REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 106 OF 2013

HASHIM MOHAMED SAID.....1ST APPELLANT

ANWARALI BROTHERS CO. LTD.....2ND APPELLANT

VERSUS

LAWRENCE KIBOR TUWEI.....RESPONDENT

JUDGMENT

The Respondent (**LAWRENCE KIBOR TUWEI**) sued the appellants seeking general damages, special damages plus costs and interest of this suit arising from a road traffic accident which occurred on 3/9/2012 when the plaintiff was lawfully riding motor cycle registration number **KMCK 729R** along Webuye – Eldoret road and the 1st appellant crashed into his motor cycle causing him serious bodily injuries. The Respondent attributed the accident to the negligence on the part of the 1st appellant the 2nd appellant is vicariously liable.

The appellants in the defence denied the accident but averred that if at all any accident occurred then the same was due to the negligence of the plaintiff.

At the hearing, the parties recorded a consent on liability at 85% - 15% against the appellant. The only issue that proceeded for determination by the trial court was the issue on quantum of damages. The court in its judgment. The court awarded Kshs. 300,000/= general damages and special damages at Kshs. 261,033/=.

The appellant contested the quantum of damages awarded, hence this appeal.

The memorandum of appeal has three (3) grounds which the appellant argued by way of written submissions to the effect that this court is obligated to review the evidence to determine whether the conclusions by the trial court should stand. Counsel referred to the decision in Peter Vs Sunday Post Limited (1958) EA 424 where it was held:-

> **"Whilst an appellant court has jurisdiction to review the evidence to determine whether the conclusion by the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong the appellant court will not hesitate so to decide."**

The appellant contends that there was no evidence to support the conclusions reached by the trial magistrate and this court is entitled to interfere with the decision. This court is urged to consider the following issues:-

1. WHETHER THE SUM AWARDED AS DAMAGES WAS MANIFESTLY EXCESSIVE.

The appellant's counsel submitted that the injuries sustained by the respondent which is consistent in all medical reports that were relied on by the court were:-

a) Tender swollen face with bruises and lacerations

b) Tender swollen left leg and knee

c) Fracture of the left femur

It was pointed out that from the medical report by **Dr. S. I. Aluda** the injuries sustained were bone and soft tissue and that:-

"The injuries sustained were very severe and are continuing to heal but for the occasional pains in the above named regions which subside with the use of analgesics."

Counsel argues that the trial magistrate stated in his judgment that the main injury was fracture of the left femur and therefore an award was to be made considering that and not the minor injuries sustained, and there was no basis for an award an amount the sum of Kshs. 300,000/= for damages. It was his contention that without a clear distinction of the injuries that should carry weight in determining the damages to be awarded, the amount is baseless. Counsel maintained that trial magistrate in failing to determine which injuries should determine the damages awarded failed to take into account and/or consideration of relevant facts and therefore urge you to interfere.

This court is urged to find that the main injury sustained by the respondent was a fracture of the left femur and that an award of Kshs. 300,000/= is excessive in the circumstances and in view of the injuries proved the same ought to be reduced to a figure of Kshs. 120,000/= to a maximum of Kshs. 150,000/= subject to liability. **In so submitting counsel relies on Kisii HCCC No. 99 of 2015 South Nyanza Co. Ltd Vs John Owino where Kshs. 60,000/=** was awarded for what counsel describes as comparable injuries such as the ones herein.

He also cited the case **Khilna Enterprises Ltd Vs Charles Maina Migwi (2006) eKLR** where the appellate court upheld the decision of the trial magistrate awarding a sum of Kshs. 100,000/= for left ulna fracture.

The respondent's counsel pointed out that apart from the report by **Dr Aluda, a P3 form filled by Dr Embenzi** who confirmed the injuries sustained as abrasion of the left elbow and upper arm. The main injury was on the left lower limb with X-ray showing compound distal left femur fracture i.e. intra articular with metaphyseal comminution. Further the respondent was taken to theatre twice. The doctor classified the injuries as grievous harm. He also points out that the respondent underwent further medical examination by **Dr. Gaya** at the instance of the appellants. According **Doctor Gaya's** second report confirmed the injuries sustained as;

a. Soft tissue injury of the head with facial bruises.

b. Soft tissue injury to the left upper harm and elbow with bruising.

c. Compound fracture of the left femur.

d. Soft tissue injury to the left femur.

e. Soft tissue injury of the left ankle joint with query fracture.

