REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 32 OF 2015

WYCLIFFE OMURWA MASANTA.....APPELLANT

VERSUS

EASY COACH LIMITED.....1ST RESPONDENT

LEON KINGOO MUTUKU .....2ND RESPONDENT

(Being an Appeal against the Judgment of Hon. S. Muchungi, RM delivered on 27th February, 2015 in Naivasha CMCC No 710of 2012)

JUDGMENT

Background

1. The appellant in this case was the plaintiff in the lower court in respect of an accident that occurred on 19th December, 2011. He seeks to have the quantum of damages awarded in the lower court reviewed and enhanced, on the grounds that the award was inordinately low. The trial court made an award as follows:

General damages	500,000.00
Special Damages	22,471.00
Total	**522,472.00**

2. The plaintiff's injuries as pleaded and for which the award was made were:

1. Posterior dislocation of the Right Hip joint
2. Transverse fracture of the Right Fibula
3. Head injury scale 14/14
4. Soft tissue injuries of the forehead
5. Right periorbital haematoma
6. Laceration on the lower lip (right side)
7. Deep laceration and swelling of the left leg

3. The respondents have not filed a cross appeal despite the appellant seeking to enhance the award. Their position is that the award is adequate. They cited the landmark case of **Butt v Khan [1981] KLR 349** and that of **Kemfro Africa Limited T/A Meru Express Services and Another v A M Lubia & Another (No. 2)** for the proposition that the appellate court should not unduly disturb the award of a lower court. For example, the Court of Appeal in the **Butt case** stated:

> ***"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 misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

And in the **Kemfro case** the Court of Appeal held:

> ***"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 or 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."***

4. The grounds of appeal are as follows:

> ***"1. That the Learned Trial Magistrate erred and misdirected herself in law and in fact by ignoring the Appellant's testimony in court, medical documents produced and his submissions on the gravity of his injuries.***
>
> ***2. That the Learned Trial Magistrate erred in misdirected herself in law and in fact in her assessment of damages awardable to the Appellant by awarding damages that were inordinately low in the circumstances.***
>
> ***3. That the Learned Trial Magistrate failed to appreciate and/or misapplied the principles applicable in the assessment of damages under the circumstances."***

Analysis and determination

5. The settled law provides that that the duty of this court as the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not itself 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 v Duncan Mwangi Wambusu [1982 – 1988] 1 KAR 278** *and* ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5).** In the latter case the Court of Appeal stated:

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

6. In the present case, the plaintiff proposed an award of Shs 1,800,000/= in the trial court and attached the case of **Charles Mwania & Another v Batty Hassan [2008] eKLR** , although he cited **Benjamin Shelema v Sccoby Enterprises Limited [2011] eKLR** where the award was for 450,000/=. In the **Charles Mwania** case, however, the plaintiff was awarded 800,000/= which amount was upheld in the High Court. The injuries suffered there were: bruise on the head, wound on the right thumb and left wrist joint, wound on the second right finger, fracture of the right tibia and fibula, wound below the right knee and a wound on the lateral aspect of the right ankle joint.

7. The defence proposed an award of Kshs 250,000/= in the trial court relying on the case of **Isaac Mwenda Micheni v Mutegi Murango, Nairobi HCCC No 335 of 2004.** There Angawa J awarded 100,000/= for wound on the scalp, fracture of the left tibia and fibula, a cut on the knee and bruised right forearm.

8. The trial court pointed out that the only evidence availed at the hearing was that of the plaintiff and Dr. Wellington Kiamba who gave a medical report. As a result, the only version of evidence was that provided by the plaintiff's side, since neither the 1st nor 2nd defendants availed any witnesses. The trial court found 100% liability against the defendants.

9. In the appeal, the appellant emphasizes the doctor's evidence which classified the injuries sustained as grievous harm with temporary disability of 5 months. He points out that consideration should have been taken of the factors of inflation and the age of the authorities relied on. He also relies on the more recent cases of: **Alphonce Muli Nzuki v Brian Charles Ochuodho [2014] eKLR** and **Fred Ogada Azere & Another v Ezekiel Kiariue Nganga [2019] eKLR** in the appeal**.**

10. In the **Alphonce Muli case** Kshs 800,000/= was awarded for bruise on the forehead, wound on the right thumb and left wrist joint, wound on the second right finger, comminuted fracture of right tibia and fibula, degloving injury medial aspect of right leg and foot wounds below the right knee. The injuries here are rather more serious than in the present case, and also, in the present case there was dislocation of hip joint, a sensitive weight bearing area of the body, in addition to a transverse – but not comminuted – fracture of the right fibula.

11. In **Fred Ogada** where the accident occurred in December 2012, this court awarded Kshs 1,350,000 for comminuted fracture of the right acetabulum, Posterior dislocation of the right hip joint, Laceration on the left ear and the left eyelid, Mild head injury, Laceration on the right knee and Leg, Bruises on the right hand. The injuries in **Fred Ogada** are definitely far more serious than the present case as there is both dislocation and fracture of the hip joint. The acetabulum is the socket for the head of the thigh bone; and a comminuted fracture is one that results in multiple fragments of bone. None of these were present in the case under appeal.

12. In **Fred Ogada** I stated that:

> ***"…general damages are damages at large and that the court is enjoined to do the best it can in reaching an award that reflects the nature and gravity of the injuries, and I might add, that is in keeping with the norms and expectations of the socio economic environment of the country. In assessing damages, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are or can be exactly alike."***

That remains my view: no two cases are exactly alike.

13. The respondent in their submissions pointed out that the appellant suffered no permanent disability; that the authorities that should be relied upon are those for awards for similar injuries in 2015, the time of the award in the trial court; and that the appellant's injuries had fully healed.

14. Respondent relied on the following cases on appeal: **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** in which the High court reduced the award of damages to shs 500.000/= for fracture of right tibia malleolus and right fibula bone and blunt injury to right ankle with partial disability placed at 3%; **Hassan Noor Mohamoud v Tae Youn Ann [2001] eKLR** where 200,000/= was awarded for fracture of tibia and fibula, dislocation of ankle and fracture of left collar bone. This latter case is too old to be relied on. In the **Akamba case** the fractures are to tibia and fibula- both the outer and inner leg bone, whilst in Hassan Noor is too old a case to follow.

Disposition

15. In my view, I do not find that the trial court misapprehended the law or misapplied its principles. I am persuaded however that the injuries suffered by the appellant approximate those suffered by the plaintiff in the **Alphonce Muli** case, except that the plaintiff was hospitalized for 42 days, underwent three operations, and received an implant. In the present case the appellant was hospitalized for only 8 days and healed reasonably well without implants suggesting that the hip dislocation was not as serious and healed after first treatment without complications.

16. All in all, however, I am not persuaded that the award given by the trail court's award was so inordinately low as to attract this court's intervention. I therefore dismiss the appeal with costs to the respondent.

17. Orders accordingly.

Dated and Delivered at Naivasha this 21st Day of November, 2019.

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Obino holding brief for Gekonga for the Appellants
2. Mwaura holding brief for Mr. Geno for the Respondent
3. Court Clerk - Quinter Ogutu