence misgivings a consent order was reached and adopted as a court order apportioning blame wholly at 100% as against the appellants.

The only issue now drawn upon the pleadings and call for evidence for the trial court to determine was that of assessment of general damages for pain and suffering and loss of amenities.

The respondents case proceeded as he took the witness stand to highlight the collision and the resultant injuries sustained on the fateful day. He explained that at first instance he was treated at St. Fatman Hospital on admission on 25th July, 2015. He indicated to the court about the P3 Form and the medical report by **Dr. Ndegwa (PW2)** dated 17th September, 2015 as documentary evidence to corroborate the injuries sustained during the accident to the head, blunt trauma to the right side of the face and jaw.

In the diagnosis carried out by **Dr. Ndegwa** (who testified as PW2) he stated that the respondent head injuries culminated into a residual 5% permanent disability likely to occasion mental illness and or epilepsy. The evidence by the respondent and his witnesses was all tested by the appellant in cross-examination.

From the record both counsels filed written submissions as their executive summary of the case and the respective proposals on what each considered the best award for the benefit of the plaintiff under the claim of pain and suffering and loss of amenities.

The appellant counsel placing reliance on principles in the case of **Charles Mwikamba Solia v Salim Mahrus HCCC 256 of 1987** pitched on the compensation of Kshs.200,000.00 - 225,000.00 on the basis of 100% liability.

As regards the respondent counsel on this aspect of the trial, he proposed an award of Kshs.1,200,000.00/= as adequate compensation citing the case of **PN. Mashru Limited v Omar Mwakoro Makenge (2018) eKLR.** That basically is the case preferred on appeal to this court.

Analysis and determination on the issue of general damages

It is trite as postulated in the cases of **Sumaria & another v Allied Industries Ltd (2007) KLR, East African Portland Cement Company Ltd v Tihikia Kenol 2016 eKLR** that:

> ***"The position of the law as regards a first appeal is that as the first appellate court, this court has a duty to reconsider the evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing witnesses to take into account, their demeanor and credibility."***

It is also the case, that an appellate court will not interfere with an award of damages unless it is shown as Law JA held in **Butt v Khan 1981 KLR at page 356** as follows:

> ***"The 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/she misapprehended the evidence in same material aspect and so arrived at a figure which was either inordinately high or low." (See also Kitavi Coastal Bottlers Ltd 1985 KLR 470)***.

It is important to note that the nature of injuries sustained by the respondent are clearly cited in his witness statement and on oath during the trial. From the evidence deduced and corroborated by **PW2 – Dr. Ndegwa**, the specific injuries were duly diagnosed to involve a concussion to the head and blunt trauma to the left jaw and the face.

The view of the appellants as submitted on appeal, these injuries are of lesser state that could not have attracted a compensation of Shs.400,000.00. Although the appellant did not challenge the medical report by **Dr. Ndegwa** with evidence from another expert of equal scientific knowledge and skill, learned counsel proceeded to argue that there was overreliance on it by the learned trial magistrate.

The point which has always occupied my mind on appeal when it comes to review or affirmation of the judgement of trial courts admittedly

on assessment of damages is the applicability of similar past awards principles. It may be feasible yes to give effect to the rule on similar injuries and corresponding awards, but there is need to bear in mind always the dissimilarities of major and minor injuries in each specific case.

These important words of pain, suffering and loss of amenities in assessment of damages shall lie distinctively from one decision to another due to the difficult of ever correlating evidence and identical cases like the Siamese twins.

In the case of **Pickett v British Rail Engineering Limited (1980) A.C. 136 – at page 167-168** Lord Scarman said as follows:

> ***"There is no way of measuring the money, pain, suffering, loss of amenities and loss of expectation of life. All that the court can do is to make an award of fair compensation. Incurably this means a flexible judicial tariff, which judges will also as a starting poingt in each individual case, but never in itself as decision of any case. The judge inheriting the function of the jury, must make an assessment which in the particular case, he thinks fair, and if his assessment be based on correct principle, and a correct understanding of the facts, it is not to be challenged, unless it can be demonstrated to be wholly erroneous (Davies v Powell Duffryn Associated Collieries Ltd (1942) A.C. 601.***
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> ***See also the dicta on this legal proposition by Lord Morris in H. West & another v Shephard (1964) A.C. 326-353"***

In short the above cited authorities tend to emphasize that when it comes to personal injuries claims, the awards should be reasonable and the facts discerned as far as possible go hand in hand with comparable injuries and awards.

Be that as it may, it must be observed that the decision of the trial court to award a particular sum as to the injuries suffered by a claimant is a discretionary function protected by the Constitution and statute. The phrase discretionary decision according to established principles and case law refers to different legal conceptual framework. In the case of **House v Theding (1986) 1936 55 CLR 499** the court fashioned the guidelines as follows:

> ***"If the questions involved tend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the question, it would be wrong to allow a court of appeal to set aside a judgement at First Instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at First Instance. In conformity with the dictates of principled decision – making, it would be wrong to determine the parties rights by reference to a mere preference for a different result over that favoured by the judge at First Instance in the absence of error, on his part.***
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> ***According to our conception of the appellate process, the existence of an error; whether of law or fact, on the part of the court at First Instance is an indispensable condition of a successful appeal."***

