REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 150 OF 2016

BPM (Suing as next of friend

and father of CNP(Minor).....APPELLANT

VERSUS

MBANDI HANNINGTON..... 1ST RESPONDENT

BIWOTT JONATHAN.....2ND RESPONDENT

(Being an appeal from the judgement of Honourable L. Simiyu (Senior Resident Magistrate) delivered on 22nd November, 2016 in the Chief Magistrate's Court at Machakos in CMCC No.895 of 2014)

JUDGEMENT

1. The appeal herein arises from the judgement and decree of Hon. L. Simiyu (SRM) in Machakos CMCC No. 895 of 2014 delivered on the 22/11/2016.

2. The Appellant being aggrieved filed the following grounds of Appeal vide the Memorandum of Appeal dated 16/12/2016 as follows:

(a) That the learned magistrate erred in law and in fact by failing to fairly and objectively evaluate the evidence before the court and therefore reaching an unjust finding.

(b) That the learned magistrate erred in law and in fact in mischaracterizing the facts of the case in her judgement contrary to the evidence that was presented before her.

(c) That the learned magistrate erred in law and in fact in apportioning liability to the Appellant contrary to the consent entered into by the parties.

(d) That the learned magistrate erred in law and infact by importing into the proceedings submissions which none of the parties had tendered thereby leading to a wrong conclusion.

(e) That the learned magistrate erred in law and in fact by awarding general damages which were manifestly low thereby arriving at an entirely erroneous estimate of the damages due to the Appellant.

(f) That the learned magistrate erred in law and in fact by awarding the Appellant special damages which did not correspond to the amounts pleaded and the evidence tendered in support.

(g) That the learned magistrate erred in law and in fact by unfairly reproducing in her judgement facts which did not form part of the proceedings before her.

3. This being a first appeal, the court's duty is to re-evaluate the evidence afresh with a view to reaching its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify. The Respondent who had been a pillion passenger on board motor cycle registration number KMCZ 826D. when the same collided with motor vehicle registration number KAS 394Z along Machakos Township road and as a result sustained injuries as set out in the plaint as follows:-

i. Fracture base of the skull

ii. Fracture of the right zygoma

iii. Bleeding within facial sinuses (hemosinuses)

iv. Perforated right ear drum with partial deafness

v. Abrasions on the right shoulder

vi. Blunt injuries on the right buttock

The minor aged about 17 years testified and stated that she sustained injury to the head, ear, eye, hand and leg. She further stated that her right ear developed infection which caused partial deafness. She also stated that the affected eye releases tears. She was examined by several doctors who prepared medical reports.

Dr. Washington Wokabi stated that he examined the minor and prepared his report dated 8/9/2014 where he confirmed all the injuries pleaded in the plaint. He formed the opinion that the ear drum had not healed and remained perforated causing discharge of pus and partial deafness. He further opined that ENT treatment was required to clean the infection and repair the perforated ear drum at a cost of Kshs. 350,000/- and that if no treatment was not done then the patient risked getting predisposed to meningitis and brain abscesses.

On the 18/8/2016, a consent on liability was entered as between the Defendants themselves at 75% against the 1st Defendant and 2nd Defendant at 25%. Both defendants opted not to tender evidences.

4. Learned counsel herein agreed to canvass the appeal by way of written submissions.

It was submitted for the appellant that the trial court's apportionment of liability upon the Appellant should be set aside since the consent on liability was only between the Respondents and did not involve the Appellant in any way. As regards the issue of quantum it was submitted that the award by the trial court was inordinately low and was thus an erroneous estimate of damages and was not commensurate with the injuries sustained by the Appellant. It was finally submitted that a sum of Kshs. 2,000,000/- as general damages plus special damages of Kshs. 368,568/- plus the doctor's attendance costs of Kshs. 20,000/- would suffice.

