

c. That the Learned Trial Magistrate erred in failing to give his reasons for finding that the sum of Kshs. 500,000/= in general damages to the Respondent was reasonable and/or adequate compensation.

d. That the Learned Magistrate erred in law and in fact in failing to find that the nature of injuries suffered by the Respondent did not warrant an award of Kshs. 500,000/=.

e. That the Learned Magistrate erred in law in failing to uphold the doctrine of precedent.

f. That the Learned Trial Magistrate erred in awarding such an inordinately high award of damages for such injuries that have resolved and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent.”

6. The court directed that the appeal to be disposed of by way of written submissions.

7. The Appellants asserted the general principle that in the assessment of general damages is that comparable injuries should be compensated by comparable awards as held in the case of *Easy Coach Limited v Emily Nyangasi (2017) eKLR*. They submitted that the two doctors who examined the Plaintiff found that prognosis was fair and that he had made adequate recovery and no further complications were envisaged. They submitted that the Respondent’s medical report by Dr. Mwaura medical report was rather exaggerated, in comparison to Dr. Wambugu’s and that the trial court failed to scrutinize the evidence tendered and to correctly relate the injuries therein with relevant case law. That the case of *Ben Menges v Edith Makungu Lande [2013]* relied upon by the trial court was not comparable as the injuries therein are far much severe.

8. Counsel submitted that the injuries in the *Peter Chege v Oserian Development Co. Ltd (2015) e KLR* relied upon by the Appellants were more similar to those suffered by the Respondent herein. In the circumstances, the award of Kshs.500,000/= in general damages was said to be inordinately high.

9. The Respondent by his written submissions contended that awarding of general damages is an exercise of judicial discretion and should not be interfered with unless it such discretion is shown to be exercised on the wrong principle. Counsel cited *inter alia* the case of *Ratnam vs Cumarasamy & Another ALL ELR (1964) Volume 3 at pg 933* where it was held that the burden of proving that a judge has exercised his discretion improperly lies on the person challenging the same. It was submitted that the Appellants herein had failed to discharge that burden and as such the appeal should fail. Counsel relied on among others the cases of *Peter Mburu Echaria vs Priscilla Njeri Echaria Civil Application No. 204 of 1998 and Mbogo vs Shah (1968) EALR at pg 93* to demonstrate instances where a court may interfere with a trial court’s exercise of its discretion.

10. The court has considered the evidence adduced in the lower court and submissions on this appeal. All the grounds of appeal can be condensed into one issue, being whether the damages awarded were so inordinately high as to constitute an erroneous estimate. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its own conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. See *Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123, Peters v Sunday Post Ltd (1958) EA 424*. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see *Ephantus Mwangi & Another vs Duncan Mwangi Wambusu [1982 – 1988] IKAR 278*].

11. The sole question for determination on this appeal is the quantum of damages. The parties consented in the lower court in lieu of a trial, to proceed by way admitting medical reports by Dr. Mwaura and Dr. Wambugu and written submissions. The particulars of injuries pleaded in the plaint were:

- a) Head concussion
- b) Swollen, tender face
- c) Bruises on peri –orbital region
- d) Bruises – left hand
- e) Blunt injuries – left leg
- f) Blunt injury – back and chest
- g) Swollen, tender left knee
- h) Cut would and swelling – left elbow

12. The medical report by Dr. Mwaura contains the same particulars above and discloses a fair prognosis. The examination was conducted about 3 months since the accident. On 16th February 2017 the Respondent was examined by Dr. P. Wambugu who confirmed:

- a) Blunt trauma to chest, left leg and left hand
- b) laceration would on left arm

c) blunt head trauma

13. Apart from noting a healed cut wound scar on (b) above, the doctor gave a positive prognosis. In making an award of KShs. 500,00/= in general damages, the trial court made a finding of fact that the injuries in the case were more comparable with those sustained by the plaintiff in **Ben Menges v Edith Makungu Lande [2013] e KLR** as opposed to the authorities tendered by the Appellants. These were **Peter Chege v Oserian Development Co. Ltd (2015) e KLR** and **Sturrock Shipping (K) Ltd v Mnengwa Moka Maselwa [2007] e KLR**.