When the trial court or tribunal considers the evidence with regard to the dispute and exercise of discretion for the decision for **Jordan CJ** in the case of **Australian Gas Light Co. v Value-General (1940) 40SR (NSW 126, 138** observed:

> ***"If the facts inferred by the tribunal from the evidence before it are necessarily within the description of award or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be distributed by a superior court which can determine only question of law."***

It certainly, appears from the above reasoning that any attempt made by an appellant challenging an award of damages before the trial court has to be methodical to persuade an appeal court that the exercise of discretion was wrong, doubtful and not founded on sound judicial principles. From a comparative authority it can be demonstrated that the predominant golden principle on assessment of damages has gained universal judicial notoriety in **CCCA Limited v Julius Jeffrey CA NO. 10 OF 2003 SVG** The Court decision read as follows:

> ***"It is, in my view, a function of the Law as far as possible, to be predictable, given the infinite variety of the affairs of human kind. In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjection and hence unpredictable, or it could be precedent based, that is to say, the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale. This is not a precise science, leaving much room for the trial Judges discretion."***

The question which this appeal court must ask is whether for purposes of assessment of damages the figure so arrived was by its nature and extent erroneous. Clearly, the relevant facts under this head speak for themselves. The soft tissue injuries much are of low grade in terms of gravity ought to receive a figure that is mathematically correct.

In this appeal in so many words the appellant counsel is basically challenging the discretionary power of the trial court in upholding an award of Kshs.400,000.00, hence arriving at an erroneous decision. In this context has the appellant discharged the burden of proof of wrong exercise of discretion to warrant interference by this court.

In order to determine that question whether the learned magistrate in the course of making the decision she misdirected herself on the facts or misapprehended the law special reference to similar awards would be taken as a better interpretation of that discretion.

In the case of **Edward G. Nyaga v Mombasa Liners HCCC No. 197 of 1999** the court therein awarded the plaintiff who was unconscious

for several days, hospitalized for one month and who suffered a fracture of the skull, jaws, and left leg and as a result of the head injury he suffered headaches, double vision, likelihood of suffering epilepsy a sum of Kshs.400,000.00 for pain and suffering and loss of amenities. In **Mariam Athumani and Suleiman Rashid Suing through her mother and next friend Mariam Athuman v Obuya Express and Kipkemboi Chelute Nakruni HCCC 477 of 1998**, the plaintiff sustained the following injuries: head injury - had brain concussion and lost consciousness for several hours, bruises and lacerations on the lips, extensive lacerations on the upper back with foreign body pieces of glass embedded in the skin, bruises on the right leg, gluteal region. The court allowed Kshs.600,000 as general damages for pain and suffering.

In **Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichuri (2005) eKLR**. In this case the 3rd plaintiff suffered multiple soft tissue injuries on the left elbow frame and injuries on both ankles. she was awarded Kshs.350,000.00 as general damages.

Juxta posing the above injuries and the awards by the respective courts it dawns on me that the case of the respondents clearly stipulates soft tissue injuries with a singular concussion due to trauma to the head. The injuries never involved any skeletal body parts of the respondent to impose higher award of damages.

In the instant appeal, again the decision boils down to the principles in **Ilanga v Manyora (1961) EA 705 and Kemfro Africa Ltd v A.M. Lubia and another 1987 KLR 27 (1982)-88) 1KAR 727**. In my view considerably, the respondent suffered soft tissue injuries of non-serious nature with no permanent residual disability. It's a balancing act done by the trial court to satisfy the criterion set in the persuasive **West Indian case of Cornilliac v St Louis (1965) WIR 491** in which the court outlines the critical factors in assessing damages in personal injury claims 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 been inundated (4) The loss of amenities suffered and (5) the extent to which consequently the injured persons pecuniary prospects have been affected."**

In assessing damages the way I see it is lack of special attention to details of the case under consideration at the trial with past comparable injuries and awards. Based on that a misdirection is bound to occur occasioning either a low or high awards that ought to be considered on appeal. That is the difficulty I faced in this appeal that taking account all matters relevant and material to the trail the award of Shs.400,000 was on the higher side and excessive.

As the court has repeatedly held in various authorities an appellate court should be cautious not to disturb an award of damages merely because if it was siting as a trial court that is the award appropriately it would have awarded. No doubt this principles weighs heavily on me with regard the decision, I am about to make. It is noted that the very significant diagnosis made by **Dr. Ndegwa** against the injuries suffered by the respondent is in so far as the 5% disability. There are no other serious injuries that could be rated to attract a higher award. The predisposition to the risks of epilepsy forecasted by **Dr. Ndegwa** had not yet set in at the time evidence of the respondent and his doctor was being admitted in 2017. Therefore the rating of epilepsy as diagnosed by **Dr. Ndegwa** is possibly that may occur or none of such a risk is likely to be experienced in his life time.

Having considered all these, my conclusion is that the sum of Kshs.400,000.00 for soft tissue injuries was on the higher side. The appeal is allowed, by setting aside, an award of Kshs.400,000.00 and have it substituted with Kshs.275,000.00 as general damages for pain and suffering and loss of amenities. Accordingly the appeal partially succeeds with costs to the respondent.

In the circumstances in the event of the decretal sum being in a joint earning interest of both counsels, the sum be released forthwith to the respondent.

It is so ordered.

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

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R. NYAKUNDI

JUDGE

In the presence of

1. Mwania for Mbuya for the respondent.