REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 85 OF 2014

MULO HOLDINGS.....1ST APPELLANT

VICTORIA COMMERCIAL BANK.....2ND APPELLANT

TOBIAS ODEYO OBURU.....3RD APPELLANT

NELSON OTIENO ATINDA.....4TH APPELLANT

VERSUS

EDWARD OMOSA.....RESPONDENT

(Being an appeal from the Judgment of Hon. Njoroge

in Kisii CMCC No. 198 of 2012 delivered on 07/07/2014)

JUDGMENT

1. The appellant being is dissatisfied with the award of Kshs. 300,000/- as general damages by the trial court filed this appeal on the following grounds:

1. The learned magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

2. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.

3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply precedents and tenets of law applicable.

4. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented ab entirely erroneous estimate vis-à-vis the Respondent's claim.

5. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

2. The facts of this case were as follows. The Plaintiff alleged that the 1st and 2nd defendants were the registered owners of motor vehicle registration no. KAH 254 A, Isuzu Tanker which was being driven by the 3rd defendant. The 4th Defendant was the owner in user, manager and or driver of motor vehicle no. KAH 254A. The 3rd and 4th defendants entered appearance and filed their defence in which they denied the allegations outlined in the Plaintiff's plaint.

3. The suit against the 2nd Defendant was discontinued on the 7/3/2013 with no order as to costs. Contents of the2nd defendant's defence was that in 1/8/1996 it hired out the motor vehicle registration number KAH 254A and the said vehicle was registered in the joint names of the 1st and 2nd Defendant. On 17/7/1997 the said vehicle was involved in a serious accident and the 2nd defendant repossessed the wreckage which the 2nd Defendant sold and transferred to M/s Deen's Agencies Limited.

4. Later on liability was agreed in the ratio 70:30 against the 3rd and 4thappellants on the 12/3/2014. The trial magistrate awarded the respondent Kshs. 300,000/- as general damages. It is the award of general damages that has occasioned this appeal.

5. In dealing with an appeal on quantum, I am guided by the decision of the Court of Appeal in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*** where it 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 …."*

6. The injuries sustained by the respondent were not in dispute. Dr Ezekiel Ogando Zoga prepared a medical report dated the 1/8/2013 in which he detailed the injuries sustained by the respondent as follows:

· Dislocation of the hip on the left side

· Contusion on the back

· Bruises on the face

7. In quantifying the award for damages, the respondent proposed Kshs. 350,000/- as general damages and relied on the following cases ;*Arrow Car Ltd vs Elijah Shamilla Bimomo & Others* as quoted in *Kithoka Youth Polytechnic vs Lucy Kithira Riungu Civil Appeal No. 126 of 2006* in which the Court awarded Kshs 150,000/- for soft tissue injuries. The quoted case did not outline the nature of soft tissue injuries sustained by the Plaintiff. The Respondent also relied on the case of *Leornand Mutua Muthamia v John Gichuhi & Others Nairobi HCCC No. of 1987* in which an award of Kshs 200,000/- was awarded where the Plaintiff sustained a posterior dislocation of the hip joint of left side and bruise over the right shin.The respondent did not indicate the case number for their second authority. The trial court in this case awarded general damages of Kshs 300,000/- in the ratio of 75:25 despite the consent between parties for liability of 70:30. Therefore liability of 75:25 as entered by the trial magistrate in my viewwas erroneous as the parties had recorded a consent on liability of 70:30. The appellant did not propose any amount on quantum before the trial court.

8. The Plaintiff/respondent sued four appellants, only the 2nd, 3rd and 4thappellantsentered appearance. The Respondent withdrew its suit against the 2nd defendant and the 3rd and 4thdefendants/appellants defended the suit. The 1st Defendant having failed to enter appearance or file defence the Respondent made an application to have interlocutory judgment was entered against him. Having perused the record, no interlocutory judgement was entered against the 1st Defendant. The appellant submitted that the trial court ought to have entered an interlocutory judgement against the 1st Defendant and is also seeking that this court to make a determination on liability against the 1st Defendant at 100% as an interlocutory judgement.

9. In this case the respondent/ plaintiff was required to formally prove its case against the defendants and the trial court was to arrive at either of the following possible outcomes:

· That all the three defendants could be held jointly and severally liable.

· Any two could be held jointly and severally liable.

· One could be liable

· None could be liable.

10. Though the Learned Trial Magistrate failed to explicitly state who of the defendants he found liable, he entered the judgement against the "defendant", it can be construed that he referred to all the 3rd and 4th Defendants who had entered a consent on liability in the ratio of 70;30. The plaintiff in his plaint had sought reliefs against the defendants jointly and severally. In ***Dubai Electronics – Vs – Total (K) Ltd & 2 Others HCC NRB Civil 870/98***, the same court had stated,

> *"Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them."*

11. Having looked at the proceedings before the trial Court I find that no interlocutory judgement entered against the 1st Defendant on application by the Plaintiff. No appeal has been preferred by the appellants' in this regard. This court cannot enter judgment against the 1st defendant as sought as the appellant chose to enter a consent with the 3rd and 4th defendants. The appellant's did not raise the issue of interlocutory judgment before the trial court, they chose not to pursue it. The trial court decided the case on the consent. The appellants cannot ask this court to make a finding on the 1st defendant's liability at this appeal. Had they brought to the attention of the trial court attention and no finding was made, then the issue of liability could have been one to determine in this appeal. In the circumstances the judgment therefore applies jointly and several against the 3rd and 4th defendants.

12. I shall proceed to determine whether the amount of Kshs 300,000/- awarded by the trial court was excessive in the circumstance. It was the duty of the advocates to guide the trial court by citing relevant cases to enable the court arrive at a fair decision. The appellant relies on two cases; Motalent Construction Co. Ltd vs Mrinzi Chimaira Mbetsya [2012]eKlR where plaintiff who had sustained a dislocated left shoulder in December 2007 was awarded of Kshs.190,000/ and the case of Kamenju Charles vs Gideon Muia Mutisya [2014]eKLR a plaintiff who suffered soft tissue injuries and a dislocation was awarded Kshs 170,000/. The respondent relied on the cases submitted before the lower court.

13. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR* that:

> *Having so said, 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.*

14. I would also add what the Court of Appeal stated in ***Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR*** that:

> *The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.*

15. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation *(see Kigaraari v Aya [1982-88] 1 KAR 768 Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661)*.

16. Having considered the cases cited and the awards being given at the time in my view an award of Kshs. 200,000/- was comparable.

17. The upshot is that the appeal is allowed and the court sets aside liability at the ratio of 75:25 and substitutes it with liability of 70:30 against the appellant. Judgment on general Damages is awarded at Kshs 200,000/- less 30%, net total Kshs. 140,000/-. Costs of the appeal are at the discretion of the court. I make no award as to costs.

Dated and delivered at KISII this **17th**day of **January 2019**.

R. E. OUGO

JUDGE

In the presence of;

Mr. Bosire h/b Mr. Menezes For the 3rd and 4thAppellants

Absent

Rael Court Clerk