REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 52 OF 2017

ST. JOHNS GIRLS SECONDARY SCHOOL.....1ST APPELLANT

BOSCO FONDO.....APPELLANT

VERSUS

FARIDA MASIKA CHONGA.....RESPONDENT

(Being an Appeal from the Judgement of SRM L.N. Wasige in SRMCC No. 62 of 2013 delivered on 18th October, 2017)

CORAM: Hon. Justice R. Nyakundi

C.B. Gor & Gor for the Appellant

Kanyi & Co. Advocate for the Respondent

JUDGEMENT

This is an appeal from the Judgement of L.N. Wasige (SRM) delivered on 18th October, 2017 in which she assessed general damages for pain and suffering at Kshs.1,800,000, Kshs.300,000 for future medicals and specials of 211,644 plus costs and interest.

As for liability by a virtue of a consent order, judgement on this issue had been adopted to apply in this close at a ratio of 20%:80% as between the appellant and the respondent. Although the appellant has raised eight grounds of appeal the main complaint lies on the award of general damages and future medicals.

Background

This appeal arises from the pleadings and judgement of the magistrate at Kaloleni presided over by Hon. L.N. Wasige. On or about 18th February, 2009 the respondent (Farida Masika) was lawfully boarding in the 1st the appellant motor vehicle registration KPB 785S being driver at the time by Bosco Fondo, who negligently and carelessly drove the aforementioned motor vehicle resulting the respondent to fall down, and the vehicle ran over her leg. As a consequence the respondent sustained personal injuries, loss and damage. By Ms Farida account in court she narrated the sequence of events on the material day which culminated in her sustaining serious injuries from which she sought compensation against the appellant.

Ms Farida testimony set out the particulars of negligence and breach of duty of care owed to her by the 2nd defendant as an agent, or servant of the 1st appellant.

Accordingly the defendant (1st appellant) were obliged to indemnify her for the damage. From the record both parties agreed to have the medical report from Agakhan hospital, PW3 form, discharge summary from Jocham hospital and a medical report by Dr. Ndegwa admitted as documentary evidence in support of the claim.

The defendants (appellants) tendered no evidence before the trial court. The learned trial magistrate judgement was therefore in essence grounded on the above evidence.

In summary both counsels under the directions of the court agreed to file written submissions to dispose of the contentious issues on

quantum. Dissatisfied with the final outcome on assessment of damages the 1st appellant preferred an appeal.

Submissions on appeal

Mr. Gor argued and submitted on the issue of damages more, specifically on inordinately high award on general and an un-pleaded future medicals. The borne of contention being the fact that in respect of general damages, there is no correlation with the injuries suffered. He contended that the learned magistrate fell in error in awarding of 1,800,000 which was excessive and unreasonable. Learned counsel further pointed out that despite there being two medical reports, one by Dr. Ndegwa and the second by Dr. Seth, in the decision presided by the trial magistrate no consideration was given to the medical report by Dr. Seth.

Learned counsel submitted that the impugned medical report by Dr. Seth was agreed to be provided by consent though that was not the position taken by the trial court. The other argument indicated by the counsel was that the award made by the learned trial magistrate was excessive and unconscionable against the principles and awards in similar cases with that of the respondent. Learned counsel in urging this court to set aside the award on general damages relied on the cases of **Tayab v Kinanu CA 29 of 1982, Butt v Khan 1982-88 1KAR 1** on grounds of being excessive and misapprehension of the principles of law that apply in such cases, by the learned magistrate.

The appellant counsel also took issue with the award of future medicals ascertained at Kshs.300,000. On this ground learned counsel submitted that this claim on future medicals was not pleaded and yet the trial court went ahead to make a finding on issue. Learned counsel submitted that it was not open to the learned trial magistrate to introduce the claim at the time of writing the judgment. The appellant counsel in buttressing this issue on special damages cited the following authorities which support the legal position that special damages must be both pleaded and proved: **Zachary Waweru Thumbi v Samuel Njoroge Thuku CA No. 445 of 2003**.

Having so submitted learned counsel argued and submitted that the appellate court jurisdiction be invoked pursuant to the principles in **Butt v Khan** (supra) to interfere with the awards on both general and future medicals.

