REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 127 OF 2017

ELIEZER KIPLIMO KERONEI...1ST APPELLANT

KIPLELEI CO. LIMITED……......……………………………2ND APPELLANT

VERSUS

SALLY JEPKEMBOI…………................……….........................RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.M. Kesse, Senior Resident Magistrate, delivered on 20 September 2017 in Kapsabet PMCC No. 162 of 2013)

JUDGMENT

1. This is an appeal arising from the Judgment and Decree passed in **Kapsabet PMCC No. 162 of 2013: Sally Jepkemboi vs. Eliezer Kiplimo Keronei and Kiplelei Co. Ltd**. The Appellants were the Defendants before the lower court. They were sued by the Respondent, **Sally Jepkemboi**, in connection with injuries sustained by the Respondent in a road traffic accident, when the motor vehicle she was travelling in, a Toyota Matatu **Registration No. KBN 505C**, collided with the 2nd Defendant's tractor/trailer **Registration No. 539M-ZB796**, Massey Ferguson. The tractor was then being driven by the 1st Appellant and the accident was alleged to have occurred at **Mberere** area along Nandi Hills-Chemelil Road.

2. It was the contention of the Respondent before the lower court that the sole cause of the accident was the negligence of the 1st Appellant in managing and/or driving the 2nd Appellant's tractor; by causing obstruction to the driver of **Motor Vehicle Registration No. KBN 505C.** The Respondent supplied the particulars of negligence alleged in Paragraph 5 of her Plaint before the lower court, dated **28 October 2013**. She likewise set out the particulars of the injuries suffered by her in the said accident at paragraph 6 of the said Plaint and urged the lower court to award her Special Damages in the sum of **Kshs. 5,700/=** as well as General Damages, costs and interest.

3. Although the Appellants filed their respective Statements of Defence before the lower court denying liability and attributing fault to both the Respondent and the driver of **Motor Vehicle Registration No. KBN 505C**, the parties subsequently agreed on liability and a consent letter to that effect filed before the lower court on **17 February 2016**. The said Consent was thus adopted as an order of the court on **17 February 2016** in the following terms:

> **"(a) Judgment on liability be and is hereby entered in favour of the plaintiff at 85:15 as against the defendant.**
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> **(b) The matter be mentioned on the 2nd March 2016 to record a settlement."**

4. The matter was consequently listed for hearing for the purpose of assessment of damages; and the lower court record shows that the Respondent was the only witness who testified in the matter. Thus, on the basis of her evidence, and on the basis of the written submissions filed by learned Counsel for the parties, the Learned Trial Magistrate made a determination on **20 September 2017** in which the General Damages payable were assessed at **Kshs. 250,000/=** together with Special Damages of **Kshs. 4,050/=;** less 15% contributory negligence.

5. The Appellants, being dissatisfied with the outcome of the suit, filed this appeal on **18 October 2017** against the said Judgment and its ensuing Decree on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in adopting the wrong principles in determining the damages awardable/payable to the Respondent in view of the injuries pleaded and the evidence adduced;
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> **[b]** That Learned Trial Magistrate erred in law and fact in failing to take into consideration relevant issues and/or evidence in making

a determination on the damages payable to the Respondent;

[c] That the Learned Trial Magistrate erred in law and fact in failing to consider the second medical report which was produced in evidence in awarding damages to the Respondent;

[d] That the Learned Trial Magistrate erred in law and fact in awarding damages to the Respondent which were excessive in the circumstances.

6. Thus, it was the Appellants' prayer that the subordinate court's Judgment on quantum be set aside and the General Damages awarded to the Respondent be reassessed downwards. They also prayed for the costs of the appeal.

7. Pursuant to the directions given herein on the **15 March 2019**, the appeal was canvassed by way of written submissions. Whereas the Appellants' written submissions do not appear to be on the file, the Respondent's written submissions were filed on **30 April 2019** by the law firm of **R.M. Wafula & Co. Advocates.** Their argument, basically, was that the award was a fair assessment and that the Trial Magistrate took into account the two medical reports and the opinion of the two doctors in making the award. Accordingly, the Respondent's Counsel, **Ms. Ghati,** urged the Court not to interfere with the findings of the Trial Magistrate, contending that it had not been demonstrated that the damages awarded were founded on wrong principles or that the award was excessive. She further argued that the Appellants' had failed to show either that the court took into account an irrelevant fact; or that it left out of account a relevant factor. Counsel relied on **Butt vs. Khan [1982-1988] KAR 1** and **Akamba Public Road Service Ltd vs. Omanaba [2013] eKLR** to support the foregoing arguments.

