REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 62 OF 2019

OBED ELPHAS NJIRU.....APPELLANT

VERSUS

BARISA ABDALLA SALIM.....RESPONDENT

(Being an Appeal from the Judgment by the Learned Resident Magistrate Honorable S. D. Sitati

in Civil Suit No. 387 of 2018 in the Senior Principal Magistrate court at Kilifi

delivered on the 5th August 2019)

Coram: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocates for the appellant

Ameli Inyangu Advocates for the respondent

JUDGMENT

The appeal before me is against the award of damages by the trial court in the sum of Kshs. 900,000/= for pain and suffering and liability at 100%. The Judgment was delivered on 5.08.2019. Aggrieved by the Judgment, the appellant filed a memorandum of appeal on the 8.11.2019. His appeal is mainly on the Trial Court's finding on quantum. The grounds of appeal are that: -

1) The Learned Resident Magistrate erred in awarding a sum of Kshs. 900,000.00/- to the Respondent (hereinafter referred to as the Plaintiff) as general damages.

2) That the said award of Kshs. 900,000.00/- 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. Udayan Sheth, a consultant orthopedic surgeon that the plaintiff has fully recovered from his injuries with no deformity and no permanent incapacity and considering the fact the plaintiff was treated as an outpatient and did not require any hospitalization.

3) That the said award of Kshs.900,000.00/- 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 Resident Magistrate failed to give any or any adequate or credible reasons of how he arrived at the figure of Kshs.900,000.00/- general damages which he awarded to the plaintiff on the basis of 100% liability.

5) The Learned Resident Magistrate erred in failing:

a) To appreciate the significance of the various facts that emerged from Dr. Udayan Sheth's medical report dated 15th February 2019

b) To consider or properly consider all the evidence before him and/or

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

6) The Learned Resident Magistrate erred in failing to adequately consider the written submissions filed by counsel for the Appellant.

At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified **(See Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123).** The parties filed Written Submissions but did not find it necessary to orally highlight.

Brief Facts Of The Case

The respondent **Barisa Abdalla Salim** filed suit against the appellant **Obed Elphas Njiru** on the 7.11.2019 for general and special damages for injuries sustained in a road accident on the 15.01.2017 along Kilifi-Mombasa road at Mbogolo Area. The plaintiff was lawfully traveling as a fare paying passenger aboard Motor Vehicle Registration Number KAS 051T Mitsubishi canter belonging to the appellant and driven by him or his authorized driver/agent/servant and/or employee from Tana River towards Mombasa, where upon reaching Mbogolo area along Kilifi-Mombasa road the tire of the said Motor Vehicle burst causing it to overturn and landed into ditch as a result whereof he sustained a chip fracture of the back bone vertebrae No. L5, blunt object injury to the back and bruises on the back and lower limbs.

The appellant then filed a statement of defence dated 28.01.2019 denying all the averments in the Plaint and pleaded that if the accident occurred then it was without negligence on the part of the defendant and was inevitable in that the defendant lost control of the motor vehicle and was unable to avoid the accident. The matter proceeded for hearing on 27.05.2019 and the respondent called two Witnesses to testify in support of his claim.

The Evidence

The Plaintiff testified as PW1 and relied on his witness statement dated 1st November 2018 as his evidence in chief. He testified that on the material day he was aboard said motor vehicle as a passenger together with his goods that were being ferried by said motor vehicle when he heard a tyre burst and the vehicle overturned. He sustained injuries to the hand, lacerations on his back and waist. He stated that he was treated at Kilifi Hospital and Coast General Hospital. He produced his treatment notes as **PEX1** and photographs to demonstrate injuries as **Exhibit 2.** Further he testified that he had reported the accident at Kilifi Police station on the same day and produced the relevant police abstract as **PMFI-3** and the P3 form as **PMFI-4**.

He was also examined by **Dr. Ajoni Adede** and marked the Medical report as **PMFI-5(a)** and the receipt for Kshs.2,000.00/- paid for the medical report as **PMFI-5(b).** He also produced a demand letter dated 16th October 2018 as **PEX6**. He further stated that he settled the hospital bills although he could not recall the exact amount. He blamed the owner of the vehicle for the accident and told the Court that the motor vehicle search showed that the defendant was the owner of the said vehicle. He testified that he still felt pain in his back and waist especially during cold days. As a result he was advised to wear a brace belt for six months.

On cross examination by the defence counsel, he stated that the motor vehicle was a public service vehicle.

That due to residual effect of the injuries, he still attends hospital for review though no documents in that. He further stated that he did not know whether the driver had been charged with traffic offence.