It was submitted for the 1st Respondent that the issue of liability having been apportioned as between the 1st and 2nd Respondent, the issue for determination is only on quantum of damages. Learned counsel for the 1st Respondent confirmed that the Appellant had been admitted in Machakos Provincial Hospital for nine days as per the discharge summary. Learned counsel proposed an award of Kshs. 1,000,000/- as compensation for the injuries sustained. Reliance was placed in the case of ***PETER GICHARU NGIGE VS CHARLES DAUD ONDERI [2012] eKLR*** where the sum of Kshs. 800,000/- was awarded to a plaintiff who had suffered fractures of the base of the skull on left side, perforated left ear drum, intracerebral haermatoma, fracture to mandible of the right side and was in semi-comatose for 7 days. On the claim for future medical expenses, it was contended by the 1st Respondent that the same had not proved since the doctors established that the Appellant's condition had improved.

It was submitted for the 2nd Respondent that the appeal on quantum lacks merit and should be dismissed since the award by the trial court was adequate for the injuries sustained and further the Appellant had fully recovered with no complications.

5. I have considered the submissions of learned counsels herein as well as the evidence presented before the trial court. The issues for determination are as follows:-

i. Whether the trial court erred on its pronouncement as regards liability.

ii. Whether the trial court erred on its pronouncement as regards quantum of damages.

6. As regards the first issue, I note from the record of Appeal on page 123 regarding the coram for the 18/8/2016 a consent on liability was entered between the 1st and 2nd Respondents in the ratio of 75% to 25%. The trial court duly recorded the said consent. The said consent did not affect the Appellant in any way as it was quite clear that the liability was to be shared between the two Respondents and the Appellant was not to contribute any in any manner. A perusal of the judgement by the learned magistrate at page 128 of the record of Appeal shows that the Appellant contributed 25% on liability. This was clearly an error on the part of the learned trial magistrate since the Appellant was not part of the consent on liability and no liability was to be attached to the Appellant. Hence I am inclined to agree with the Appellant's counsel that the trial court misconstrued the facts presented and thereby reached a wrong and unjust decision. The correct position should have been that the Respondents were to shoulder liability at 100% apportioned amongst themselves at 75% by the 1st Respondent and at 25% by the 2nd Respondent.

This court is alive to the well known principle that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all or on a misapprehension of it or the court is shown to have acted on wrong principles in reaching the findings. (See the case of MWANSOKONI VS KENYA BUS SERVICE LTD [1982-88] IKAR 278).

The issue of liability had not been left to the trial court to determine since the Respondents of their own volition through their advocates agreed to shoulder responsibility by entering into a consent between themselves at 75% and 25% respectively. There was thus no way that the Appellant would again be said to have contributed on liability yet he was not part of the consent.

7. As regards the second issue, it is noted that the Appellant is dissatisfied with the quantum of damages awarded by the trial court on the grounds that the injuries sustained and confirmed by the doctors were severe. According to the evidence of Dr. Washington Wokabi (PW5) vide pages 111-114 of the Record of Appeal, the Appellant sustained fracture base of the skull, fracture of right zygoma, bleeding within

facial sinuses, perforated right ear drum with partial deafness, abrasions and blunt injuries on right buttocks.

According to the said doctor, the injuries had the potential of pre-disposing the Appellant suffering complications of meningitis or brain abscess. The doctor went on to add that the Appellant would need to undergo ENT treatment at a cost of Kshs. 350,000/-. The Appellant also called Dr. Mutunga who produced a P3 form that had been filled by his colleague Dr. Morerwa. An assessor of ear disabilities Christopher Kasungo was also called to testify and who stated that he carried out an audiogram on the Appellant and formed the opinion that the Appellant required medical intervention like surgery.

From the evidence of the Appellant and her witnesses, it is clear that she had sustained severe injuries. The Appellant's counsel had cited the authority in **JUSTUS KAIBUNGA LAICHENA VS ERUSTUS M. MUREITHI [2001] eKLR** where Kuloba J (as he then was) awarded a sum of Kshs. 1,200,000/- to a plaintiff who had suffered fractures of skull and zygoma. He also cited the case of ISAAC WAWERU MUNDIA VS KIILU KAKIE NDETI T/A WIKWATYO SERVICES [2012] eKLR where the sum of Kshs. 1,000,000 was awarded for fracture of the zygoma. Counsel for Appellant proposed an award of Kshs. 2,000,000.

