REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO. 69 OF 2014

JAMES WANYOIKE.....1ST APPELLANT/APPLICANT

GREAT RIFT VALLEY SHUTTLE.....2ND APPELLANT/APPLICANT

-VERSUS-

ROSEBELLA JEBET BOR.....RESPONDENT

JUDGMENT

1.The Appellants were dissatisfied with the trial court's award of damages to the Respondent for injuries she sustained following a traffic road accident while a fare paying passenger in the Appellants motor vehicle Reg. No. KBA 331G on the 9th December 2011 along Nakuru-Eldoret road.

2. The Respondent sustained injuries as stated in the medical report dated 15th June 2012 prepared by Dr. Obed Omuyoma and pleaded in the plaint as well as in the appellant's doctor - Dr. Sophia Opiyo report dated 19th July 2013. Both doctors agreed on the nature and extent of the injuries. These are segmental fracture of the right femur with numerous soft tissue injuries.

According to Dr. Sophia's report prepared two years after the accident the fracture had achieved complete healing.

3. The Respondent testified that metal plates were *insitu* and needed to be removed. Her evidence was that she had not fully recovered and could not perform normal farming activities as her right leg could not bend normally.

The trial court awarded to the Respondent Kshs.700,000/= general damages for pain and suffering on the 6th June 2014.

This award is the subject of this appeal stated to be excessive and not in support of the evidence adduced before the trial court.

4. As the first appellate court, I have been urged to re-examine the evidence and vary the award downwards.

In the case **Butt –vs- Khan (1977) I KAR** it was held, and is trite that

> "An appellate court will not disturb an award of damages unless it is 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 misapprehend the evidence in some material respect, and arrived at a figure which was either inordinately high or low.

5. Considering the above principles, it is now my duty to re-evaluate the entire evidence and determine if the trial magistrate misapprehended the evidence or whether the award was excessive as to be an erroneous estimate.

I have stated the respondent's injuries and her testimony before the trial court as well as the two medical reports.

I have considered the authorities cited before the trial court.

For the appellants, no submissions nor authorities were filed before the trial court.

The Respondents filed submissions and cited authorities in support of their propositions.

6. It is on record that the trial magistrate considered the two authorities cited by the Respondent being **HCCC No. 86 of 1998(Nakuru), Rosemary Bulld –vs- Peter Kinyanjui Gakuru & Another** and **HCCC No.112 of 1999 Ernest Odongo Obando –vs- Quick Hauliers Limited** as well as those cited by the Appellants in their submissions in this appeal.

7. In **Michael Adeka Khaemba & 2 Others -vs- Rassangyllo Muli Kunuyu (2018) e KLR**, an award of Kshs.600,000/= was reduced to Kshs.200,000/= on appeal, for fracture of the femur, had nails *insitu* that required surgery for removal. The issue here was that the medical report was found to have exaggerated the injuries, thus the reduction on the award of damages. This authority is therefore not relevant.

7.(a) In the **Kenyatta University –vs- Isaac Karumba Nyuthe (2014) e KLR** the Respondent sustained fracture of the right femur & soft tissue injuries and underwent surgery for internal fixation. For these, a sum of Kshs.700,000/= was awarded by the trial court. On appeal, the High Court reduced the damages to Kshs.350,000/= in November 2014. This is a comparable authority in terms of the injuries.

8. It is to be noted that no two injuries can be wholly similar, but can only be comparable.

I agree with the appellants that the general approach for assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards, and cited the case **Denshire Muteti Wambua –vs- Kenya Power and Lighting Co. (2013) e KLR.**

I also agree with the Respondent's submissions that the trial court relied on its discretion in the absence of the appellants submissions. Notwithstanding, the principles as enunciated in the numerous superior court's decisions ought to be taken into account in the manner of assessment of damages.

9. In the circumstances, the question is whether the appellants have demonstrated that the trial magistrate's award is inordinately high as to invite this court's interference and whether there is evidence of misapprehension of the material evidence.

The **Court of Appeal** in **Denshire Muteti Wambua** (**Supra**) considered the principles stated in the old age case **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A.M.M. Lubia & Another (1982 -88) I KAR 777,** and found that the trial court erred in its failure to consider the oral and documentary evidence placed before it, and proceeded to set aside the award.

10. This is not the case in the present appeal.

I am persuaded that the trial magistrate did consider the evidence, and cannot be faulted on that line of argument.

However, looking at the then current and comparable decisions, the award of Kshs.700,000/= on general damages is excessive, and a wrong estimate of damages. See the following, where the injuries are comparable:

Kenyatta University –vs- Isaac (Supra) and James Mukathi Maria –vs- M.A Bayusuf & Sons Ltd (2013) e KLR, and

Samuel Kipkemon Kirui –vs- Ibrahim Shero Hussein & 2 Others (2016) e KLR.

11. The current trend in awards coupled with recent precedent justify interference with the trial court's award of damages. I proceed to allow the appeal, set aside the award of Kshs.700,000/= in general damages, and substitute it with an award of Kshs.600,000/= upon factoring in inflation, plus interest at court rates from the date of the trial court's judgment.

12. The appellants shall have costs of the appeal.

Delivered, Signed and Dated at Nakuru this 7th Day of November 2019.

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J.N. MULWA

JUDGE