REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 88 OF 2014

MULO HOLDINGS..................................1ST APPELLANT

VICTORIA COMMERCIAL BANK.....2ND APPELLANT

TOBIAS ODEYO OBURU......................3RD APPELLANT

NELSON OTIENO ATINDA..................4TH APPELLANT

VERSUS

MARTIN OGACHI MUTUNDURA...........RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Njoroge in Kisii CMCC No. 221 of 2012 delivered on 07/07/2014)

JUDGMENT

1. The appellant is dissatisfied with the award of Kshs. 150,000/- as general damages by the trial court filed this instant 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 254 A. 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 Plaintiff withdrew the suit against the 2nd Defendant after the 2nddefendant filed their defence. Contents of their 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. The Plaintiff and the 2nd Defendant subsequently entered into a consent and withdrew the suit against the 2nd Defendant.

4. Later liability was agreed in the ratio 70:30 against the appellant. The trial magistrate awarded the respondent Kshs. 150,000/- as general

damages. It is the award of general damages that has triggered this appeal.

5. This appeal is against the trial court's judgment on quantum. 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 in which he detailed the injuries sustained by the respondent as follows:

- Blunt trauma to the head
- Facial laceration
- Multi cut wounds on the right leg
- Bruises on the fore head
- Bilateral lower limb bruises on both lower limbs

7. In quantifying the level of award, the respondent proposed Kshs. 200,000/- as general damages. He cited *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.

8. The Plaintiff/respondent sued four defendants, only the 2nd, 3rd and 4thappellants entered 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 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 three Defendants she found liable, it can be construed that when he entered the judgement against the "defendant", he referred to the 3rd and 4thDefendants. 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 court stated as follows;

> ***"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 on 7/11/2012 interlocutory judgement was not entered against the 1st Defendant as the orders therein were not been signed by the trial magistrate. In the circumstance the judgment therefore applies jointly and severally against the 3rd and 4ththe defendants/appellants with the exception of the 2nd Defendant whom the Plaintiff withdrew its case. The issue of liability was resolved by a consent apportioning liability at 70:30 in favour of the respondent.

12. The appellants also raised the issue that the injuries in the medical report were at variance with the treatment notes at Christa Marianne Hospital. Interestingly, during the hearing and as can be discerned from the proceedings of the before the trial Magistrate, the Advocate for the appellant did not object to the production of the medical report, P3 form and treatment notes from Crista Marianne Hospital by the respondent. If there were differences in the documents, it would have been prudent for the parties to summon both doctors to explain their findings. The medical report and P3 form prepared by Dr Ezekiel Ogando Zoga, including the treatment notes from Christa Marianne Hospital are independent documents that a court considered to ascertain the nature of injuries. The P3 form indicated injuries on the head, face and both legs, the notes from Christa Marianne hospital indicated injuries on the face, deep cut wound on the right leg and that the respondent complained of severe headaches and generalised pains. All these 3 medical documents indicate injuries to the head, face and legs. Am persuaded that the respondent suffered injuries as stated.

13. I shall now proceed to determine whether the amount of Kshs 150,000 awarded by the trial court was excessive in the circumstance.

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. It was the duty of the advocates to guide the court by citing relevant cases to enable the court arrives at a fair decision. ***Eastern Produce (K) Limited (Savani Estate) vs Gilbert Muhunzi Makotsi (2013) eKLR; George Kinyanjui t/a Climax Coaches &Another vs Hussein Mahad Kuyale (2016) eKLR;*** and ***Peter Ambani Shrindwa vs Gordon Osore (2013) eKLR*** now cited by the appellants were not cited before the trial court. In Hassan ***Farid & another v Sataiya Ene Mepukori & 6 others [2018] eKLR*** the court revised the award of the lower court in CC 21 of 2007 and made an award of Kshs. 150,000/= where the Plaintiff suffered cut wound on the forehead; cut wound on the occipital region; facial cut wounds; blunt injury to the chest; blunt injury to the back; blunt injury to both hands; and cut wound on the right leg.

17. The trial magistrate in this case did the best and applied his mind to the issues by awarding Kshs. 150,000/. I therefore cannot detect any error on the part of the trial magistrate that would warrant. I dismiss the appeal and for reasons I have stated with costs to the Respondent.

Dated, signed 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 4th Appellants

Absent

Rael **Court Clerk**