Mr. Kanyi on behalf of the respondent submitted and vehemently opposed the appeal and submissions relied upon by the appellant. Learned counsel urged the court to apply the principles in the cases of **Butt v Khan, Kemfro Africa Ltd v AMM Lubia & another 1982-1988, David Murungi Daniel & another v Martin Gitongo Ndereva 2017 eKLR, Julius Kiprotich v Eliud Mwangi Kihohia 2006 eKLR** and **Godfrey Wamalwa Wamba & another v Kyalo Wamba 2018 eKLR** to dismiss the appeal.

The above authorities sound a cautionary note that the decision on award of damages being exercised within the realm of discretion can only be interfered with by an appellate court where the trial court was acted on wrong principles, took into account irrelevant matter or any other sufficient reason. Learned counsel further submitted and made a review on the medical evidence as presented in the medical reports by Dr. Ndegwa and Dr. Seth.

In the case of Dr. Seth's medical report learned counsel's contention was that the learned magistrate did not ignore it but only placed less weight to the opinion therein.

According to leaned counsel the award in question was assessed not only on the basis of Dr. Ndegwa's medical report but also other factors to arrive at the appropriate award. Learned counsel argued and submitted that there is no basis why this court should interfere with the award on general damages.

Learned counsel's submissions on future medicals was guided by the medical reports by Dr. Ndegwa and Dr. Seth. Learned counsel submitted that the trial court was entitled to consider future medical as a fact though the claim was note pleaded. It is on this basis that learned counsel submitted that the appeal be found to lack merit.

The law, analysis and determination

This being a first appeal the court is under a duty to re-evaluate and re-examine the evidence before the trial court and be able to draw its own conclusions. In doing so I will bear in mind that I do not have the advantage of observing the demeanor of the witnesses and evidence on the first hand. See **Selle v Associated Motor Boat Co. Limited 1968, Peter v Sunday Rose Ltd 1985**. Further the jurisdiction of this court on appeal is exercisable by virtue of the principles in the case of **Henry Mudaya v Manyema Manyora 196 EA 705**, **Nance v Bruise, Columbia Electric Railway Co. Ltd 1951 AC** and **Kemfro Africa Ltd (supra)**.

The cardinal principle an award of damages in negligence claims is an attempt by the court to put an injured claimant, whose body frame has been injured to some kind of restoration. On this purpose and approach I find the passage in the case of West (H) & Sons Ltd v Shepherd 1964 AC 326 relevant:

> ***"But money cannot review a physical frame that has been buttered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some unfortunate in the general method approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is correctly desirable that so far as possible comparable injuries should be compensated by the comparable awards. When all this is said, it still must be that awards which are awarded are to a considerable extent convenience."***

In **Lim Phochoo v Cariden 1979 1 ALL ER 339** Lord Denning stated interalia "**that in considering compensation in physical injury claims the plaintiff is only entitled to what is in the circumstances a fair compensation"**.

From the submissions by both counsels they are in disagreement as to the fair and just quantum for pain and suffering. It becomes quite

apparent from the record that the respondent's case was based on her testimony and the medical reports that were admitted by consent as evidence.

The sum total of the injuries suffered by the respondent are as summarized by Dr. Ndegwa in his report filed in court on 14th September, 2015. The Doctor states the injuries suffered to be comminuted fracture of the proximal shaft of the left femur, compound fracture of the left calcaneous, fracture of the proximal left fibula, extensive massive degloving injury covering the entire leg, the heel, planta and dorsum of the foot, avulsion of the left calcaneal tendon, cut wound on the right forearm.

The complaints associated with the injuries are clearly particularized in the report to include shortening deformity of the left leg, weak bones union with severe stiffness of the left ankle together with loss of calcaneal bones making it impossible to walk, she will find it difficult to engage in sports or physical activity. In overall Dr. Ndegwa observed 45%.