Learned counsel for the 1st Respondent has proposed in this appeal an award of Kshs. 1,000,000/= and cited the case of **PETER GICHARU NGIGE VS CHARLES DAUDI ONDERI {2012} eKLR** where a sum of Kshs. 800,000/- was awarded for fracture of the base of the skull on left side, perforated let ear drum, haematoma, fracture of mandible of right side.

Learned counsel for 2nd Respondent submitted that the award by the trial court should be upheld.

It is trite that an appellate court should not disturb an award unless the trial court took into consideration irrelevant factors or left out relevant ones or applied wrong principles of law in making an award. In the case of **BUTT VS KHAN [1977] IKAR** it was held that an appellate court will not disturb an award unless it is inordinately high or so low as to represent an erroneous estimate of the damages.

I have noted that the trial court awarded general damages of Kshs. 250,000/=. Looking at the injuries sustained by the Appellant as well as the authorities which were presented before the trial court, it is clear that the trial court had applied wrong principles in arriving at the award. The two authorities that had been cited before the trial court namely **JUSTUS KAIBUNGA LAICHENA VS ERUSTUS M. MUREITHI {2001} eKLR, ISAAC WAWERU MUNDIA VS KIILU KAKIE NDETI T/A WIKWATYO SERVICES {2012} eKLR** and **PETER GICHARU NGIGE VS CHARLES DAUDI ONDERI {2012} eKLR** had more or less injuries like those sustained by the Appellant and that general damages awarded ranged between Kshs. 800,000/= - Kshs 1,200,000/=. The award by the trial court therefore was inordinately low as the learned magistrate did not take into consideration the authorities for the purpose of comparing the appropriate award. I have considered these authorities and find that they were decided several years ago and the incidence of inflation has to be factored. The injuries sustained by the Appellant are more or less similar to those of the plaintiffs in the above three authorities. Had the trial magistrate properly exercised her mind on these three authorities in relation to the Appellant's injuries, she would not have arrived at the award which is in my view ordinately low. The trial court therefore must have taken into account irrelevant factors. The Appellant's counsel has submitted that the trial court imported evidence from nowhere yet the witnesses such as Dr. Mutunga (*pages 109-110, 127 of the record of Appeal)* did not allude to the same.

I am therefore satisfied that the trial court applied wrong principles and irrelevant factors in arriving at the award which is inordinately low. The same ought to be set aside and substituted with an award of Kshs. 1,500,000/= as general damages for pain, suffering and loss of amenities.

As regards the claim on special damages, the same was pleaded vide paragraph 7 of the plaint dated 14/1/2014 as Kshs. 368,528/=. It is rite law that special damages must be specifically pleaded and proved. I have perused the receipts that were produced by the Appellant and all total to Kshs. 39,428/=. This is the amount that was specifically proved by the Appellant. The Appellant's witness Dr. Wokabi had suggested that a sum of Kshs. 350,000/= was needed for future medical treatment. However the said doctor was not an ENT specialist and on being cross examined he could not indicate where he got the information other than claiming that it was from his knowledge. There was no quotation from ENT specialist so as to justify the amount required. Dr. Kasungo an assessor on disabilities did recommend the use of hearing aid or repair of the ear drum but did not indicate the cost. It also transpired that such a cost would differ depending on whether the patient was taken to a public or private hospital. In the absence of evidence from a qualified ENT specialist, I find the cost of future medical expenses of Kshs. 350,000/= was not proved and same is discounted. Hence the trial court's award of special damages was inordinately low and was not commensurate with the receipts produced. The same is set aside and substituted with the sum of Kshs. 39,428/=.

8. In the result, the Appellant's appeal succeeds. The same is allowed. The judgement of the trial court is hereby set aside and substituted with the following:-

(a) Liability

- Plaintiff - Nil

- Defendants - 1st Defendant at 75%

- 2nd Defendant at 25%

(b) General Damages

---Kshs. 1,500,000/=

(c) Special Damages

---Kshs. 39,428/=

Total Kshs. 1,539,428/=

(d) Costs of the appeal and in the trial court are awarded to the Appellant.

Dated and delivered at Machakos this 7th day of November,2018.

D.K. KEMEI

JUDGE