8. It was further the submission of **Ms. Ghati** that no two cases are exactly the same so as to form a perfect basis of each other; and that whereas it is settled that comparable injuries should attract comparable awards, each case must, ultimately, be determined on the basis of its own peculiar facts. She urged the Court to dismiss the appeal with costs, reiterating her assertion that the lower court committed no error of principle in making the award. She cited the cases of **Machakos HCCA No. 16 of 2008: Kiwanjani Hardware Ltd & Another vs. Nicholas Mule Mutinda** and **Nyeri HCCC No. 320 of 2008: Catherine Wanjiru Kingori & 3 Others vs. Gibson Theuri Gichumbi,** being some of the cases involving comparable injuries, for the guidance of the Court.

9. I am mindful that, this being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** this principle was stated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."**

10. As has been pointed out herein above, the trial court was concerned only with assessment of the quantum of damages payable; the parties having settled liability by consent**.** In her Plaint, the Respondent furnished the particulars of her injuries at paragraph 6 thereof thus:

[a] Blunt trauma to the neck which was tender;

[b] Blunt trauma to the lumbo-sacral spine which was tender;

[c] Both knees and legs were swollen and tender with bruises.

11. The Respondent's uncontroverted evidence is at page 54 of the Record of Appeal; and it confirms that she suffered the injuries set out above. In addition thereto, she produced the treatment chits and receipts issued to her at **Nandi Hills District Hospital** where she was taken for treatment after the accident, as well as the Medical Report prepared by **Dr. Aluda** dated **27 August 2013.** That report is at page 59 of the Record of appeal and it confirms that the Respondent sustained injuries by way of blunt trauma to the Respondent's neck and lumbo-sacral spine were still tender; and that there were scabs on both knees and legs. Thus, in **Dr. Aluda's** opinion and prognosis, the Respondent's injuries were basically soft tissue injuries which would heal with time; and that the scabs would eventually fall off upon completion of the healing process.

12. In addition to **Dr. Aluda's** Medical Report, the Respondent produced the Medical Examination Report (or P3 Form) prepared by **Dr. Kilel** of **Nandi Hills District Hospital**, in proof of the injuries suffered by her. The parties also relied on **Dr. Gaya's** Medical Report dated **18 August 2015,** which was produced by consent before the lower court and marked **Defence Exhibit No. 1**. These documents confirm the injuries sustained by the Respondent as being soft tissue injuries, and the prognosis given therein was that she was expected to recover fully from the said injuries. Accordingly, the only issue for determination in this appeal is the question whether the award of **Kshs. 250,000/=** as General Damages, and **Kshs. 4,050/=** as Special Damages is defensible.

13. In **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

> **"...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."**

14. I have, likewise, taken into consideration the principle that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. Hence, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."** (Also see **Butt vs. Khan [1981] KLR 349)**

15. What then, is the correct approach to employ? In this respect, I find instructive the approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, that:

> **"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."**

16. And in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR,** the Court of Appeal suggested thus:

> **"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

17. As is evident from the summary of the Respondent's evidence herein above, there is no dispute that the injuries suffered by her were soft tissue injuries from which she was expected to fully heal, with no residual disability. The P3 Form as well as the Medical Reports prepared by **Dr. Aluda** and **Dr. Gaya** show that the Respondent, an adult female Kenyan, was aged 22 years at the time the accident occurred; and that she was admitted for treatment at **Nandi Hills District Hospital** for two days. In the light of the foregoing, I have looked at recent awards and note as follows:

> **[a]** In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR**, an appeal from an award that was made on **10 December 2015**, the Respondent had been awarded **Kshs. 300,000/=** by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to **Kshs. 100,000/=** in a Judgment delivered on **1 February 2018**.
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> **[b]** In **Godwin Ireri vs. Franklin Gitonga [2018] eKLR**, the Respondent had been awarded **Kshs. 300,000/=** as general damages for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced to **Kshs. 90,000/=.**
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> **[c]** In **Maimuna Kilungya vs. Motrex Transporters Ltd [2019] eKLR** the Appellant sustained a blunt neck injury, blunt injury to the left shoulder and bruises on the left ear and was expected to recover fully. The lower court awarded **Kshs. 100,000/= which was** enhanced on appeal to **Kshs. 125,000/=.**

[18] Thus, granted the nature of the Respondent's injuries, it is manifest that the award made by the lower court for General Damages is on the higher side for soft tissue injuries. I would reduce the same to **Kshs.150,000/=** less 15% contribution. Accordingly, the decision of the lower court on quantum is hereby substituted with judgment in the Respondent's favour in the sum of **Kshs. 127,500/=** together with interest and costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE