REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 59 OF 2017

AMAZON ENERGY LIMITED.....APPELLANT

VERSUS

PATRICK GATHOGO GATHOMI.....RESPONDENT

(An Appeal against the judgement and decree of the Senior Resident Magistrate

Hon. L.N. Wasige in PMCC No. 228 of 2016 Kaloleni

delivered on the 22nd November, 2017)

CORAM: Hon. Justice R. Nyakundi

Mr. Jengo for the Appellants

Kennedy Ngaira for Respondent

JUDGEMENT

This is an appeal from the judgment and decree of L.N. Wasige (S.R.M.) at Kaloleni, where in her decision she found the appellant guilty of negligence and breach of duty of care owed to the respondent. The appellant in the main suit was the owner of the offending motor vehicle registration No. KBZ 949X. The respondent had sustained serious injuries and sued the appellant, or his agents, driver and or servant for damages in negligence.

The learned trial magistrate on conclusion of the trial in her judgement she ordered as follows:

a) Judgement on liability be assessed at 100%

b) General damages at Kshs.100,000

c) Future medications at Kshs.100,000

d) Special damages at kshs.50,931.

Total award kshs.1,150,931 plus costs and interest at court rate.

Being aggrieved by the judgement of the court the appellant filed a notice and memorandum of appeal citing the following grounds

a) That the assessment and award of general damages for pain, suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate.

b) That the learned trial magistrate in assessing damages for pain and suffering and loss of amenities failed to apply the correct principles by leaving out account, the age of the plaintiff, the length of suffering of the plaintiff and the fact that the plaintiff had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.

c) That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedent and the submissions by parties that she made an award for pain suffering and loss of amenities that was erroneous and inordinately high.

d) The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of stare decis and take into account public interest. He thus made an award for pain, suffering and loss of amenities that was arbitrary, inordinately high and erroneous.

In the circumstances the appellant prayed for the appeal to be allowed and reassessment for the damages be undertaken afresh by this court.

On Quantum

The central issue in this appeal is on the assessment of general damages in favor of the respondent.

Mr. Jengo for the appellant submitted and urged this court to find that the respondent did not discharge the burden of proof placed on him to show that he was entitled to the award allowed by the court.

In learned counsel's view having regard to the injuries suffered by the respondent as referred to in the various medical reports more so that of Dr. Ndegwa dated 13th February, 2016, the general damages awarded represent manifestly high and excessive award.

It was further submitted by learned counsel that the trial magistrate erred in not factoring in the inconsistencies reflected by the discharge summary, the treatment notes, the P3 Form and the prognosis of what Dr. Ndegwa said in his medical report on the nature of injuries suffered and expected disability of 14% on overall impact occasioned by the accident.

The issue learned counsel argued was not whether the respondent suffered personal injuries as supported by the medical reports, but the learned trial magistrate approach of relying upon case law with more serious injuries compared with that of the respondent. The appellant's counsel relied on passage from **Losiamuro v Lochab Brothers & another HCC No. 48 of 1988** which demonstrate that a person is not compensated for physical injury, he is compensated for the loss which he suffers as a result of the injury. The plaintiff will not be compensated for having serious injuries but for her inability to lead a full life, (see also **Jobling v Associate Dairies Ltd 1983 3 WLR 1972 West v Shepherd 1964 AC 326-346**. Where in the latter case Lord Morris said as follows:

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

Taking an approach of the above principles the Learned counsel also challenged the trial magistrate finding by allowing herself to be carried away with the particularized physical injury but not the aftermath consequences resulting on an error to arrive at inordinately high estimate and unjust estimate of the award for the respondent. In this respect he submitted that the case of **Eldoret Steel Mills Ltd v Eliphas Victor Esipila HCCA 72 of 2006** shows a common sense approach to the assessment of general damages for pain and suffering. He described the authority reported to above as depicting more serious injuries with those sustained by the respondent. This approach among others submitted counsel for the appellant was ignored by the trial magistrate.

While urging this court to interfere with the Judgment of the trial court on quantum learned counsel invited this court to rely on the following decisions **Victor Esipela** (supra), **Kenyatta University v Isaack Karumba, Nyuthe HCCA 193 of 2012, T.A.M. (minor suing through her Father and next friend J.O.M.) v Richard Kirimi Kinoti & Another HCCA 82 of 2008** and **Bhachu Industries Ltd v Peter Kariuki Mutura HCCA 503 of 2009.**

Counsel for appellant submitted that whereas an award of general damages is a discretionary remedy the respective award in comparison with similar decided cases presents an error of fact and law which ought to be corrected by this court.

In the appellant counsel contention of Kshs.250,000 – Kshs.300,000 would have been sufficient in the circumstances of the injuries sustained.