PW2, P.C. Wandera from Kilifi Police Station Traffic Department, adduced evidence and stated that there was an accident reported on 15th January 2017 slight injury O.B Number 7/15/1/2017 0606hrs, by one **Barisa Abdalla Salim**, who was aboard Motor Vehicle KAS 051T Mitsubishi FH driven by one **Bakari Omari Deige**. The motor vehicle had been loaded with mangoes from Tana River heading to Kongowea Market for sale. That along Malindi-Mombasa road at Mbogolo area the motor vehicle developed a tyre burst lost control and overturned along the road. The Victim and Gadana Ali sustained slight injuries and were rushed to Kilifi County Hospital for treatment. On the same day **P.C. Mumo**, his colleague who is now in Mtwapa, booked the accident report thereafter proceeded to the scene of the accident where he found the said motor vehicle had been removed from the road and placed aside and was being repaired. The driver was ordered to drive the said motor vehicle to the police station for inspection notes but he failed to do so and drove off to an unknown place. Later the owner brought a certificate of insurance to the police station. The Investigating officer blamed the driver since the driver was supposed to have reported the incident but failed to do so. He presented to the court the original P3 form dated 15th January 2017 filed on 23rd January 2017 (PEX-4) and the Police Abstract (PEX-3). He stated that the abstract had an error as the correct OB NO. is 5/15/1/2017 and not 16/15/1/2017.

In cross examination he stated that he was appearing on behalf of his colleague on transfer and who blamed the driver for the accident since it was a self-involving traffic accident.

Based on all the information in his possession the driver had failed to report the accident. He stated that it was impossible to tell if it was a purely mechanical issue since they did not get the chance to inspect the said motor vehicle. He further confirmed the subject motor vehicle allowed one or two passengers on board despite designated as purely used for commercial purposes.

At this juncture the parties by consent agreed to have the medical report by **Dr. Adede (PMFI-5a)** produced as **PEX-5a** and the receipt as **PEX-5b** and the plaintiff closed its case. It was further agreed by consent that the Defendant produce the Medical Report by **Dr. Udayan Sheth** dated 15th October 2019 as **DEX-1** at which point he closed his case.

Parties were asked to file submissions by 15.07.2019 however, despite the court granting the adequate time to file submissions, the defendant never complied with that case management directions.

The Trial Court's Judgment

The trial court made a determination that the plaintiff had sufficiently proved that the accident had indeed occurred as pleaded in the Plaint. The trial court was further persuaded by the plaintiff that the motor vehicle did indeed belong to the defendant as proved from the Police Abstract and oral evidence. Further as the plaintiff had relied on the doctrine of **res ipsa loquitor** the burden of proof had shifted to the defendant to disprove the particulars of negligence attributed to him. The trial court further stated that as the plaintiff having raised a presumption that the driver was negligent it was expected that the defendant would call the driver as a witness to rebut that presumption by showing inter alia what steps the driver took to avert the accident upon the vehicle experiencing the tire burst. The same had not been done and as such the court held the driver wholly liable for the accident which means that the trial court found the driver 100% liable for the accident and by extension vicarious liability on the part of the owner.

On the issue of the medical reports dated 17.10.2018 and 15.02.2019 the trial court observed that both reports indicated that the plaintiff had suffered a chip fracture of his 5th lumbar vertebra but the two doctors differed on the level of permanent disability, as **Dr. Ajoni Adede** put the disability at 2.5% while **Dr. Udayan Sheth** notes that the plaintiff had fully recovered and that there was no deformity and no permanent incapacity. **Dr. Ajoni** supports his assessment based on the fact that the piece of bone from the chip fracture will be a continuous source of irritation and pain and further the plaintiff submitted that he still feels pain especially on cold days.

On the issue of quantum the trial court submitted that it had perused the authorities relied on by the plaintiff and that they showed almost similar injuries as the plaintiff's. However the proposal of Kshs.1,000,000.00/- was on the higher side given that Kshs.800,000.00 was awarded in October 2017 in the most recent case as such a sum of Kshs.900,000.00 was awarded.

The Trial Court delivered Judgment in favor of the respondent against the applicant at 100% liability, General damages of Kshs.900,000.00/=, special award of Kshs.2,000.00/= as well as costs and interests on 5th August 2019. This decision triggered the present appeal.