According to Dr. Gaya the X-rays show comminuted compound supracondylar fracture of the left femur. Check X-ray show reduction with plating and left ankle show a stable split fracture of the lateral aspect of the tibia. Further, according to the doctor, the respondent has developed a limping gait which will be permanent, and the respondent will develop post traumatic osteoarthritis of the left knee and ankle joints. He assessed the degree of permanent disability at 12%. Counsel points out that the medical reports by the three doctors are largely in agreement and the final report by Dr. Gaya assessed the degree of permanent disability and contains finding of X-rays done to check the current status of the injuries.

Counsel also drew to this court's attention that the respondent in his testimony stated that he still had metal plates in his leg a fact which is confirmed by the medical report.

2. <u>WHETHER THE MAGISTRATE USED WRONG PRINCIPLES IN ASSESSING DAMAGES</u>?

Whereas the appellant's counsel acknowledges that trial magistrate had the advantage of seeing and hearing the witnesses and the evidence, he however maintains that the trial magistrate ought to have been guided by the law, evidence and the well laid down principles of law. He submits that the trial magistrate was guided by wrong principles in assessing the damages herein saying the trial magistrate relied on the P3 form other than the medical reports and other initial treatment chits from **Moi Teaching and Referral Hospital.**

This court is urged to consider that the award on damages given does not indicate the basis upon which the court gave an award. Further that in any event, the purposes of awarding the general damages is not to enrich the victim but put him on the position where he could have been if not for the accident-citing **ASAL VS MUGE AND ANOTHER (2001) EKLR 202 which stated:**

"Assessment of damages is essentially an exercise of discretion and the grounds on which an appellate court will interfere with the manner in which a trial court assessed damages relate to issues of an error of principle."

The court is urged to look at the award on injuries as at time of delivery of judgment and not the present time.

To this the respondent's counsel argued that, the principles upon which a superior court can disturb an award of damages by a trial court are now well established as follows;

a) The award is inordinately too low or too high.

b) The trial court took into account irrelevant factors or failed to consider relevant factors so as to arrive at an erroneous estimate of damages.

It was further pointed out that there is no scientific computation of damages but the above factors ought to be considered, and comparable injuries ought to be compensated by an award of comparable injuries. Further, the passage of time and inflationary trends ought to be considered.

> **See Mombasa CA NO. 148 of 2010 Jackson Murerwa –vs- Jai-Ambe Enterprise [2011] eKLR where the power of the appellate court to interfere with general damages was discussed at page 4 while citing Kemfro Africa Ltd t/a Meru Express Services & Another -vs- A.M. Lubia & another (No 2)(1982-88)KAR 727 where it was stated by Kneller J.A. at page 730 as follows;**
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> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs. Manyoka [1961] E.A. 705, 709, Lukenya Ranching and Farming Co-operatives Society Ltd vs. Kavoloto [1970] E.A., 414, 418, 419. This court follows the same principles."**

He also referred to Malindi **HCCA NO. 1 of 2015 Ahmed Mzee Kamau t/a Najaa Coach Ltd & another –vs- Veronica Ngii Muia aka Veronica Muiya aka Veronica Ngui Muiya [2017] eKLR**

The respondent cited two decisions before the trial court in support of his submissions which are directly relevant being **a) Mombasa HCC NO 103 of 2004 Erick Onyango Okumu -vs-Transami (K) Ltd.** Further that the injuries sustained were comparable to the injuries sustained by the respondent.

In the judgement delivered on 18/1/2007 **D.K. Maraga J.** (as he then was) awarded the sum of Kshs 600,000/= in general damages for pain, suffering and loss of amenities.

b) Court of Appeal at Nyeri Civil Appeal No. 152 of 2005 Fakir Mohammed –vs- Joseph Mugambi Kiara & 2 Others where the Court of Appeal on 19/11/2010 upheld an award of general damages of Kshs 600,000/= which had been made by the High Court on 2/10/2003. The plaintiff in that case is said to have sustained almost comparable injuries as the respondent in this case.

