REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Appellate Side)

(Coram: Odunga, J)

CIVIL APPEAL NO. 87 OF 2017

(CONSOLIDATED WITH CIVIL APPEAL NO. 72 OF 2017)

JACQUILINE MUENI MUASYA..APPELLANT

-VERSUS-

KENYA POWER & LIGHTING CO.

KIMUNYA JULIUS..................RESPONDENTS/CROSS APPELLANTS

(*Being an Appeal from the Judgment of the Senior Resident Magistrate at Machakos Hon. K, Kibellion delivered on 27th day of April, 2017 in Machakos CMCC No. 48 of 2015)*

BETWEEN

JACQUILINE MUENI MUASYA... PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING CO.

KIMUNYA JULIUS...DEFENDANTS

JUDGEMENT

1. By a plaint dated 20th January, 2014, the Appellant herein instituted a suit against the Respondents herein claiming Special Damages in the sum of Kshs 386,074/-, Future Medical expenses in the sum of Kshs 70,000/-, General Damages, Costs of the suit and interests.

2. According to the plaint, on or about the 21st September, 2013 he was lawfully riding as a pillion passenger on motor cycle registration No. KMCX 324R when Motor Vehicle Reg. No. KBD 167U owned by the Defendants was negligently and/or recklessly managed, controlled and/or driven by the Respondents either by themselves, their authorised driver, agent and/or servant that it was allowed to veer off the road onto the lawful path of the said motor cycle violently hitting it as a result of which the Appellant suffered serious and severe injuries and has suffered loss and damages. The Appellant proceeded to itemise the particulars of the said negligence, injuries and special damages.

3. In her testimony the appellant relied on her witness statement filed herein in which she stated that on 21st September, 2013, she was carefully and lawfully riding as pillion passenger on motor cycle registration No. KMCX 324R along Machakos-Nairobi road heading towards Kenya Israel when just past Kenya Power Offices at a bridge Motor Vehicle Reg. No. KBD 167U which was heading towards Machakos veered off onto the motor cycle's lane and violently hit the said motor cycle as a result of which the Appellant sustained serious injuries. According to her she sustained cuts and bruises on her right hand, fracture of the femur, degloving injury on the right leg and fractural right tibia plate. It was her case that she had not fully recovered and was continuing to seek medical treatment. As a result, she still was in need of further medical treatment such as the metal implants which were yet to be removed. According to her the driver of the said vehicle was to blame for overtaking at a bridge.

4. Before the trial court the Appellant reiterated the contents of the said statement and stated that the said vehicle veered off its lane before hitting them on their lane. She stated that she had a helmet and a reflective jacket and was treated at Machakos and Kijabe Hospitals and

produced the treatment notes. The accident was also reported at the police station and she produced the P3 form issued to her. Later she was examined by **Dr John Mutunga** who prepared a medical report for her. As a result of the injuries, a metal plate was placed on her thigh whose removal would require Kshs 70,000/=. It was her testimony that she incurred medical expenses to the tune of Kshs 386,074/- and produced receipts. The search conducted revealed that the vehicle belonged to Kenya Power Lighting Company and **Julius Kimunya** and he produced a copy of the records. It was her evidence that the motorcycle moved to the edge of the bridge rail to avoid the accident.

5. In cross-examination she stated that they were the rider and 2 pillion passengers and it was about 7.00pm. She admitted that it was wrong for two pillion passengers to ride in one motor cycle and stated that the other passenger was her husband though according to her this fact did not cause the accident. Referred to the medical report she confirmed that the doctor stated that the injuries were soft tissue injuries. She stated that she was assisted through a fund drive to cater for her medical expenses while the NHIF catered only for the bed. She was however referred to the invoice from Kijabe and the NHIF which showed payment of Kshs 74,500/-.

6. PW1 was **PC John Kanyugo** who testified on behalf of **PC Mutiso** a colleague who had been transferred to Lamu. He had with him investigation file in respect of an accident which occurred on 21st September, 2013 at 7pm at Red Cross area along Nairobi-Machakos Road involving Motor Vehicle Reg. No. KBD 167U Toyota Station Wagon and Motor Cycle KMCX 342R being ridden by **Martin Mutunga** from Machakos towards Nairobi while the vehicle was being driven by **Muya** from Nairobi Towards Machakos

7. According to him the vehicle driver failed to keep proper lane and collided with the motor cycle as a result of which the rider and pillion passenger, **Jackline Mueni**, suffered injuries. According to the investigations the driver of the vehicle was to blame for not keeping to the proper lane. He produced the police abstract as exhibit in the case. He disclosed that he had been paid Kshs 5,000/- being court attendance fees.

