REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 119 OF 2009

LOCHAB BROTHERS LIMITED.....APPELLANT

-VERSUS-

PETER ASHIUNDU MULAMA.....RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. G. Mmasi, Senior Resident Magistrate, delivered on 16 July 2009 in Eldoret CMCC No. 995 of 2007)

JUDGMENT

[1] This appeal arises from the Judgment and Decree of the Senior Resident Magistrate, **Hon. Grace Mmasi**, delivered on the **16 July 2009** in **Eldoret CMCC No. 995 of 2007**. The Appellant herein, **Lochab Brothers Limited**, was the Defendant before the lower court. It had been sued by the Respondent, **Peter Ashiundu Mulama**, for Special and General Damages, costs and interest, in connection with injuries sustained in a road traffic accident that occurred on or about **9 June 2007** at around 10.00 p.m. The accident involved motor vehicle **Registration No. KAP 476W,** a Scania Bus, in which the Plaintiff was then travelling as a fare paying passenger, and motor vehicle **Registration No. KAS 295C**, Mercedes Benz Lorry, belonging to the Appellant.

[2] It was the contention of the Respondent before the lower court that collision occurred due to the negligence of the drivers of the two motor vehicles and set out the particulars of negligence at paragraph 6 of his Plaint dated **29 November 2007**. He accordingly claimed General and Special Damages for his pain and suffering. The lower court resolved the issue of liability by adopting, with the consent of the parties, its determination in **CMCC No. 987 of 2007** which arose from the same accident. Thus, 10% liability was then attributed to the 1st Defendant, **Eldoret Express Bus Service Co. Ltd**, the owner of the Bus **Reg. No**. **KAP 476W**. The Appellant herein was to bear 90% liability for the Respondent's suffering and loss.

[3] The Learned Trial Magistrate then proceeded to assess the quantum of damages payable. Having considered the material that was availed before her, the Learned Trial Magistrate came to the conclusion that:

> **"...It is very clear without doubt that the injuries sustained by the Plaintiff were grievous and severe and he will incur future medical expenses as the plates have to be removed. It is also not in doubt that the maximum jurisdiction of this court is Kshs. 800,000/= thence asking the court to award Kshs. 1,000,000/-. The same is over and above the jurisdiction of this court and awarding Kshs. 150,000/- or Kshs. 200,000/- as general damages for pain suffering and loss of amenities will be on the lower side putting into consideration the injuries which the plaintiff sustained. Thence judgment is entered for the plaintiff as against both defendants jointly and severally for both special damages at Kshs. 53,200/- and Kshs. 700,000/- (Seven hundred thousand shillings only) being general damages for pain suffering and loss of amenities plus costs of the suit and interest at court rates from the date of this judgment. The court had apportioned liability as follows;**

The 1st defendant to shoulder 10% liability and the 2nd defendant to shoulder 90% liability. The same culminates in: 1st defendant,

Special damages = Kshs. 5,320/-

General damages = Kshs. 70,000/-

Kshs. 75,320/-

2nd defendant

Special damages = Kshs. 47,880/-

General damages = Kshs. 630,000/-

Kshs. 677,880/-"

[4] Being dissatisfied with the Judgment of the lower court, the Appellant appealed the decision on the following grounds:

[a] That the Learned Magistrate erred in law and fact in making an award in general damages that was so excessive as to amount to an erroneous estimate of the loss or damage suffered by the Respondent.

[b] That the Learned Magistrate erred in law and in fact in making an excessive award on special damages yet the same wa not specifically proved before the court.

[c] That the Learned Magistrate erred in law and in fact in finding the Defendant liable at all.

[d] The Learned Magistrate erred in law and fact in failing to take into account the pleadings, evidence and submissions tendered by the Appellant showing that the Respondent was to blame for the accident.

[e] The Learned Magistrate erred in law and fact in finding the Appellant liable in negligence for the injuries suffered by the Respondent herein.

[f] The Learned Magistrate erred in law and fact in finding the Appellant 90% liable for the injuries suffered by the Respondent.

