REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 13 OF 2011

NESTER DISHON GATUKU.....APPELLANT

V E R S U S

COMPUTER TECH LTD.....1ST RESPONDENT

KAPURI LTD.....2ND RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied with the judgment of Embu Senior Resident Magistrate in CMCC No. 295 of 2009. His claim was for special and general damages for injuries sustained in a road traffic accident on the 20th of February 2008 in which the 2nd respondent was found fully liable. The appellant was aggrieved by the assessment of general damages at Kshs.60,000/= which he complains were inordinately low and not based on comparable decisions.

2. The memorandum of appeal contains the following grounds:-

(a) The leaned magistrate erred in fact and in law in assessing damages in favour of the plaintiff at Kshs.60,000/=.

(b) The learned magistrate erred in fact and in law in not appreciating the extent and gravity of the injuries sustained by the plaintiff.

(c) The learned magistrate erred in fact and in law by completely disregarding the plaintiff's/appellant submission on the evidence, facts and issues before the court.

(d) The learned magistrate erred in fact and in law in not entering judgment on general damages together with costs and interest as pleaded submitted and proved.

3. The respondents were served but did not enter appearance in this appeal or attend court. The appellant filed its submissions in support of his arguments. It is argued that the assessment of damages was passed on misconception of the law on the appreciation of the magnitude of the injuries as set out and described in the appellant's medical report, P.3 form and the medical report of St. Mary's Mission hospital.

4. The appellant states that the respondent did not dispute the degree and the nature of the injuries. The case of ***NAKURU HCCA No. 323 of 2010 KENYA POWER & LIGHTING CO. LTD VS NEHEMIAH WACHIRA [2014] eKLR*** where the legal principles applicable were enumerated by Mshila J. It was observed:-

The principles that allow an appellate court to interfere with an award are laid down in th renowned case of ARROW CAR LITED VS BIMOMO & 2 OHTERS, Civil Appeal No. 344 of 2001 and have since become trite as it can be observed in all subsequent authorities in similar cases. The Court of Appeal set down the principles that need to be observed which are inter alia;

(a) an irrelevant factor was taken into account or;

(b) A relevant factor was left out or;

(c) The amount awarded as damages is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimate....”

5. The issue for determination in this appeal are as follows:-

(*a) Whether the leaned magistrate applied the correct legal principles in assessing the general damages.*

(b) Whether the damages awarded were inordinately low as to adequately compensate for the injuries sustained.

6. The appellant argued that the court has an obligation to give adequate compensation for injuries as was stated in the case of ***Kisumu HCCA No. 20 of 2015 EASY COACH LTD VS EMILY NYANGASI [2017] eKLR.***

I am oblivious to the fact that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. LORD MORRIS OF BORTH-Y-GEST had occasion to comment of the above concept in the case of H. WEST AND SON LTD VS SHEPHERD [1964] AC 326 and stated thus:

"....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 endeavour 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....."

"General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in SIMON TAVETA VS MERCY MUTITU NJERU Civil Appeal 26 of 2013 [2014] eKLR thus:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".

7. The medical report of Dr. Njiru of Embu Provincial Hospital and that of Dr. Nyaga of St. Mary's Mission Hospital were in agreement that the plaintiff herein suffered the following injuries:-

Communitated fracture distal tibia with segmental fracture of fibula clistal ?.

8. The appellant was put in plaster cast for three months and on crutches for a further three months. She walked with a limp and developed swelling after walking. The degree of incapacity was assessed at 16%.

9. The damages awarded for pain and suffering by the learned magistrate was Kshs.60,000/=. The plaintiff relied on two decisions and urged the court to award general general damages of Kshs.60,000/=.

10. In the case of ***CHARLES AMUSALO & ANOTHER Nairobi HCCC No. 287 of 1987*** the plaintiff was awarded Kshs.600,000/= in 1991. For a compound communited fracture ? left tibia and fibula as well as skin loss on the leg. He was admitted in the ICU for 18 hours and hospitalized for 8 months. He underwent a second operation for removal of metal screws and metal plates.

11. The second case was that of ***SHARIFF MOHAMED SHAFFI VS EXPRESS (K) LTD Msa HCCC No. 255 of 1992***, the plaintiff was awarded Kshs.600,000/= for pain and suffering in 1994 for a bilateral comminuted fractures of the tibia/fibula of distal ? level in 1994. He was hospitalized for 38 days and underwent an operation of open reduction and internal fixation of screws to immobilize the fractures. He was readmitted for removal of implants and was off work for 6 months.

12. The defendant did not submit on quantum of damages referring to the input as academic exercise.

13. In the case of ***PAUL NJOROGE VS ABDUL SABUNI [2015] eKLR*** the High Court in 2015 enhanced the damages for pain and suffering to Kshs.500,000/= for a major fracture of the right femur and shoulder blade among other injuries.

14. I have perused the judgment of the learned magistrate in relation to the quantum of damages. I note that there was no reference to a single authority from the court or consideration of any of those relied on by the appellant.

15. The magistrate acknowledged that the appellant sustained a fracture of the left leg of the tibia and fibular bones. She did not describe it as it was done in the medical reports – comminuted fracture. There is a deference between a simple fracture and a comminuted one with the latter being more serious for it has fractured particles of the bone.

16. It is noted that the magistrate did not give due consideration to the fact that the injury extended segment of the fibula distal ? and the fact that the appellant was admitted in hospital for some time. She was immobilized for almost six months with POP for half the period and crutches for 3 months. Further that the appellant underwent two operations.

17. Before the magistrate was a medical report by Dr. Njiru of Embu Level 5 hospital. The magistrate noted in her judgment:-

"However, no doctor was called as a witness to guide the court on the extent of the severity of the injuries".

18. If the magistrate was in doubt as to the injuries, she would have directed the appellant to avail the doctors concerned. It is my considered opinion that with the medical report and the P.3 form, the learned magistrate had sufficient material to award reasonable damages based on the nature and degree of the injuries.

19. It was held in the case of ***KIMATU MBUVI & BROS VS AUGUSTINE MUNYAO KIOKO [2006 eKLR*** that:-

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

20. As I have already pointed out that the learned magistrate did not refer to any decisions with conventional awards. She also failed to state the injuries correctly as per the medical reports before her. The failure to consider these important factors led to an erroneous award which this court has a basis to disturb as held in the ***KIMATU MBUVI*** (supra) case.

21. The award in this case was made in 2010 and this court will take into consideration conventional awards made close to that period. The fact that the appellant is likely to benefit from the award about seven years after the judgment must be taken into consideration among other factors in assessing the damages.

22. Taking into consideration the fact that the appellant underwent two surgeries one for insertion and the other for removal of the implants and that he was discharged from hospital on crutches which he used for three months, I am of the considered opinion that the award of general damages of Kshs.60,000/= was inordinately low and ought to be reviewed.

23. I find the case of ***CHARLES AMUSALA (supra)*** and that of ***SHAFFI MOHAMED SHAFFI (supra)*** relevant to the case before me.

24. All the foregoing factors considered, I set aside the award of Kshs.60,000/= for general damages and substitute it with an award Kshs.600,000/=. The other sub-heads of the award remain undisturbed.

25. The appellant is therefore entitled to payment of the following:-

(a) General damages - Kshs.600,000/=

(b) Special damages - Kshs. 2,900/=

Kshs.602,900/=

26. The interest on general damages attracts interest at court rates from the date of the lower court judgment. On special damages, interest accrue at court rates from the date of filing the suit.

27. The respondent will meet the costs of this appeal and the court below.

28. The appeal is allowed.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF JUNE, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Makumi for appellant