14. The Appellants' complaint was that the trial court failed to consider the nature of injuries and gave an inordinately high award in damages. Contrasting the two medical reports, the Appellants claim that Dr. Mwaura's contained an exaggeration of injuries and that the authority in **Ben Menges** relied on by the trial court did not involve comparable injuries. They complain that the court did not consider the more relevant case of **Peter Kairu Chege**.

15. The appellate court will only disturb an award of damages where such award is so inordinately high or low as to represent an entirely erroneous estimate. See **Bashir Ahmed Butt v Uwais Ahmed Butt (1982 – 1988) I KAR 1**.

16. There is no dispute that the Respondents injuries were soft tissue injuries and were confirmed in the two medical reports. In his judgment, the learned trial magistrate correctly restated the findings in the doctors' reports and authorities cited. However, in considering the award of damages, the trial court considered the Respondent's authority while not giving any reasons as to why the Appellants' authorities were not applicable. Even so, the trial court proceeded to observe that the plaintiff in the Respondent's authority had suffered serious injuries with adverse sequela. At that point the trial court ought to have also considered the Appellant's authorities, more so as the Respondent's injuries had healed without any disability.

17. This court also finds merit in the complaint by the Appellants that Dr. Mwaura's report appeared to exaggerate the injuries. In my opinion items a) and b) and e) and g) related to the same body organs and could have been listed together. It is not clear why a separate listing was found necessary.

18. Back to the authority in **Ben Menges**, the trial court having found that authority represented more severe injuries ought to have made an award that was, even considering inflation, proximate, even if higher, to the Appellants' authorities. In the circumstances, the award of KShs.500,000/= appears to have been made in complete disregard of the Appellants' authorities which on the face of it compare well with the instant case. In particular, in **Sturrock Shipping** the Plaintiff had sustained head –injury concussion, contused wound on the left side and contusion on the chest and pelvis. He did not suffer permanent disability.

19. Other authorities considered in that case (**Sturrock**) include **Charles Agoya Mbuya v Fred Okiya Olande (HCCC 750 of 1987)** wherein the plaintiff sustained head injury, broken left lower teeth, pain in the back, injury on the left ear, multiple lacerations, bruises on scalp and left elbow. The victim was awarded KShs.150,000/= in damages for these serious injuries. As for the Plaintiff in **Sturrock** the Court set aside an award of Kshs.180,000/= substituting it with a sum of KShs.60,000/=. Granted, the authorities are rather dated and court would have had to consider the inflation factor .

20. That said, the decisions are more relevant to this case than the decision in **Ben Menges** where the court confirmed that the Plaintiff sustained the following injuries:

- a) Blunt injury to the head and both shoulders
- b) Blunt injury to back
- c) Numbness of the lower limbs
- d) Tender lumbo-sacral spine
- e) Post traumatic osteoarthritis of lumber spine
- f) Injury to the chest

21. He was hospitalized for 2 days and complained a year after the accident of persistent and recurrent lower back pain, necessitating treatment with pain killer, degenerative changes in the vertebrae of the spine leading to spasms. No doubt the injuries were severe and resulted in a poor prognosis for the plaintiff unlike the Respondent herein. The injuries of the present Respondent appear to compare well with the **Sturrock** case and in my considered view an award of KShs.500,000/= was excessive and unjustified.

22. The court will therefore set aside the said award and considering inflation, will substitute the award with an award of KShs.240,000/=, (Two Hundred and Forty Thousand) subject to the liability ratio agreed upon by the parties. The costs of the appeal will be borne equally between the parties. It is so ordered.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the Presence of:-

Mr. Mwangi for the Respondent

Mr. Olaka holding brief for Mr. Maanzo for the Appellants

Court Assistant Nancy