The Appelant's Submissions

Counsel for the appellant, **C. B Gor** submitted that the appeal was against the award of damages and as such the court should be guided by the principles set out in the Court of Appeal in **Henry Hidaya Ilanga v Manyema Manyoka {1961} 1 EA 705 (CAD)**. They then proceeded to submit on the grounds collectively.

Counsel submitted that the respondent is entitled to fair compensation for the loss and damage suffered. He submitted that the appellant is not a wrongdoer but simply the person who foots the bill. For this submission counsel relied on the case of **Cecilia W Mwangi & Another V Ruth Mwangi [1977] eKLR**. Counsel submitted that the award of Kshs.900,000.00/- is altogether disproportionate and the Learned Senior Resident Magistrate failed to give any adequate or credible reasons of how he arrived at the said figure. Counsel further argues that the authorities cited by the respondent and relied upon on quantum were dissimilar from the present case as the parties therein had suffered more serious injuries with that of the respondent.

On the issue of quantum the appellant relied on the following cases where the respondent's injuries are comparable to those suffered by the plaintiff; **Mwavita Jonathan V Silivia Onunga Kisumu High Court Civil Appeal No.17 of 2017 {2017} eKLR** and **Gladys Liyaka Mwombe V Francis Namatsi & Others [2019] eKLR** where the courts awarded Kshs.400,000/= and Kshs.300,000/= respectively, to submit that the damages awarded by the trial court were excessive.

Consequently, Counsel asked that the Court find that the trial court's award was excessive and that an award of Kshs.300,000/= would suffice as fair compensation for the plaintiff's injuries. For these submissions Counsel also relied on the cases of **Jane Waruguru Miano V Jotham Nguri Magondu & Another [2018] eKLR** and **Abyssinia Iron and Steel limited V Isaack Okoth Ochieng [2018] eKLR.**

Finally, Counsel submitted that the Learned Trial Magistrate misdirected himself and took into account irrelevant factors which he ought not to have taken, failed to take into account relevant factors and applied wrong principles thereby making an award that is inordinately high.

The Respondent's Submissions

The respondent through his advocate on record **Ameli Inyangu & Partners Advocates** submitted that he supported and affirmed the trial court's award of damages as being fair and commensurate with the injuries sustained by the respondent. He further submitted that the assessment of damages is a discretionary exercise by the Trial court and that the appellate court should always refrain from interfering with an award of damages, unless it's a clear case of misdirection they relied on the cases of **Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case Number 241 of 2000 cited in Mwangi Kiunjuri V Wangethi Mwangi & 2 Others {2016} eKLR**, **Munza Investment Company Limited V Makau Mwonewa {2012} eKLR** and **Innocent Ketie Makaya Denge V Peter Kipkore Cheserek & Another {2015} eKLR** for these submission**.**

It was also counsel's submission that the Trial Court did not make any error in awarding the damages as the Learned Magistrate gave credible reasons as to why he awarded Kshs.900,000.00/-. Despite the respondent's plea for Kshs.1,000,000.00/-. That the Learned Magistrate was further guided by authorities availed by the respondent's Advocate. It was his submission that the appellant's counsel had failed to file submissions in the primary suit and as a result the Learned Magistrate was guided by the applicable law, submissions and authorities cited by the respondent's counsel.

He further submitted that the Appellant's had an opportunity to argue its case in the primary suit but failed to do so and was now submitting on it in the current appeal. Further, he urged this court to maintain the award by the Trial Court as he the appellant had failed to give definitive reasons as to why he wanted the award reviewed downwards to Kshs.300,000.00/-. He submitted that the authorities provided by the appellant to buttress their claim are not comparable to the injuries sustained by the respondent. He referred this court to pages 56-72 of

the record of Appeal where the respondent's counsel had provided authorities with comparable injuries commensurate with the award given by the Trial Court. He submitted that it has not been shown that the Learned Magistrate acted on wrong principle or that the award was inordinately high noting that they had an opportunity to pursuade the court at that trial. He submitted that the court is bound by the laid down principles as settled in the cases of **Jabane V Olenja {1986} KLR 661** as cited in **Odinga Jactone Ouma V Moureen Achieng Odera {2016} eKLR.**

He submitted that the only evidence the Appellant relied on was the Medical Report by **Dr. Udayan Sheth** and whose opinion was that the respondent had fully recovered with no permanent incapacity and deformity. Whereas the Learned Magistrate was guided by both the aforementioned Medical report as well as the Report by **Dr. Ajoni Adede.** The injuries were in tandem in both Medical reports. Hefurther submitted that the Trial court was alive to the issue of inflation and the relevant principles in relation to injuries of this nature hence awarded Kshs.900,000.00/-.

