REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 40 OF 2016

1. HASSAN ABED

2. ALI SUBER HABSY......................................APPEALLANT

VERSUS

MWATEMO MNYIKA CHEMBE....................RESPONDENT

J U D G M E N T

Outline and introduction

1. In this appeal, the appellant only challenges the award of general damages in the sum of Kshs.200,000/= as being excessive and manifestly too high in view of the injuries suffered by the Respondent. The Appellant contends that the sum awarded was so high and not comparable to awards made in the decided case which were cited to court.

2. In urging the Appeal parties filed submissions but on the date set for highlighting of these submissions only the respondent appeared and not the Appellant. The court opted not to dismiss the appeal pursuant to Order 42 Rule 20(1) of the Rules, be the appellants absence notwithstanding, because parties had filed submission and the court was merely to have what the parties sought to highlight on the submissions already offered.

Submissions by the parties

3. In its submissions dated 27/7/2017 and filed in court on the 01/08/2017, the Appellant get out the evidence led at trial on the injuries sustained and the authorities cited and contended that there was demonstration that the award of Kshs.200,000/= to the Respondent resulted for misapprehension of the law, facts, and evidence coming out total disregard of the submissions offered hence a clear application of wrong principles. The submission stress and underscore the principle that comparable injuries should attract comparable damages but it is equally submitted that this court, as an appellate court can only interfere with the discretionary jurisdiction in assessment of damages if it be demonstrated that the award is so high or inordinately law it founded on wrong principles.

4. In support of its position, the appellant cited to court the decisions in ***Channain Agricultural Contractors Ltd vs Fred Brasa Mutayo [2013]eKLR award George Kinyanjui vs Hassein*** Mohammed Kuyale [2016] eKLR in which the High Court reduced awards by the trial court for 250,000/= to 150,000/= and for 650,000/= to 109,890/= respectively.

5. The Appellant additionally cited Dickson Ndungu Kerembe vs Theresia Atieno [2014] eKLR and Purity Wambui Muriithi vs High Land Mineral Water [2015] eKLR where the High Court and Court of Appeal respectively reduced the awards by the trial courts from 350,000/= to 170,000/= and for Kshs.700,000/= to Kshs.150,000/= respectively.

6. On the basis of such decisions the Apellant submitted that the award by trial court in this appeal be reduced for the award of Kshs.200,000/= to Kshs.100,000/=.

7. For the Respondents, submissions were made to the effect that on the evidence of injury adduced and the submissions offered at trial took the position that there were no establishment basis to interfere with the decision of the trial court.

8. For instance the Respondent referred the court to the decisions cited by the two parties before the trial court. The decisions cited by Respondent were Shahmar Flowers Ltd vs Noah Muniango Matianyi Nku HCCA No. 175/2008 where an aware of Kshs.500,000/= was upheld and Suleiman Rahmtuallah Omar vs Comuhoni Missionaries Mbs HCCC No. 105 of 1996 were a sum of Kshs.20,000/= was awarded. The two decisions was made on 25/3/2011 and 14/2/2000 respectively.

9. For the Appellant decision in Pamela Ombayo Okunda vs Kenya Bus Services Ltd HCCC No. 1309 of 2002, NBI was cited in which the sum of Kshs.500,000/= was awarded in February 2004. I have perused the judgment of the trial court and the proceedings upon which it was based. Those records reveal that the trial court did consider the submissions offered and the authorities cited and rendered itself in the following words in determining the general damages it did award:

> **"Taking into the account the injuries sustained by the plaintiff and the age of the cited cases, I am of the considered view that Kshs.200,000/= would be adequate compensation for the plaintiff and I reward him the same"** (page 9 of the Record of Appeal)

10. Now the question this court must pose and answer in determining the appeal is whether or not in coming to the conclusion that it did, the trial court committed any error of principle or if the award was too high and exhorbitant as to represent a wholly erroneous exercise of discretion in the duty to assess damages[1] .

11. It is not enough for an appellate court to for the view that had it sat it would have awarded a different sum just as it is not permissible for the appellate court to substitute its own discretion for that by the trial court [2].

12. Looking at the judgment and the decision rendered by the trial court together with the submissions filed on behalf of the Appellant, there is no demonstrated an error in principles or that the award was inordinately high as to demonstrate a wholly erroneous estimate of damages. The law is that assessment of damages is a matter at the discretion of the court and it is a strong thing for a court sitting on appeal to substitute its own views or discretion, in that matter for that of the three court[3].

13. In this matter the trial court cannot be faulted for any failure including that of considering the submissions offered. That the Appellant cited to court a decision made in the year 2004, some 12 years before the decision in this appeal is no reason to inter an error the same court was cited to other decisions more current in which the awards were more than what it did award.

14. I have not been persuaded that the threshold have been established for this court to disturb the finding by the trial court and I therefore find no merit in the appeal and dismiss some with costs to the Respondent.

Dated and delivered at Mombasa this 20th day of July 2018

P J O OTIENO

JUDGE

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[1] Selle & Another vs Associated Motor Boat Co. Ltd [1968] 1968 EA 123

[2] Kemfro East Africa vs Lubia [1982-1988] 1KAR where the court, Kneller JA said of an Appellate court:-

"…it must be satisfied that either the judge in assessing 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 low or so inordinately high that must be wholly erroneous estimate of damages…"

[3] Kemfro East African's case (supra)