REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 128 OF 2017

ELIEZER KIPLIMO KERONEI...1ST APPELLANT

KIPLELEI CO. LIMITED..2ND APPELLANT

VERSUS

FANCY CHERONO SIELE..RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.M. Kesse,

Senior Resident Magistrate, delivered on 20 September 2017

in Kapsabet PMCC No. 161 of 2013)

JUDGMENT

1. The two Appellants herein were the Defendants before the lower court in **Kapsabet PMCC No. 161 of 2013: Fancy Cherono Siele vs. Eliezer Kiplimo Keronei and Kiplelei Co. Ltd**. That suit was filed on **5 November 2013** by the Respondent, **Fancy Cherono Siele**, whose cause of action was that on or about the **15 August 2012**, the 1st Appellant so negligently drove the 2nd Appellants Tractor, **Registration No. 539M**, Massey Ferguson, that he caused it to collide with **Motor Vehicle Registration No. KBN 505C,** Toyota Hiace Matatu, in which she was then travelling. It was further the contention of the Respondent that, as a result of the accident, which is said to have occurred at **Mberere** area along Nandi Hills-Chemelil Road, she was seriously injured.

2. The Respondent supplied the particulars of negligence alleged in Paragraph 5 of her Plaint dated **28 October 2013**. She similarly furnished the particulars of the injuries suffered by her in the said accident at paragraph 6 of the said Plaint as follows:

(a) A cut wound of about 10 cm long on the right leg which was tender; and

(b) A cut wound on the left leg which was tender.

3. It was in the light of the foregoing that the Respondent prayed for general and special damages, interest and costs; adding that the 1 st Appellant was charged with the offence of causing obstruction and driving a defective tractor in **Eldoret Traffic Case No. 654 of 2012**. And, whereas the Appellants filed their respective Statements of Defence before the lower court denying liability and attributing fault to both the Respondent and the driver of **Motor Vehicle Registration No. KBN 505C**, the issue of liability was settled by consent and an order made to that effect on **17 February 2016** as proposed in the consent letter dated **16 February 2016**. Thus, the parties thereby agreed on liability at 85:15 as against the Appellants. The matter was thereafter listed for hearing for the purpose of assessment of damages.

4. A perusal of the lower court record shows that the Respondent was the only witness who testified in the matter; and that, on the basis of her evidence, and on the basis of the written submissions filed by learned Counsel for the parties, judgment was entered in the Respondent's favour as follows:

(a) Liability by consent in the ratio of 15:85 in favour of the Plaintiff;

(b) General Damages in the sum of **Kshs. 250,000/=** less 15% contributory negligence;

(c) Special Damages of **Kshs. 2,000/=;**

(d) Costs of the suit;

(e) Interest at court rates.

5. Being dissatisfied with the decision of the lower court on quantum, the Appellants filed this appeal on **18 October 2017** on the following grounds:

(a) That the Learned Trial Magistrate erred in law and fact in adopting the wrong principles in determining the damages awardable/payable to the Respondent in view of the injuries pleaded and the evidence adduced;

(b) That learned trial magistrate erred in law and fact in failing to take into consideration relevant issues and/or evidence in making a determination on the damages payable to the Respondent;

(c) That the learned trial magistrate erred in law and fact in failing to consider the second medical report which was produced in evidence in awarding damages to the Respondent;

(d) That the learned trial magistrate erred in law and fact in awarding damages to the Respondent which were excessive in the circumstances.

6. Based on the foregoing four grounds of appeal aforementioned, the Appellants' prayed that the Judgment of the lower court be set aside and that the General Damages awarded to the Respondent be reassessed downwards. They also prayed for the costs of the appeal. Directions were then given on **5 March 2019** that the appeal be canvassed by way of written submissions; to which end, the Respondent filed her written submissions on **30 April 2019** through **R.M. Wafula & Co. Advocates,** contending that the award was a fair assessment; and that, in making the award, the Trial Magistrate took into account the medical reports and the opinion of the three doctors, whose reports were presented before the lower court.

7. Accordingly, the Respondent's Counsel, **Ms. Ghati,** urged the Court not to interfere with the findings of the Trial Magistrate, contending that it had not been demonstrated by the Appellants that the damages awarded were founded on wrong principles or that the award was excessive. She further argued that the Appellants' had failed to show either that the court took into account an irrelevant factor; or that it left out of account a relevant factor. Counsel relied on **Butt vs. Khan** [1982-1988] KAR 1 and **Akamba Public Road Service Ltd vs. Omanaba** [2013] eKLR to support the foregoing arguments.