[5] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **1 March 2016**. consequently, the Appellant's written submissions were filed herein on **4 October 2016**; while the Respondent's written submissions were filed on **18 February 2017**. According to the Appellant, it emerged from the facts presented before the trial court that the Appellant's motor vehicle **Registration No. KAS 295C** was overtaking a trailer and consequently crashed onto the Bus **Registration No. KAP 476W** on its correct lane; and therefore that the Appellants and the Respondents ought to have shared liability equally. Counsel relied on **Alfarus Muli vs. Lucy M. Lavuta & Another [1997] eKLR,** for the proposition that vehicles when properly driven on the road, do not run into each other and that from the act of collision alone, a judge would be perfectly entitled to infer negligence on the part of one or the other of the drivers or on the part of both of them. Thus, it was the submission of the Appellant that there was no evidence on record to support the apportionment of liability at 90:10 as between the two motor vehicles, and that the Trial Magistrate did not give the reason for the said apportionment. The Court was accordingly urged to undertake its own independent assessment of the evidence and arrive at a fair decision on liability.

[6] On quantum, Counsel for the Appellant was of the view that the Trial Magistrate erred in making an award of **Kshs. 700,000/=** as that amount is excessive for the injuries sustained by the Respondent. It was further submitted that the Trial Magistrate failed to take into account the principle of *stare decisis* in awarding the aforestated amount. Counsel relied on **Muthamiah Isaac vs. Leah Wangui Kanyiri [2016] eKLR** where an award of **Kshs. 400,500/=** was made for similar injuries. Thus, on quantum, the Appellant prayed that the judgment and decree in **Eldoret CMCC No. 995 of 2007** be set aside and that the Court be pleased to either make its own independent assessment of damages or substitute the lower court Judgment with an order dismissing the suit with costs.

[7] Counsel for the Respondent defended the lower court decision on both liability and quantum. It was the contention of the Respondent that, granted the evidence of **PW1** and **PW2** that the point of impact was on the path of the bus; and that the Appellant's driver was overtaking another motor vehicle when the collision occurred, there was sufficient proof of recklessness on the part of the Appellant's driver for which the Appellant ought to be held 100% liable. Counsel relied on the case of **Samuel Mukunya Kamunge vs. John Mwangi Kamuru, Nyeri HCCA No. 34 of 2002** and **Samuel Gikuru Ndung'u vs. Coast Bust Co. Ltd [2000] EA 462** for the holding that the owner of a motor vehicle can be held vicariously liable for the negligence of his driver even where the driver is not a party to the suit.

[8] On quantum, Counsel for the Respondent urged the Court to consider the injuries suffered by the Respondent, the medical reports filed before the lower court and the prognosis that the Respondent would require future operation to remove the metal plates and screws as well as physiotherapy sessions. On that account, the Court was urged to uphold the finding of the Trial Magistrate on quantum. The following authorities were cited in support of the Respondent's submissions:

[a] Nakuru HCCC No. 384 of 2000: Esther Wanjiru Kiarie vs. Joseph Kiarie Ng'ang'a;

[b] Nakuru HCCC No. 193 of 1987: Waihiga Kimani vs. Attorney General;

[c] Sosphinaf Co. Ltd vs. James Gatiku Ndolo and Ng'ang'a Kanyi, Civil Appeal No. 315 of 2001.

[9] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while giving allowance for the fact that I did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was expressed thus:

> **"...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] A careful perusal of the lower court record shows that the only witness was the Respondent, who testified on **23 September 2008**. The Appellant was unable to avail witness in spite of being accorded time to do so. The record further shows that before the testimony of the Respondent was taken, the parties, by consent adopted the finding of the lower court on liability in a related suit; namely **CMCC No 997 of 2007.** Hence, the Respondent's unrebutted evidence was to the effect that, on the **9 June 2007**, he was travelling in **Motor Vehicle Registration No. KAP 476W,** Eldoret Express bus, from Malaba to Eldoret when the said motor vehicle was involved in a road traffic accident at Murukusi area at about 9.00 p.m. According to the Respondent, the Appellant's motor vehicle suddenly emerged from behind a trailer that was headed for the opposite direction vis-a-vis the bus and collided head on with the bus on its correct lane, thereby occasioning him the following injuries:

[a] Fracture of 3 ribs on the left side;

[b] Fracture of the right leg;

[c] Bruises on the left foot and left elbow

[11] He further told the lower court that he was admitted for treatment at **Moi Teaching and Referral Hospital** and at **Mediheal Hospital** and that he underwent surgery in which a metal plate was affixed to his fractured foot. He produced the treatment documents and medical reports prepared on his behalf as exhibits. In cross-examination, the Respondent was categorical that the point of impact was on the path of the bus, namely on the left lane, facing Eldoret direction; and therefore blamed the Appellant's driver for attempting to overtake at a corner when it was not safe to do so. The Respondent also blamed the bus driver for over-speeding; and in all these respects, there was no rebuttal evidence. There would be no basis therefore for faulting the apportionment of liability between the Appellant and its co-defendant before the lower court at 90:10, respectively. In any event, the parties were in agreement with that apportionment and urged the lower court to proceed on that basis. I therefore find no basis for re-opening the issue of liability.