It was argued that the trial court considered relevant issues in arriving at the award of general damages. He did not leave out of consideration a relevant factor. He considered the injuries sustained and the medical reports. He considered the fact that comparable injuries should be compensated by similar awards of general damages.

Counsel for the respondent however contends that the court's award of general damages is so inordinately low as to amount of an erroneous estimate of damages. He points out that the trial court appears to have been guided by the decisions cited by the appellant which were 21 years old at the time and did not consider the passage of time and the inflationary factors. Further that the trial court failed to be guided by the aforementioned two decisions which were cited by the respondent and therefore made an award of Kshs 300,000/= as general damages for pain, suffering and loss of amenities. The court is urged to review the medical evidence, the previous decisions on comparable injuries, the inflationary trends and adjust the general damages payable upwards by finding that this award was inordinately too low and amounted to an erroneous estimate of damages as the respondent had sought an award of Kshs 800,000/=.

3. <u>WHETHER THE LEARNED TRIAL MAGISTRATE ERRED BY FAILING TO SUBJECT THE SPECIAL DAMAGES TO THE 15% CONTRIBUTION ON LIABILITY.</u>

The appellant submits on this head that liability had been agreed upon the parties by consent. The respondent conceded 15% contribution so it follows that both the general damages and special damages should be subjected to 15% contributory negligence. The trial magistrate is faulted as having erred in law and fact in disregarding this fact and not subjecting liability to 15% contributory negligence as agreed upon by parties. The court is thus urged to interfere and subject special damages of Kshs. 261,033/= to 15% contributory negligence-reference was made to the decision in **GLOBAL ALLIED INDUSTRIES LIMITED VS GERALD MWANGI MURORI [2015] eKLR and SAMUEL NDIRANGU NG'ANG'A VS LUCY WAMBOI WACHIRA [2013] eKLR** where special damages were subjected to contributory negligence.

The court is urged to allow this appeal reassess the general damages and reduce the same and award costs to the appellant. We also urge you to subject special damages of Kshs. 261,033/= to 15% contribution on liability. That without prejudice to the foregoing, then this court should find that even if the respondent sustained the bruises as alleged then the same were soft tissue injuries which had fully healed and the award of Kshs. 300,000/= was still excessive and we propose a maximum amount of Kshs. 150,000/=.

The respondent's counsel submitted that special damages of Kshs 261,033/= being the medical expenses incurred was pleaded and proved. He concedes that since the parties had recorded a consent on liability at the ratio of 15:85 in favour of the respondent, then the award on special damages ought to be subjected to a reduction by 15% as a matter of course.

I am guided by the well tested pronouncements that assessment of damages is essentially an exercise of discretion and the grounds on which an appellate court will interfere with the manner in which a trial court assessed damages relate to issues of an error of principle. Did the trial court leave out of consideration a relevant factor? The record shows he considered the injuries sustained and the medical reports-I have considered them afresh. Assessment of injuries cannot be confined to one limb of the body and leave out all the other injuries. The extent and nature of injury, the pain suffered and the residual effects are all important in assessing damages. The trial court referred to the report by Dr Aluda as well as the findings contained in the P3 form in considering the nature and extent of the injuries as well as the prognosis. I find no error on the part of the trial court.

Did the trial court considered the fact that comparable injuries should be compensated by similar awards of general damages? I think not, because the two cases referred to addressed situations involving multiple fractures whereas in the present case the respondent suffered a single fracture with other soft tissue injuries and in so doing ended up awarding an inordinately high amount. I am persuaded that there is merit in interfering with the award by setting aside the award of Kshs 300,000 and substituting it with an award for general damages in the sum of Kshs. 200,000/- as appropriate after factoring in the agreed percentage of contribution at the ratio of 15%:85%.

The special damages in my mind should not be subjected to the apportionment

The appellant is awarded the costs of this appeal

Delivered and dated this 9th day of October 2018 at Eldoret

H. A. OMONDI

JUDGE