REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 173 OF 2015 Consolidated with

CIVIL APPEAL NO. 174 OF 2015

AAR HEALTH SERVICES (K) LIMITED .....1ST APPELANT

BONIFACE OLANDO .....2ND APPELLANT

VERSUS

TERESIA ISIYA OMODING.....RESPONDENT

AND

AAR HEALTH SERVICE (K) LIMITED & BONIFACE OLANDO

VERSUS

EVERLINE AKINYI ONYANGO.....RESPONDENT

JUDGMENT

These appeals are consolidated. The two appellants were the defendants in the lower court although in two different suits filed by the two respondents herein. The 1st appellant was the owner of the ambulance registration No. KAT 980K driven by the 2nd appellant as employee and driver at the time of the accident. The said ambulance was being driven from Timau to Nairobi with passengers who included the two respondents herein. At some place near Juja along Thika Road, the motor vehicle was involved in an accident leading to injuries sustained by the respondents. The respondents then filed separate suits against the appellants upon which the lower court delivered judgments on 2nd April, 2015 which judgments are the subject of these appeals.

At some point in the proceedings the parties alluded to a consent on liability which eventually was adopted by the trial court, in which the appellants conceded 90% liability while the respondents contributed 10% thereof. The apportionment of liability is not contested in these appeals.

The respondents had made witness statements which they adopted in the trial during their respective testimonies. In Civil Appeal No. 173 of 2015, the doctor who prepared the medical report on the respondent did not appear to testify while in Civil Appeal No. 174 of 2015 Dr. Kinuthia gave evidence. I say this because in Civil Appeal No. 173 of 2015, the appellants have contested the award of Kshs. 10,000/= for doctor's attendance to court on the basis that no doctor testified.

Whatever the case, the appellants have raised several grounds in their memorandums of appeals the thrust of which is that, the awards made by the trial court were not justified by way of evidence and in any case they were excessive.

As the first appellate court, it is my duty to consider and re-evaluate the evidence adduced before the trial court with a view to arriving at independent conclusions. I must observe that, the pleadings presented before the lower court by counsel for the respondents were very elaborate and comprehensive, which left no doubt that a lot of effort had been made, to ensure that the trial court was properly guided in the final determination of the respondents' claims. Indeed, the trial court in addressing the subject of quantum was guided by the respondents' statements, documents and the medical reports prepared by doctors Moses Kinuthia and Wambugu on the respondents. It was not hard therefore, for the court to follow the pleadings as set out in addressing the issues laid down for determination. The only observation I make at this point is that, the trial court did not specifically cite any cases which, however, were contained in the submissions of the parties.

That notwithstanding, my perusal of the judgments and relating the same to the submissions, left no doubt that the trial court had in mind the said decisions in addressing the issues placed before it and the awards that followed.

The trial court set out the injuries sustained by the two respondents comprehensively, the effects on their physical frames and impact on their future with respect to earning capacity. It is not necessary for me to recap the observations made by the trial court except to observe that, for the appellate court to disturb the awards made by the trial court, it must be persuaded that they were inordinately high or low to attract the intervention of the court. It must also be established that the court proceeded on wrong principles to arrive at the wrong conclusion. See **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1987] KLR 30, Butt –V- Khan (1982 – 1988)1 KAR 727.** The cases cited before the trial court and in these appeals include **Ali Issa vs. China Road & Bridge Corporation (2011)e KLR, Dennis Nyamweno Openda vs. Anwarali & Brother Limited & Another (2015) e KLR Ibrahim Kalema Lewa vs. Esteel Co. Limited (2016)e KLR. Mary Pamela Oyioma vs. Yess Holdings Limited (2011) e KLR. Gabriel Mwashuma vs. Mohammed Sajjad & Another (2015) e KLR.**

There is no doubt from the medical reports that the respondents sustained very serious injuries and no amount of compensation may repair the physical frame of an injured person. After considering the medical reports and the injuries sustained by both respondents, I am unable to fault the trial court in respect of general damages awarded for pain and suffering.

In Civil Appeal No. 173 of 2015, I observe that the appellant claimed replacement of her sole and pleaded that this would be increased by 40% inflation. With profound respect, although this was included in the witness statement, no evidence was led to justify the increase of the said sum by Kshs. 108,000/= to represent inflationary trends and therefore, in the absence of such evidence, that increase was not justified. It must be deducted from the final award. Additionally, since the doctor did not appear to give evidence, the sum of Kshs. 10,000/= must be excluded from the final figure.

The respondent admitted that she is currently employed and earning a salary of Kshs. 90,000/= per month after completing her Master's degree. This has been raised by the appellants as an issue relating to reduced earning capacity. It is the respondents' position that, the appellant having found a better paying job, there should not be any award for loss of, or reduced earning capacity. It must be considered that the loss of, or reduced earning capacity was attributable to the accident not whether or not she completed her Master's degree. It is what the doctor observed that leads to assessment of such damages. The court however should bear in mind the enhanced financial position of a litigant in considering damages of that nature. Having done so, I find nothing untoward in the award to justify any interference thereof.

With respect to Civil Appeal No. 174 of 2015, my assessment of the evidence on record is that, the appellant remained firm under cross examination with respect to her claim. On the issue of diminished earning capacity, she was emphatic that the injuries would limit her and that, considering her training is in nursing, it is not easy to find alternative employment. Again, I must observe that, assessment of diminished earning capacity is based on medical reports which the trial court sufficiently addressed in her judgment. I have no reason whatsoever to disturb the said findings.

On the whole therefore, the challenge of the lower court judgment by the appellants is lacking in merit and except the subject of inflation and the doctors' fees addressed in Civil Appeal No. 173 of 2015,these appeals are hereby dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 7th Day of May, 2020.

A.MBOGHOLI MSAGHA

JUDGE