REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 303 OF 2015

PETER MWAURA NGA'NGA.....APPELLANT

VERSUS

LUCY W. KIMANI.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgement of the Principal Magistrate Court **Kikuyu Civil Suit No. 162 of 2014** delivered on the 15th June 2015.

2. The respondent instituted suit against the appellant and another for compensation for general damages, special damages, future medical expenses, loss of future earning and earning capacity and costs of the suit and interest as a result of injuries suffered by the respondent in a road traffic accident.

3. The trial court awarded the respondent Kshs. 900,000/= for pain and suffering, Kshs. 172,800/= for loss of earnings, Kshs. 150,000/= for future medical expenses and Kshs. 147,453/= for special damages as well as cost of the suit and interest. This was to be reduced by 20% as the parties had consented on liability at 80:20 in favour of the respondent against the appellant.

4. The appellant's who was the 2nd defendant in the trial suit, being dissatisfied with the trial court's decision appealed on 4 grounds that can be summarised as follows;

> *a)* ***That the learned magistrate erred in law and in fact by awarding exorbitant damages of Kshs. 900,000/= which were not commensurate to the injuries sustained by the respondent and against the evidence adduced by the appellant.***

5. The parties consented to dispose of the matter by way of written submissions.

B. Appellant's Submissions

6. The appellant submitted that trial magistrate erred by awarding the respondent general damages of Kshs. 900,000 which were excessive, unwarranted and excessive and not commensurate to the injuries suffered by the respondent. He relied on the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia [1987] KLR 30.**

7. He further submitted that this court was mandated to subject the evidence before the trial court to a fresh scrutiny so as to arrive at its own conclusion.

8. He further submitted that the general damages ought to be reduced to Kshs. 150,000/= taking into consideration the cases of **Smokies Bar & Restaurant & Anor v Reuben Kieti [2015] eKLR** where the court upheld an award of Kshs. 250,000/= for injuries of 2nd degree burns on both arms and the right leg and 1st degree burns on the face, as well as the case of **China Wuyi Co. Ltd v Jotham Mwangi Weru [2012] eKLR** where the court upheld an award of Kshs 250,000 for injuries of severe burns on the right arm, burns on the neck, chin and both legs.

C. Respondent's Submissions

9. The respondent submitted that the award of the Honourable trial court was reasonable and not excessive as the court had been guided by

previous awards for similar injuries. She submitted that she had relied on the cases of **Charles Kimani Nga'nga v Kenya Power & Lighting Company Ltd [2006] eKLR** where the court awarded Kshs. 2,500,000 for similar injuries, **Joseph Kiptonui Koskei v Kenya Power & Lighting Company Ltd [2010] eKLR** where the Plaintiff was awarded Kshs. 1,200,000 for less severe injuries and the case of **Agnes Wanjiku Ndegwa v Kenya Power & Lighting Company Ltd [2014] eKLR** where the plaintiff was awarded Kshs. 1,300,000 for less severe injuries.

10. She further submitted that the trial magistrate did not err nor take into account any wrong principles in arriving at the award and as such the appeal should be dismissed.

D. Analysis of Law

11. I have considered the written submissions of the appellant and those of the respondent as well as considered the authorities relied on by the respective counsel.

12. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

13. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

14. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*.** The appropriate standard of review established in these cases can be stated in three complementary principles:

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

15. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***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 Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

16. The respondent's case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

> *a)* ***The Appellant owed the deceased a duty of care;***
>
> *b)* ***The Appellant breached that duty, and;***
>
> *c)* ***The deceased suffered injury as a result of that breach.***

17. The respondent's case as it emerged from trial was that she was a passenger in motor vehicle registration number KAT 447S that was involved in an accident with motor vehicle registration number KBP 332N being driven negligently and recklessly by the appellant.

18. The respondent suffered the following injuries;

> *a)* ***Deep burns on the right arm and forearm***
>
> *b)* ***Deep burns on the right shoulder and axilla***
>
> c) ***Deep burns to the upper back***

19. As earlier stated the issue of liability had been earlier settled at 80% liability against the appellant and is not a subject of this appeal.

20. The principles upon which this court should proceed are those stated in the case of **Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs A. M. M. Lubia & Another [1998] eKLR**.

> ***"…. It 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

21. The same principle was reinstated in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*** where the Court of Appeal in held: -

> ***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 ….***

22. The appellant has questioned the basis for the award of Kshs. 900,000/= as general damages for pain and suffering. The injuries sustained by the respondent are not contested, and are as listed herein.

23. 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 ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** thus:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

20. For this court to interfere with the trial court's decision on quantum, it must be established that the trial court acted on wrong principles and or misapprehended the law. See **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** the Court held: -

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"***

24. The respondent was admitted in hospital for over two months having suffered deep burns on the right arm and forearm, on the right shoulder and axilla and on the upper back which were assessed as 20%. The permanent and functional capacity was assessed at 25%.

25. From the authorities of the respondent, plaintiffs who had suffered comparable injuries were awarded more than Kshs. 1,000,000/= for pain and suffering as follows: -

a) **Joseph Kiptanui Koskei Vs Kenya Power & Lighting Co. Ltd [2010] eKLR** - awarded Kshs. 1,200,000/=.

b) **Agnes Wanjiku Ndegwa Vs Kenya Poer & Lighting Co. Ltd. [2014] eKLR** – awarded Kshs, 1,300,000/=

26. Bearing in mind that the respondent underwent prolonged treatment and medical care and that she suffered great pain from injuries as well as a permanent and functional disability of 25%, I find the award by the magistrate adequate compensation.

27. The appellant has not established that the trial magistrate made any erroneous estimate or misapprehended the legal principles applicable in awarding damages. A perusal of the trial court's judgment reveals that the trial court considered the submissions and the authorities placed before it by the parties. I see no reason to interfere with the findings of the trial magistrate on quantum.

28. The appeal lacks merit and is hereby dismissed with costs.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F.N. MUCHEMI

JUDGE