On the other hand the appellant/defendant at the time apparently put in a second medical report by Dr. Seth dated 17th July 2014 and filed in court on 28th July, 2015 by Dr. Seth. In his summary he state as follows:

Stiff left ankle, non-healing would left leg, healed scar, mark of skin graft over left leg 12 x 5", 4", healed operative scar over the buttocks, there is mild limp while walking. There is no shortening of the left leg. He assessed permanent disability at 15%. In deciding on the award for pain and suffering learned trial magistrate placed weight on the medical report by Dr. Ndegwa and other medical reports admitted in evidence at the time. She pointed out that Dr. Sheth's medical report was not part of documentary evidence and admitted during the trial or produced by consent of both parties.

Notwithstanding the procedural defects in admission of the medical report by Dr. Sheth's. Learned trial magistrate allowed it though giving little weight to his opinion. When this appeal came out and the issue of Dr. Sheth, medical report became contentious, I have to refer to the record for an answer. The observation I made on the issue is that from the testimony of the respondent no mention of Dr. Sheth medical report marked for quantification or admitted as an exhibit. Save for the bold statement by the appellant counsel that they consented to admission of medical report, there is no order or supportive evidence to that effect.

Indeed, when the case was scheduled to have the defendant tender any evidence no was forthcoming and a decision was taken by the court to close the proceedings.

That being so, there was no basis upon which the learned magistrate would consider the evidence provided through the back door. when the pleadings and the trial has been concluded. With respect to counsel for the appellant the test to be applied in admission of evidence is now settled in terms of the provisions of Section 107(1) of the Evidence Act which provides that whoever desires any court give judgement as any legal right or liability depended on the existence of facts he asserts must prove those facts exist. This position runs throughout the features and the submissions until final judgement is delivered.

The appellant gave no evidence at the trial challenging the medical reports, i.e. discharge summary, P3 Form and the medical report by Dr. Ndegwa in regards the diagnosis and manner they impacted negatively on the respondent. In equal measure I am fully satisfied the trial court exercised discretion to take into any deficiency in the evidence relied upon by the parties to the litigation.

The suggestion therefore by counsel for the appellant that the award was made without reference to the Dr. Sheth's medical report can readily be discussed as involved breach over admission for documentary evidence. The above expert evidence being at variance with the already admitted medical report by Dr. Ndewa required that it be subjected to rigorous test on the cross-examinatin by the respondent. The creteria and threshold on expert evidence is as expressly stated in the case of **Stephen Wangondu v the Ark Ltd 2014 eKLR**. In overall it remains the duty of the court to determine the relevant facts and to qualify them with other relevant evidence and legal provisions on admission of evidence. When determining the criteria used to weigh Dr. Sheth medical report learned trial magistrate made a certain caution that there was no mention of the production of medical report during the trial. The court's evaluation though not absolute cannot be faulted in this case with regard to medical report sneaked in at the time of filing submission.

For instance given the fact that there was already another medical report which was in conflict in opinion with Dr. Sheth's report one may have expected to have it tested in reference to the initial report by Dr. Ndegwa to enhance its probative value. It can be said from the onset that the appellants counsel cannot rely on this submission to impugn the award on general damages.

From this line of submissions one is left with impression the appellant counsel seems to urge this court to give particular importance to the existence of the medical report by Dr. Sheth. On appeal I give relatively little weight to evidence of Dr. Sheth that it offends the rule of due process, admissibility and exclusion for non-closure to the other party. The evidence has finally introduced in the proceedings by the appellant to a large extent focuses in aiding the respective defendant in the pending judgement before court.

Whether the opinion would stand an objection on the necessity test would be questionable going by the sentiments given by the learned trial magistrate.

Let me now turn to the first ground of substance to this appeal which concerns the assessment of damages at 1.8 million. Before the trial court the appellant submitted and proposed an award of 800,00 relying on the following authorities: **Otieno Musa v Mzee Mtoto & another HCC 537 1985, Sharif Salim & another v Malundu Kikava Civil Appeal No. 15 of 1989 Mombasa.** Whereas the respondent counsel placed reliance on the following cases: **Mombasa HCCC. No. 585 of 1985 Mwanakombo Ali Mwatabu v Mwanzala Ngowa and Mombasa HCCC. NO. 178 OF 1989, Rosmary Bulinda v Peter Kinyanjui Gakumu and another, Nakuru HCCC. NO. 86 of 1988, Masha Kombo v Nicholas Nyange & ANOHTER, Mombasa HCCC. No. 403 of 1996, Stephen Wanderai Kamau and another v Gladys Wanjiku Kungum, Nakuru CA No. 81 of 2005 and Ernest Odongo Ombaddo v Quick Hauliers Ltd and another, Momabsa HCCC. No. 112 of 1999 (RD)**. The plaintiffs in the above cases sustained crush injury to the left tibia fibula bones and the range of damages awarded for pain and suffering was in the range of Ksh.600-650,000.