[12] The foregoing being my view, the only issue to consider is whether the trial court's assessment of damages is reasonable in the circumstances. The Judgment of the lower court dated **16 July 2009** shows that it took into account the injuries suffered by the Respondent in arriving at the award. Again, the Respondent's evidence was entirely uncontroverted as regards the injuries suffered, namely: multiple rib fractures, compound fracture of the right tibia and fibula, abrasions with lacerations to the left lower limb and blunt injury with bruises to the left elbow.

[13] When he was examined by **Dr. Kubasu** on **11 October 2007**, the Respondent still had a swollen limb with tenderness on palpation. The leg injury had healed with a scar on the right thigh laterally. The Respondent also had surgical and traumatic scars to the tibia region and was in post-traumatic pain. **Dr. Kubasu's** conclusion was that the injuries sustained by the Respondent amounted to grievous harm and that he would require non-steroidal anti-inflammatory agents for the pain along with medical follow-up; and that after complete union, another operation would be required to remove the plate.

[14] The Respondent underwent a further examination on **16 April 2008** or thereabouts, by **Dr. Sokobe** at the clinic of **Dr. Gaya**. His complaints at the time were occasional swelling and pains of the right lower limb. In **Dr. Sokobe's** view, though the injuries the Respondent had suffered were severe, he had healed well. In the premises, the question to pose is, what would be reasonable recompense in the circumstances?

[15] It is trite that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** (supra), the Court of Appeal restated this principle as follows:

> **"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."**

[16] Hence, on the face of it, the Judgment of the lower court does not show that it took into account an irrelevant factor or that the Learned Trial Magistrate left out of account a relevant factor. However, it must be underscored that in arriving at the figure of **Kshs. 700,000/=** the lower court was under obligation to manifestly state and be explicit that it had in mind comparable awards. Other than a general statement that the lower court had considered the submissions and the authorities cited by the respective Counsel in their submissions, it is not evident how the authorities cited impacted on the lower court's determination. Thus, in the case of **H. West and Son Ltd v. Shepherd (1964) AC.326 it was proposed that, in so far as possible, comparable injuries should be compensated by comparable awards. It was held thus:**

> ***"…money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional….."***

[17] In the premises, having given due consideration to the case of **Muthamiah Isaac vs. Leah Muthamiah Isaac vs. Leah Wangui Kanyingi [2016] eKLR** which was cited by the Appellant's Counsel, I note that that the injuries suffered therein were somewhat different from those of the Respondent herein. Hence, on my part, I have given consideration to the following comparable decisions:

[a] In the case of **Zachary Kariithi v Jashon Otieno Ochola [2016] eKLR,** the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th 5th ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. Hon. **Majanja, J.** awarded a sum of **Kshs 1,500,000/=** general damages for pain and suffering and loss of amenities.

[b] In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, Hon. **Wakiaga, J.** allowed a sum of **Kshs. 700,000/=** as general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

[c] Similarly, in **Clement Gitau v G K K [2016] eKLR** wherein the 1st respondent sustained fractures of the tibia and possibly the fibula and bruises on the neck, the Court **(Hon. Sergon, J.)** awarded the sum of **Kshs. 600,000/=** on **28 October 2016**.

[18] In the premises, it cannot be said that the award by the lower court of **Kshs. 700,000/=** as general damages was inordinately high given the Respondent's injuries. Likewise, receipts were produced by the Respondent to show that he incurred much more in terms of special damage expenses but only claimed **Kshs. 53,200/=** which was supported by the uncontroverted evidence of the Respondent, including the documents exhibited by him before the lower court.

[19] In the result, I would uphold the Judgment of the lower court dated **16 July 2009** and the Decree ensuing therefrom, and would accordingly dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY 2019

OLGA SEWE

JUDGE