REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 19 OF 2017.

MATHERI JOEL......................1ST APPELLANT

JAMES NDAYA KIIRU...........2ND APPELLANT

VERSUS.

EDWIN NYONGESA.................RESPONDENT

*[An Appeal from the Judgment and Decree in Original Kimilili PMCC No. 75/2013 delivered on **10/5/2017** by **Hon. C. MENYA** Resident Magistrate]*

JUDGMENT.

Edwin Nyongesa the (Respondent) filed a Suit in the Principal Magistrate's Court against the Appellants Mathew Joel (1st defendant) and James Ndaya Kiiru (2nd defendant) seeking general damages for pain and suffering from injuries sustained in a road traffic accident involving Motor vehicle Reg. No. KBC 197S at Kibisii area along Kimilili – Kamukuywa road. The said Motor vehicle was owned by the Appellants and driven by the defendant's driver who drove it so negligently that he lost control and rammed onto Motor vehicle Reg. No. KAR 833M occasioning the plaintiff to sustain injuries and suffer damage. The particulars of negligence were pleaded, the nature of injuries sustained tabulated and particulars of Special damages pleaded.

By Court statement of defence dated 6.3.2014 the appellants denied the claim and any negligence on the part of the driver and without prejudice pleaded that the accident was caused due to the negligence of driver of the Motor vehicle KAR 833M whose particulars they pleaded.

Upon hearing the party and considering the submission the learned trial magistrate in her Judgment rendered herself thus;

> *"It was the plaintiffs evidence that he was a passenger aboard motor vehicle registration No. KBC 197S that rammed into a lorry and hit it from behind. He stated that their driver was at a high speed and hit the lorry while trying to overtake. I believe that the driver of the matatu was at an advantageous point and should have been able to make a proper calculation as to avoid the said accident since he was approaching from behind.*
>
> *The defendant did not also bring any witness to shed light as to what happened and has not successfully been able to shift blame to the plaintiff or the lorry in any way so that the court can conclude that either the lorry of the plaintiff were also to blame for the said accident.*
>
> *It is also worth noting that the plaintiff was a mere passenger and was not in control of the vehicle and therefore there was very little he could have done to avoid the said injury that he suffered following the said accident. I shall therefore hold the defendants 100% liable for the accident.*

The trial magistrate then awarded the Respondent general damages of Kshs.250,000/=.

Aggrieved by the Judgment and decree the appellant filed this appeal on the following grounds.

> *1. **THAT** the learned trial magistrate erred in fact and in law in awarding the Respondent/Plaintiff damages which were excessive in view of the nature of injuries suffered.*
>
> *2. **THAT** the learned trial magistrate erred in fact and law in failing to consider the Appellants' oral evidence and written submissions and authorities thereof on the quantum of damages awardable to the Respondent who had suffered injuries which were classified as moderate soft tissue injuries.*

3. ***THAT*** *the learned trial magistrate assessment of quantum of damages was in any event, inordinately high in view of the nature and extent of injuries suffered which injuries had in any event, healed with no residual incapacity.*

By consent this appeal was to be disposed of by way of written submissions. M/s Kairu McCourt Counsel for the appellants submits that the trial magistrate took into account irrelevant factor in assessing quantum of damages in particular the injuries sustained in the accident. Counsel submitted that the doctor assessed the injuries as moderate soft tissue injuries which were expected to heal within weeks but the trial magistrate arrived an erroneous finding on the nature of injuries sustained which led to an award of erroneous award in damages. Secondly counsel submitted that the award of Kshs.250,000/= was inordinately high and an erroneous estimate of damages. He submitted that an award of Kshs.50,000/= would be adequate compensation.

Mr. Mukisu learned Counsel for the Respondent submitted that the injuries sustained by the plaintiff were particularized in the plaint as bruises on chest, right upper limp, right lower limp and blunt injury to the right ankle joint. He submits that Dr. Kubasu classified the injuries as soft tissue that will recover leaving scars. He submits that the award of Kshs.250,000/= damages was not excessive.

This is a first appeal. The duty of the first appellate court is to subject the evidence in the trial court to a fresh and exhaustive scrutiny and make its own conclusion but always bearing in mind that it did not have the opportunity to hear and see the witnesses testifying.

From the submissions by counsel of both parties, the main issue in this appeal is whether the award of Kshs.250,000/= by the trial Court was excessive in the circumstances. The auxiliary issue is whether in arriving at the award the trial Magistrate considered extraneous factors which were not pleaded or proved. The medical evidence adduced on the injuries by Dr. Cleopas Okubasu was; *"I have a medical report for Edwin Simiyu Nyongesa who I treated on 19/3/2013 at the time 31 year following on road traffic accident on 12/11/2011. I got the injuries from medical notes. He had blunt injury in the chest, bruises on the chest, limb and right lower limb and blunt injury to the ankle joint previously treated at Kimilili hospital. He complained of chest pain. He had a tender chest. I concluded that his injuries were moderate soft tissue injuries classified as harm. They should fully heal without incapacitation save for the scars I produce a medical report."*

No other evidence in respect to injuries was adduced. Indeed the Appellant who had insisted on a 2nd medical examination and filed application dated 7.6.2016 on 20.7.2016 withdrew the same and closed defence case. No evidence was rendered by the applicant on the 2nd medical examination which they wanted to rely on. That left the evidence of Dr. Okubasu as the only evidence the court now rely on. The learned trial Magistrate considered the injuries sustained in determination of the award. She rendered herself thus *"in my considered opinion, an award of Kshs.250,000/= would suffice as adequate compensation. In arriving at this decision, I am guided by the case of;* ***SIMON MUCHEMI ATAKO & ANOTHER*** *Vs.* ***GORDON OSORE NAIROBI CA. 180 OF 2005*** *in which the Court awarded Kshs.120,000/= for similar injuries. In arriving at the said decision, am taking into account factors namely the nature and seriousness of the injuries, comparable awards and inflation. I have also considered that the injuries have healed fairly well and there is no permanent disability."*

It is therefore clear from the Judgment that she considered the injuries sustained by the Respondent and as testified by Dr. Okubasu.

The second is within the award of Kshs.250,000/= is excessive as to amount to a wrong estimate of damages for this court to interfere with the same.

It is now settled that the quantum of damages awarded is at the discretion of the trial judge or magistrate. The appellate court can only interfere with the award if it is demonstrated that the trial magistrate took into account extraneous facts or did not consider a relevant factors or that he applied wrong principles or that the award is so low or so high as to reflect an erroneous approach to assessment of damages. In this appeal none of the above factors have been demonstrated. I therefore respectively decline the invitation to interfere with the trial court assessment on quantum of damages. In the result, I find no merit in this appeal and which is hereby dismissed with costs.

Dated and Signed at Bungoma this 3rd day of October, 2018.

S.N. RIECHI

JUDGE.