It has been pointed out the appellant counsel that the award on general damages was too high to invite interference by this court. On appeal therefore its trite as stated in case of **Butt v Khan** and **Kemfro** (supra) **"that it is not enough that there is a balance for opinion or preference by the appeal court. The scale and weight must go down heavily against the figure being altered if the appellate court is to interfere whether on ground of excess or insufficiency (See Flint v Lovel 1935 1KB 354**)" Also in the case of **Cornilliac v St. Louis 1968 WIR 491** that assessment of damages is motivated to be within the following factors:

1) **The nature and extent of the injuries sustained**

2) **The nature and gravity of the resulting disability**

3) **The pain and suffering endured**

4) **The loss of amenities and the effect of future pecuniary prospects.**

It is also significant to note that the respondent was aged 24 years at the time of accident. In respect of pain and suffering the only evidence was that of the responded and the medical report by Dr. Ndegwa. She was discharged with main injury being compound of the left femur, extensive degloving wound of the left leg and foot and compound fracture of the left calcaneum with achiles tendon. The permanent disability was put at 45% of the whole person of the respondent.

Nevertheless being guided with similar awards cited by the respondent counsel and the injuries sustained I am of the considered view that the learned magistrate misapprehended the evidence, and expert evidence by Dr. Ndegwa. She gave too much weight to this medical report particularly the ratio on disability which resulted in exaggerate the final award. When this court applies the principles from the authorities referred to by the respondent counsel the nearest comparative injury was awarded Kshs.600,000. Taking the queue and keeping in view the principles on assessment of general damages, inflationary trends since the awards were made in those cases there is every reason to interfere with the award by the trial magistrate. In the premises the appellant's appeal succeed by this court substituting the award of Kshs.1.8 million with that of Kshs.1 million being an appropriate compensation under this head. The second issue raised in this appeal is future medicals assessed at Kshs.300,000. From the record the learned trial magistrate relied on clause in the medical report by Dr. Ndegwa. As argued by the counsel for the appellant there was no such pleading by the respondent in a plaint.

The law on this specific claim is as stated in the case of **Bonham Carter v Hyde Park Hotel 1948 TL.R 177, Kenya Bus Services Ltd v Mayendar 1991 2 KAR, Aliv Nyambu t/a Sisera Store CA No. 5 of 1990** where the court expounded on the plea for special damages in the following passage:

> ***"Plaintiff must understand that if there being action for damages it is for them to prove damage. It is not enough to write down particulars and so, to speak throw them at the head of the court, saying this is what I have lost I ask you to give me these damages. Special damages must both be pleaded and proved before they can be awarded by the court."***

Applying the above principles in respect of this case the respondent omitted to plead in a plaint that she will incur future medicals of Kshs.300,000. It was incumbent upon the respondent to prove whether the cost was in respect of a private or public hospital and any step taken to mitigate the costs for future medicals. I therefore think that the sum of Kshs.300,000 is not tenable in the circumstances and facts of this case.

The upshot of all these the appeal is partially allowed as follows:

1) Liability as per the consent judgement of 20%:80% in favour of the respondent

2) General damages appeal allowed by substitution on award of Kshs.1.8 million with that of Kshs.1 million for pain, suffering and loss of amenities.

3) The claim for other specials of Kshs.211,644 remain undisturbed.

4) Costs of this appeal be equally shared with the respondent.

5) The award in (2) and (3) above be subjected to 20% liability.

6) The respondent will have interest accrue from the date of judgement of the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JULY, 2019.

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R. NYAKUNDI

JUDGE