Finally, Learned counsel reminded the court that it is trite law that an appeal Court can only disturb the award by the lower court if it finds it to be manifestly low or inordinately high. Which is not the case in this appeal.

Issues For Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence of the subordinate court both on points of law and facts and come up with its findings and conclusions **(See Peters –vs- Sunday Post Limited {1958} EA 424)**. The Court emphasized the following principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

These principles are well settled and are derived from various binding and persuasive authorities including;

a) ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: **Tunoi, Bosire and Owuor JJA);**

b) Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another **(Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA);** ***Virani T/A Kisumu Beach Resourt v Phoenix of East***

c) ***Africa Assurance Co. Ltd*** **(Kisumu High Court CC No. 88 of 2002).**

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this court in my view:

1. Liability

2. Quantum

Liability

A perusal of the abstract submitted in the trial court is clear that the document is an abstract of the records of the police on the accident. It is also express that it is the record that gives the salient facts of the occurrence of an accident as ascertained by the police from their own observation. It follows that, in the absence of any contrary evidence, the abstract was sufficient enough to prove, at least on a balance of probability, that indeed a road traffic accident involving the said motor vehicle registration occurred along Kilifi-Mombasa road as pleaded by the respondent and consequently is enough to prove that the respondent was a passenger in the accident vehicle and that the appellant was its owner. I concede that a certificate of official search from the registrar of motor vehicles would be the best evidence and conclusive proof of ownership of a particular vehicle; showever, where there is no contrary evidence, the person indicated in the abstract as the owner of the vehicle is presumed to be the owner **(See Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Ano.)**

The appellant ought to have called evidence to rebut this assumption which he did not do, consequently displaying to the trial court that the issue of ownership was not a central issue for him for this I am persuaded by the Court of Appeal in the case of **Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another**. Consequently, I find that the said accident did occur and that the motor vehicle was indeed the appellant's. It is clear from all these decisions that a police abstract as evidence of ownership of an accident vehicle will suffice as proof of that fact if it is neither contested nor controverted.

I am inclined to believe the testimony of PW1 who produced the Police Abstract. Further the appellant did not adduce any evidence to rebut the testimony of the witnesses at the trial as such I find that the learned Magistrate did not error in finding that the 2nd defendant who was the appellant's employee, had caused the accident. Going by the evidence on record, in all probability, the accident must have been a self-involved sort of accident. In the sense that no other vehicle of any kind is indicated to have been involved in the same accident. Neither was there any suggestion that the accident was caused or contributed to by some other person to whom liability could be attributed in any degree.

The respondent had pleaded the doctrine of *res ipsa loquitur* in his plaint and to that extent the witness summoned explained how the accident may have occurred. Generally, once the appellant invoked this doctrine, the burden was on the respondent to rebut that he was not negligent and steps taken to avoid the accident but did happen all the same **(See Scott versus London Dock Co (3H&C 601).** I am persuaded by the case of **Barkway versus South Wales Transport Co. Ltd (1950) 1ALL ER where** a tyre burst of an omnibus caused it to veer off the road and fell over an embankment as a result of which a passenger died. Several hypotheses were put forth but none of them was attributable to the tyre burst with any measure of certainty. It could not be explained in categorical terms how the defendant company, the omnibus owner, may have been negligent. The claimant pleaded *res ipsa loquitur* because, so it was her case, ***'omnibuses which are properly serviced do not burst their tyres without cause nor do they leave the road along which they are being driven.'***

In the **House of Lords, Lord Porter cited Erle CJ** in **Scott versus London Dock Co (3H&C 601)** where he said of this doctrine as follows:

> ***"... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care***"
>
> The learned judge went further to explain that "***the doctrine is dependent on the absence of explanation and although it is the duty of the defendants if they decide to protect themselves to give an adequate explanation of the cause of the accident yet if the facts are sufficiently known the question ceases to be one where the facts speak for themselves and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not."***

On his part, **Lord Normand** spoke of the doctrine as follows:

> ***"The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maximum res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. <u>The maxim is no more than a rule of evidence affecting onus. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant</u>***." **(Emphasis added).**

On a balance of probabilities, the accident in the present case was self-involved and the moment the respondent pleaded this doctrine, he was not required to call evidence in the strict sense of the Evidence Act on how the accident happened in order to find the respondent culpable. The burden was on the appellant to prove that the accident occurred other than as alleged by the appellant and, in any event, it was not as a result of negligence on his part. He did not call any such evidence and therefore under Section 119 of the Evidence Act it entitled the Court to raise a rebuttable presumption of fact from the circumstances of the case.