On the part of the respondent, Mr. Kennedy Ngaira argued there are striking differences between the cases referred to and disability assessed by the Doctors who examined the respondent. It was submitted by counsel that the arguments being advanced on behalf of the appellant are erroneous as they fail to factor the medical evidence in support of the award. In answer to the submissions by the appellant counsel placed reliance to the following cases: **Butter Khan Court of Appeal No. 40 of 1997, H. Yoning & Co. E.A. Ltd v Emelda Nyaboke, Zakayo Civil Appeal No. 218 of 2009, Qureneni Wambua Kitilu HCCA No. 19 of 2008, Agnes Akoth & 3 others, Nyabi Chuku Farm, HCC No. 1540 of 1988.**

The germane issue of the respondent's submissions is that the trial magistrate did not error in law and fact to find that the respondent injuries based on evidence deserved an award of Kshs. 1,000,000 for general damages as fair and just to compensation under the limb on general damages.

I have considered the grounds of appeals and submissions by both counsels to this matter. The general guiding principles as to the jurisdiction of the first appellate court are clearly cited in **Selle and Another V Associate Motor Boat Company Ltd and Others 1968 EA 123**. In giving judgement of the court it was identified that the primary duty of the appellate court is to evaluate the evidence of the trial court

and to subject it to a fresh scrutiny, so as to reach its own conclusions and findings on the matter. In considering the appeal, the court went further to state that the appellate court should bear in mind that it has no advantage as to the demeanor of witnesses which was rightfully and wholly a purview of the trial court.

In the light of the above principles the critical issue in respect of this appeal is on assessment of quantum. That the award made for general damages as apportioned by the learned trial magistrate was excessive rendering it unreasonable. The issue of liability appears to have been properly decided as the same was not contested in this appeal.

Evidence at the trial

From the record on 20th July, 2015 the respondent (PW 1) was a lawful passenger travelling in motor vehicle registration No. KBZ 949X along Mombasa-Nakuru Highway, when the said motor vehicle was involved in a road traffic accident on or around Miritini. That due to the negligence of the driver, servant or agent of the identified motor vehicle he collided with motor vehicle registration KBH 715H.

As a result of the accident the respondent sustained personal injuries involving comminuted fracture of the proximal right femur, several cut wounds on the left upper back and shoulder and 3cm cut wound on the right forehead near the hairline. The pain, injury and damage suffered by the respondent was corroborated by the testimony of by Dr. Ndegwa (PW2) who examined the appellant produced the medical report indicative of injuries and prognosis. PW3 Cpl. Philip Mungai of Mariakani Traffic Base investigated the accident and produced the police abstract with details on occurrence of the accident. Further the respondent PW 1 also produced discharge summary from Coast General Hospital as exhibit 5 and P3 Form as exhibit 7.

At the close of the plaintiff's/Respondent's case there was no evidence in answer to the claim save that both counsels for the respective parties filed submissions and authorities to aid the court in assessment of general damages.

The trial magistrate assessed general damages being guided by the principles illustrated in the respective authorities. It is instructive to note that from the submissions both counsels in the court below made reference to the injuries suffered by the respondent. Those considerations were majorly based on the medical report of Dr. Ndegwa dated 13th February, 2016.

In that report the only motor injuries established through x-rays to have been sustained were to the comminuted fracture of the proximal right femur and scars to the back, shoulder and forehead. The respondent was hospitalized where he underwent surgery at Coast Provincial General Hospital. The surgery, did fix metal implants insitu. The other general observation made by Dr. Ndegwa was the nature and gravity of the resulting permanent physical disability assessed at 14%. It was also found that he would experience post-traumatic discomfort due to the weak union of the borne and scars which will ruin his appearance and affect him drastically. There is no doubt that the learned trial magistrate in her assessment appears to have been informed by the prognosis made by Dr. Ndegwa a medical Doctor based at Mombasa.

Assessment of damages on appeals

It is trite law that the first appellate jurisdiction to interfere with the judgment of the trial court is grounded on the following principles:

> ***i. Where an error of principle of law by the trial court or where from the evidence the trial court was plainly wrong and or error of principle can be inferred from the facts of the case.***
>
> ***ii. That the trial magistrate in assessing damages failed to take into account something he or she ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. (See Robert Msioki Kitavi v Coastal Bottlers Ltd 1985 (1 KAR) 891-895, Mwavita Jonathan v Silvia Ouma HCCA 17 of 2017.***
>
> ***Other general guideline is as expressly stated in the case of Bundi, Marube v Joseph Nyamuro 1982-88 – 1KAR 108 – where the court stated interalia that an appellate court will not normally interfere with the findings of a trial court unless it is based on no evidence or misapprehension of the evidence which in the circumstances demonstrates that he or she acted on wrong principles in arriving at the decision. (See also Kemfro v AM Lubia 1987 KLR 27).***