8. Upon cross-examination, he stated that the vehicle was not at the scene having taken the victims to the hospital. He however insisted that the motor cycle was on its proper lane. According to the statement recorded from the driver of the vehicle he encountered a tyre burst which made him lose control and hit the motor cycle. According to the witness the injured persons were the rider and the two pillion passengers but that was not the cause of the accident. Though he was unable to say why the driver was never charged, according to him the driver ought to have been charged.

9. On the part of the Respondents, they called **Julius Nganga Kimunya** who on the material day was driving Motor Vehicle Reg. No. KBD 167U from Kenya Israel towards Machakos. Upon reaching Red Cross, there was a vehicle coming from the opposite direction and as he was going downhill, there was a motor cycle behind the other vehicle which tried to overtake and collided with the right side of his vehicle. According to him he was not to blame and he was never charged with a traffic offence. He therefore denied that he encroached onto the other side of the lane since his lane was clear and the accident occurred at 7.30pm and the weather was clear. It was his testimony that there were three people on the motor cycle, the rider and two passengers. He denied that he had a tyre burst and stated that he did not tell the police so. He therefore blamed the motor cyclist for carelessly overtaking at a bridge.

10. In cross-examination he stated that he was on the left side of the road. According to him he neither got the registration number of the other vehicle or that of the motor cycle. After the accident the pillion passengers fell on the left side of the road as one faces Machakos. He however stated that he did not have the motor vehicle inspection report. Referred to the police abstract, he stated that the same did not mention the presence of any other vehicle and stated that the accident was between his car and the motor cycle. In re-examination, he stated that the passenger and the motor cyclist were thrown on the left side as you face Nairobi direction.

11. In his judgement the learned trial magistrate found that the evidence of the appellant was corroborated by that of the police officer, PW1, that DW1 did not keep to his lawful lane. According to the learned trial magistrate he had no reason to disbelieve the Appellant and therefore found the Respondents wholly liable. He then proceeded to assess the damages and awarded the Appellant general damages in the sum of Kshs 550,000/=, special damages of Kshs 386,073/= and Future Medical Expenses in the sum of Kshs 70,000/= totalling Kshs 1,006,073/=.

12. This Judgement is in respect of two appeals being Appeal No. 87 of 2017 filed by the Appellant and 72 of 2017 filed by the Respondent. The two appeals were on 26th July, 2019 consolidated with the lead file being Appeal No. 87 of 2017.

13. On behalf of the Appellant it was submitted that her appeal is only in respect of quantum. According to her the award of Kshs 550,000.00 was inordinately low taking into account the serious injuries sustained by the Appellant. It was submitted that the Appellant was admitted for a period of 6 months before being transferred to Kijabe Hospital where she was admitted for one month. While the doctor categorised the injuries as soft tissue injuries, it was submitted that the injuries sustained by the Appellant cannot be categorised as soft tissue injuries. The court was therefore urged to set aside the award and substitute therefor an award of Kshs 1,500,000.00 based on **P W vs. Peter Muriithi Ngari [2017] eKLR**.

14. It was submitted that PW1 read verbatim DW1's statement which was not disputed. According to the Appellant the attempt by dw1 to deny the same at the hearing was simply meant to exonerate him but the facts and the evidence was clear. It was submitted that the Appellant's evidence was corroborated by the evidence from the police records. In this regards the Appellant relied on **Kenya Bus Services Ltd vs. Dina Kawira Humphrey [2003] eKLR**, **Daniel Kaluu Kieti vs. Mutuvi Ali Nyalo & Another [2016] eKLR** and submitted that the vehicle was to blame.

15. It was submitted on behalf of the Respondent that from the two memoranda of appeal, the issues for determination are who is to blame for the accident and what damages (if any) are rightful to compensate the victim.

16. According to the Respondents, three witness testified on the circumstances leading to the accident. These are the Plaintiff, the police officer and the defendant's driver. Of the three, only the plaintiff and the defendant's driver were at the scene when the accident occurred. The plaintiff blamed the defendant's driver for encroaching the path of the motor cycle she was travelling in. The Defendant's driver blamed the motor cyclist for overtaking when it was not right to do so. The two accounts were conflicting and it was not easy to decipher how the accident occurred. The police (PW-2) explained that he was not the investigating officer. He further explained that the Investigations Officer

arrived at the scene when the vehicles had already left the scene. He blamed the defendant's driver for causing the accident. No sketch-maps were produced to help the court understand how the accident occurred. No further details of the accident were provided and no eye witness was called.

17. It was the Respondents' submission that the Plaintiff at trial had a duty to prove her case on a balance of probabilities. Other than merely blaming the defendants' driver, she had the duty to adduce tangible evidence to that effect. It must be noted that the mere occurrence of an accident does not automatically mean that the defendant was to blame. According to the Respondent, negligence was not proved at all.