Consequently, without any rebuttal, the Learned Magistrate was right to accept the respondent's evidence as the truth with respect to the question of who might have been responsible for the accident. As such I am in agreement with the Learned Magistrate's finding on 100% liability against the Appellant as there was no evidence adduced to the contrary.

Quantum

The issue for determination here is whether the award of general damages of Kshs.900,000.00/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera {2016} eKLR** stated that ***"comparable injuries should attract comparable awards"***.

To begin, the injuries suffered by the Respondent were:

1. ***A chip fracture of the back bone vertebrae No. L5***
2. ***Blunt object injury to the back***
3. ***Bruises on the back and lower limbs***

I have considered the rival submissions on the quantum of damages, the authorities cited by the respondent in their submissions for this appeal have no bearing on my decision as they do not reflect the circumstances of this case nor do they have similar injuries. I must hasten to add that the fact that the appellant did not file submissions during the trial should not be a basis for the court's assessment of quantum.

From the evidence adduced by the respondent it is clear that he had indeed suffered serious injuries backbone injuries but the Medical reports prognosis differ on this issue of whether or not the respondent suffered some form of disability or has healed completely from the injuries he sustained. It must be noted that injuries would never be fully identical to another victims injuries. What a court does is to consider that as far as possible evaluate the harm or injury which the plaintiff has demonstrated. The evidence which the plaintiff introduced to aid the Court in the process of assessing damages, the expenses he has incurred in effecting a cure, the physical disability he has suffered, either temporary or permanent, the importance of his earning capacity and loss of amenities as a result of the injury. In all these the trial Court has to bear in mind the specific combination of facts in each case is unique.

Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt V Uwais**

Ahmed Khan [1982-88] KAR 5 where the court held that;

> ***"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"***

The list is as laid down in **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo {2005} eKLR** the court stated as follows: -

> ***"It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance …"***

On occasion other Courts have applied the same kind of test on special damages clearly articulated in **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the respondent clearly proved the loss pleaded as special damages and as such I find no reason to vary the Learned Magistrate's decision on this decision. In this appeal I consider the various aspects of the Law when Judgments may be reversed on appeal.

For this I rely on the Court of Appeal's decision in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that –

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
>
> ***'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."*** **Emphasis my own.**

From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made. Upon studying the cited authorities relied upon by the respondent, I note that the injuries therein were more severe in nature than in the current case. I am mostly persuaded by the authorities cited by the appellant and the principles alluded to in this decision and the present effectiveness of damages for monetary and non-monetary loss with particular regard to personal injury suffered. Whether a particular award is reasonable and fair will clearly depend on a range of factors.

I took the step of considering comparable awards previously made and relied on in the following cases:

> **(a). Philip Musyoka Mutua v Leonard Kyalo Mutisya [2018] eKLR:**
>
> ***here, the High Court on appeal substituted an award of Kshs.400,000/ with one of Kshs.300,000/ made to a plaintiff who had suffered closed fracture injury, Bruising on the forehead and left hand, and cut wound on the face.***
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> **(b). Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR**:

where an award of Kshs.650,000/ was replaced with that of Kshs.400,000/ in the instance of a plaintiff who had suffered various bruises, cut wounds and fracture injuries, all of which were termed soft tissue injuries.

In view of the foregoing, I am persuaded that the award made by the learned trial magistrate fell on the category of inordinately higher side in comparison to comparable awards, hence there is need for interference. Upon considering the damages awarded in the authorities I have just cited, I find an award of Kshs.550,000/ to be reasonable, as expressed in the case of **Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR** cited by the appellant, where the court held that injuries of a nature similar to those sustained in the present instance typically warrant awards of between **Kshs.300,000/ and Kshs.500,000/.**

Determination

Let me say from the outset in conclusion what has been said many times before that no appellate Court is justified in substituting a figure of its own for that awarded by the trial Court. Simply because it would have awarded a different figure if it had tried the case at first instance. Its trite that the Court must be satisfied that a wrong principle of Law was applied or that the overall amount is a wholly erroneous estimate of the damage. **(See Paul v E. A. Cargo Handling Ltd {1974} EA 75.)** Giving credence to the above dictum in interfering with the Learned trial Magistrate, I have considered the principle that in calculating damages one has to consider the pecuniary sum which will make good, the respondent harm so far as money can compensate for the loss on personal injury done by the appellant.

The upshot, then is the respondent will have Judgment for Kshs.550,000/ and the costs of the appeal be equally apportioned.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

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