In considering the law on assessment of damages there is no dispute that it remains within the realm of discretion of the trial court and the relevant facts surrounding the suit. It has been quite the legal position pointed out by various courts that awards on general damages must be within limits set by decided cases. That limit must also take into account the socio-economic politic of a country like Kenya with a low Gross domestic product index. That is the law in Kenya as earlier stated by **Lord Diplock in Wright v Brush Rulways Board 1983 2 ALL ER 698**:

> ***"Non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than a recipient and, if the aim is that justice meted out to all litigants should be even handed instead of depending on idiosyncrasies of the assessor, whether jury or Judge – the figure must be basically a conventional figure derived from experience and from awards in comparable cases"***

The case of **Wells v Wells 1998 3 ALL ER 481** was subsequently considered and after considering **Wright** (supra) Lord Hope stated as follows:

> ***"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criteria of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the plaintiff's general damages."***

In the instant case with respect to the judgement of the learned magistrate this jurisprudential approach from the above persuasive authorities provides the anchor to our domestic law on assessment of general damages.

Applying these principles to the facts the present appeal it is significant to note that the appellant suffered comminuted fracture to the right femur on which he underwent surgery for the implant of metals. The total sum of Dr. Ndegwa's report was that the appellant sustained the aforesaid fracture which healed with a weak borne union. There were also lacerations to the back forehead which had permanent scars. The appellant in seeking interference with the award asked this court to rely on the authorities of **Eldoret Steel Mills (supra), Ibrahim Kalemia Lewa v Steel Co. Ltd HCCA 472 of 2010** and **Kenyatta University v Isaack Karumba HCCA 193 of 2012.** When paying regard to the award of general damages the range was between 250-350,000 for the claimants.

The respondent on the other hand cited the following authorities: **Jirenda Tarachand Shah v Kenya Ports Authority HCC No. 180 of 1980** where the court awarded Kshs.300,000 for similar injuries, **James Ngichuri Kibe v Simon Muriuki Thuga & Another HCC No. 5066 of 1981**, wherein that court learned counsel submitted that the injuries sustained were similar with that of the respondent. The court held and awarded Kshs.200,000. In **Miondo Mwakisa v Paul Musyala Mutemi & others HCC No. 879 Mombasa**; the court awarded kshs.350,000 for pain and suffering for a claimant who had similar injuries like the respondent herein.

I have weighed both counsel's submissions and authorities cited in opposition and support for the award of Kshs 1 million – general damages. Considering Dr. Ndegwa's examination and medical reports it becomes apparent the sum total of the respondent's injuries involved primarily comminuted fracture of the right femur. Also the examination and prognosis showed a 14% permanent and disability. Although the authorities cited are of useful guidance none of it can support an award of 1 million for the pain and suffering inflicted against the respondent. It is apparent that the trial magistrate gave much weight to the ratio on permanent disability.

It is also worthy to mention that from the evidence and medical report by the Dr. Ndegwa as an expert witness there is no description as to his expertise on orthopedic and trauma surgery as well post qualification on this area of specialty. The trial court and this court does not have the benefit of the parameters on how the ratio 14% permanent disability was arrived at by the medical doctor PW 3. There is no evidence that the respondent had experienced loss of fracture of his right leg to a degree of 14% as alluded to in the medical report. Dr. Ndegwa's own report attest to the union of the bones though describing it as weak. The fact of the matter is that the respondent at the time of his examination on 13th February, 2016 was stated to be 36 years old. The judgement was decided on 22nd November, 2017. The trial magistrate did not have an advantage of a second medical report to show whether the injury is at the state described by Dr. Ndegwa in 2016.

In summary the principles to be observed by an appellate court in deciding cases of this nature are well settled in **Kemfro Africa Ltd (supra), Lubia & another** (supra) and **Shah v Mbogo 1968 EA 93**. Taking the queue and account of the injuries, the long term trauma likely to be suffered by the respondent as stated in the medical report and similar awards I hold the view that the sum of Kshs.1,00,000 was erroneous and in the circumstances inordinately high and excessive. It is therefore erroneous estimate of the general damages to be awarded to the respondent.

That being the view of the matter I allow this appeal, set aside the judgement and decree on quantum of the trial court and in lieu substitute it with an award of Kshs. 500,000 general damages for pain, suffering and loss of amenities. The award on future medicals and special damages remain undisturbed as there was no appeal or cross-appeal against any one of them. The appellant awarded costs of this appeal. The interest on total quantum of this Appeal to accrue from the date of judgement at the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JULY, 2019.

.....

R. NYAKUNDI

JUDGE