18. On quantum, it was submitted by the Respondent that the award was excessive. Since **Dr. John Mutunga** noted that the injuries were soft tissue and that complete healing was anticipated, it was the Respondents'' view that an award of Kshs. 250,000/= is sufficient based on **T A M (Minor Suing Thro' her father and next friend J O. M) vs. Richard Kirimi Kinoti & Another [2015] eKLR.** The Respondents therefor submitted that appeal no. 72 of 2017 be allowed and appeal no. 87 of 2017 be dismissed with costs.

Determination

19. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

20. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

22. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

23. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."**

24. In this appeal, it is clear that the determination of this appeal revolves around the question whether the respondents proved their case on the balance of probabilities. That the burden of proof was on the respondents to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

25. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

26. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2**

Others [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

27. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

28. When then does an appellate court interfere with the findings of facts? In **Richard Kaitany Chemagong vs. Republic [1984] eKLR** it was held by the Court of Appeal that:

> **"A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

29. Similarly, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

30. In this case, the Respondents faulted the Appellants for relying on the evidence of a police officer who never visited the scene and who was not the the investigating officer. It was contended that no sketch-maps were produced to help the court understand how the accident occurred and that no further details of the accident were provided and no eye witness was called. As regards the relevancy of the police investigations to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

31. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigating officer is not necessarily fatal in accident claims. In **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR** it was held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”

32. In this case there was evidence of PW2, who testified that the cause of the accident was the fact that DW1 veered off from his lane onto the path of the cyclist. This evidence was supported by the records from the police. Whereas DW1 stated that the accident was caused by the fact that the motor cyclist was overtaking another vehicle, in his evidence he contradicted himself as to the resting position of the occupants of the motor cycle. While in cross-examination he stated that after the accident the pillion passengers fell on the left side of the road as one faces Machakos, in re-examination, he stated that the passenger and the motor cyclist were thrown on the left side as you face Nairobi direction. The final resting position of the said persons in my view would have given the court an indication as to which version was believable in the absence of the sketch plans. Having contradicted himself in that material respect, it is my view that the learned trial magistrate, despite not sufficiently evaluating the evidence before him came to the correct decision. He cannot be faulted on his finding on liability particularly as the evidence on records was on all fours with the statement attributed to DW1 by the police that the accident was caused by a tyre burst which made him lose control of the vehicle and collide with the motor cyclist and his passengers.

33. The Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** opined that:

“If a “*matatu*” is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle…Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other.”

34. It was similarly held in **Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482** that:

“Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred inspite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff’s case must fail.”

35. Therefore, if the accident occurred due to a tyre burst as indicated in DW1’s statement to the police, a statement which was not disputed in cross-examination, then the failure by the Respondents to explain the steps taken in the management of the said tyre must mean that the Respondents failed in their obligation under sections 109 and 112 of the ***Evidence Act***.

36. As regards the quantum of damages, I agree with the position of Court of appeal in **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR**, as follows:

“**It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees…we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd –vs- Shephard [1964] AC 326 at page 345**:

‘But money cannot renew a physical frame that has been battered 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 uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Pho Choo v Camden and Islington Area Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab v Kinanu [1982-88] 1 KAR 90.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been

due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.'

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant."

37. However, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

38. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

39. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

40. I agree that the injuries sustained by the Appellant cannot by any stretch of imagination be termed as soft tissue injuries. I agree with the view of the Court of Appeal expressed in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** that:

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

41. In this case **Dr Mutunga's** medical report showed that the Appelalnt sustained bruises on both hands, fracture of the right femur, degloving injury to the right leg and fractural right tibia plate. The Appellant testified that the accident left her with ugly scars and she was, as a result, restricted to wearing long trousers only, a fact which was noted by the court when the Appellant passionately expressed herself in court. The Court of Appeal in **Mary Mukiri vs. Njoroge Kiania Civil Appeal No. 48 of 1996** appreciated that in a man scars might carry a kind of toughness or even heroism, but they may not be an advantage whatever to a young, single woman. The effect of ugly scars on a lady

were acknowledged in **Muciri vs. Kamau [1986] KLR 432** where the Court stated that:

> **“For a young woman who would normally be expected to have looked forward to a happy marriage the mouth and face injuries which have rendered her face asymmetrical and which gives her face an ugly appearance, must have been one of the worst effects of the accident. The ugly appearance of the face coupled with the multiplicity of scars thereon must have dismissed these prospects since it is generally difficult if not impossible for girls with serious physical disability to contract happy normal marriages.”**

42. Having considered the nature of the injuries sustained by the Plaintiff/Appellant in this mater as well as the comparable authorities whereas I am of the view that sitting as the trial court I would have awarded a slightly higher figure I am not satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

43. In the premises, I find no merit in both appeals. The same fail and are dismissed. Each party will bear own costs of the appeals. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 19th day of November, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mwau for Mr Muumbi for the Appelalnt

CA Geoffrey