8. It was further the submission of **Ms. Ghati** that no two cases are exactly the same so as to form a perfect basis of each other; and that whereas it is settled that comparable injuries should attract comparable awards, each case must, ultimately, be determined on the basis of its own peculiar facts. She, accordingly, urged the Court to dismiss the appeal with costs, reiterating her assertion that the lower court committed no error of principle in making the award. She also cited the cases of **Machakos HCCA No. 16 of 2008: Kiwanjani Hardware Ltd & Another vs. Nicholas Mule Mutinda** and **Nyeri HCCC No. 320 of 2008: Catherine Wanjiru Kingori & 3 Others vs. Gibson Theuri Gichumbi,** as some of the cases involving comparable injuries, for the guidance of the Court.

9. I am mindful that, this being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon; and that in doing so, I must bear in mind that I did not have the advantage of seeing or hearing the witnesses. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was held that:

> **"...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..."**

10. With the foregoing in mind, I have given careful consideration to the evidence placed before the lower court in the light of the pleaded injuries. The Respondent gave uncontroverted evidence before the lower court, at pages 55 and 56 of the Record of Appeal, that she suffered injuries on both legs and was treated at **Nandi Hills District Hospital** for those injuries. She produced as exhibits the treatment notes and receipts issued to her at **Nandi Hills District Hospital**; the P3 Form that was filled by **Dr. Kilel;** as well as the Medical Report prepared by **Dr. Aluda** dated **27 August 2013.** The P3 Form was marked **the Plaintiff's Exhibit No. 5** and it shows that it was filled on **23 August 2013**. **Dr. Kilel** confirmed thereby that the Respondent sustained a 10 cm long injury on the anterior aspect of the right leg and another injury on the left leg; and that both injuries had healed with scar formation.

11. **Dr. Aluda's** Medical Report was produced before the lower court as **the Plaintiff's Exhibit 6a**. It confirms that the Respondent sustained cut wounds on the right and left legs; and that she was still experiencing occasional pain on her legs as at **27 August 2013** when the report was made. In **Dr. Aluda's** prognosis and opinion, the injuries sustained by the Respondent were basically soft tissue in nature, and that they had healed, save for the occasional pains. As for the scars, **Dr. Aluda's** opinion was that they would remain a permanent feature on the Respondent's body.

12. The proceedings of the lower court further show that the parties also relied on **Dr. Gaya's** Medical Report dated **18 August 2015,** which was produced by consent before the lower court and marked **Defence Exhibit No. 1**. The report confirms that the Respondent sustained cut wounds on the left and right legs; and that, as at the time of examination, her complaint was occasional pains on both legs. **Dr. Gaya** also noted that the Respondent's injuries had healed, though she was left with ugly scars on the anterior right leg and on the left leg.

13. Thus, as the three medical reports were in sync as to the injuries sustained by the Respondent, the argument by the appellant that **Dr. Gaya's** report was not taken into account is completely unfounded. Accordingly, the only issue for determination in this appeal is the question whether the award of **Kshs. 250,000/=** as General Damages, is a fair estimate in the circumstances, bearing in mind the expressions

in **H. West & Son Ltd vs. Shephard [1964] AC 326**, that:

> **"...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 forhimself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences 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 own assessment."**

14. I have similarly taken into consideration the principle that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. Hence, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

> **"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."** (Also see **Butt vs. Khan [1981] KLR 349)**

15. The approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, and which I find useful, was thus:

> **"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."**

16. And, in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR,** the Court of Appeal suggested thus:

> **"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

17. There is no dispute herein that the injuries suffered by the Respondent were basically soft tissue injuries from which she was expected to fully heal devoid of any disability, save for the permanent residual scars. The P3 Form as well as the Medical Reports prepared by **Dr. Aluda** and **Dr. Gaya** show that the Respondent, an adult female Kenyan, was aged 26 years at the time the accident occurred; and that she was an inpatient for two days at **Nandi Hills District Hospital**. In the light of the foregoing, I have looked at recent awards and note as follows:

(a) In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another** [2018] eKLR, an appeal from an award made on **10 December 2015**, the Respondent had been awarded **Kshs. 300,000/=** by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to **Kshs. 100,000/=** in a Judgment delivered on **1 February 2018**.

(b) In **Godwin Ireri vs. Franklin Gitonga** [2018] eKLR, the Respondent had been awarded **Kshs. 300,000/=** as general damages by the lower court for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced, on appeal, to **Kshs. 90,000/=.**

(c) In **Maimuna Kilungya vs. Motrex Transporters Ltd** [2019] eKLR, the Appellant sustained a blunt neck injury, blunt injury to the left shoulder and bruises on the left ear and was expected to recover fully. The lower court awarded **Kshs. 100,000/=** which was enhanced on appeal to **Kshs. 125,000/=.**

18. Thus, granted the nature of the Respondent's injuries, it is manifest that the award made by the lower court for General Damages is on the higher side for soft tissue injuries, and therefore erroneous. I would reduce the same to **Kshs. 150,000/=** less 15% contribution. Accordingly, the decision of the lower court on quantum is hereby set aside and substituted with judgment in the Respondent's favour in the sum of **Kshs. 127,500/=** together with interest and costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY, 2020

OLGA SEWE

JUDGE