REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 42 OF 2015

LEONARD NJENGA NG'ANG'A.....1ST APPELANT

OBADIAH KARIUKI MUGURU.....2ND APPELLANT

=VERSUS=

LAWRENCE MAINGI NDETI.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Honorable L.A. Mummassabba Resident Magistrate at Mavoko on 05.03.2015)

=IN=

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT MAVOKO

CIVIL SUIT NO. 447 OF 2013

LAWRENCE MAINGI NDETI.....PLAINTIFF

=VERSUS=

LEONARD NJENGA NG'ANG'A 1STDEFENDANT

OBADIAH KARIUKI MUGURU.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 13th May, 2013, the Respondent herein instituted a suit against the Appellants herein claiming Special Damages in the sum of Kshs 2,500/- General Damages, Costs and interests.

2. The Respondent's suit was premised on the fact that on the 21st October, 2012, the Respondent was driving his motor vehicle Registration No. KBQ 358W along Nairobi-Mombasa Road when at Lukenya Area motor vehicle registration No. KBR 254R1 registered and/or beneficially owned by the Appellants when the said vehicle which was being driven by themselves, their driver, servant and/or agent was so negligently and carelessly driven that an accident occurred and the Respondent sustained serious injuries. Both the particulars of negligence and injuries were set out in the plaint.

3. The Respondent also relied on *res ipsa loquitor*, the ***Traffic Act*** and the ***Highway Code***.

4. According to the Plaintiff, on 21st October, 2012 at about 4.30pm, he was driving Motor Vehicle Reg. No. KBQ 358W from Nairobi headed towards Machakos at a speed of 30 KPH. Upon reaching Lukenya area, there was a heavy traffic jam on the opposite side though his side was clear. It was his evidence that a *matatu* heading towards Nairobi from Mombasa direction came at a high speed and upon finding the jam slowed down a bit but suddenly crossed over to the other side in an attempt to beat the jam without checking and collided with the

Respondent's vehicle. It was the Respondent's case that though he applied brakes, the said *matatu* nevertheless crashed onto his vehicle and the said *matatu* lost control, went off the road and crashed onto the road side wall at the Lukenya junction before coming to a standstill. It was the Respondent's evidence that since there was a lorry on the other side he could not manoeuvre. According to him the point of impact was on his lane.

5. As a result the Respondent and his wife were badly injured. It was his evidence that he sustained a deep cut on the forehead which was stitched, fracture of the right collar bone (clavicle), compounded fractures on the right hand (both bones of right radius spinal bones and fracture of the femur, deep cut on the lower lip, loss of the lower teeth denture and injury to the gums, fracture on the left ankle and dislocation to the ankle joint and generalised body pain. He received treatment at Athi River health Centre and was admitted at Shalom Hospital for 4 weeks during which time he was operated on, the fractures fixed and metal implants inserted and was discharged on a wheel chair. He testified that he endured a lot of pain and still required future operation to remove the metal implants. He therefore sought compensation for the injuries sustained, medical expenses and the costs of the suit. At the time of his testimony, he was feeling numbness at times on his left hand which had lost power and his left leg had been infected. To him, the same ought to be removed.

6. The Respondent disclosed that the driver of the *matatu* was charged and sentenced in Traffic Case No. 1208 of 2012.

7. The Respondent called PW1 whose name was unfortunately not recorded. It was simply recorded that his introduction was as per PW1 in CMCC 446/13. With due respect to the Learned Trial Magistrate, the particulars of the witness ought to have been produced since the two matters were not consolidated. The said witness confirmed having examined the Respondent and relied on the discharge summary from Shalom Hospital. He confirmed the injuries sustained by the Respondent. In his evidence the Respondent had not recovered from the injuries sustained as he was still feeling pain and was on crutches.

8. According to him, the removal of the metallic implants would require Kshs 120,000/=. PW2 on his part estimated that the same would require Kshs 300,000/=.

9. From the judgement, it comes out that the Appellants did not adduce any evidence in rebuttal.

10. In her judgement, the Learned Trial Magistrate found that the river of motor vehicle registration number KBR 254B was charged in Traffic Case No. 1208 of 2012 where he pleaded guilty and was convicted and fined Kshs 30,000/= or 3 months imprisonment. He was further disqualified from holding a driving licence for 6 months. She therefore proceeded to find the Defendant 10% liable for the accident.

11. As regards the quantum, the trial court awarded the plaintiff Kshs 2,150,000/= for pain and suffering and loss of amenities and Kshs 2,500/= being special damages, plus costs and interests. As future medical expenses were not pleaded the same was not awarded.

12. This appeal is substantially on the quantum of damages. According to the appellant, the plaintiff pleaded and testified that he sustained a deep cut wound on the face, fracture of the right collar bone, compound fractures of the right hand, fracture of the femur, deep pierce wound on the lower lib, loss of lower teeth denture and injury to the gum, fracture and dislocation of the left foot at the ankle joint and generalized body pain. Pw1 and P3 confirmed that the plaintiff sustained the aforesaid injuries in their evidence. It was however submitted that the Trial Magistrate erroneously relied on the case of **Edward Nzamili-vs-C.M.C Motor Groups HCCC 70 of 1977 Mombasa,** where the plaintiff sustained compound fracture of the left elbow, chest injury with fracture of the 5^{th}, 6^{th} and 7^{th} ribs, fracture of the Left Femur upper 1/3 shaft, fracture of the left scapula and head injuries leading to a concussion. In the appellant's view, the injuries in this case were more severe than those in the instant case and the Learned Trial Magistrate therefore based his decision on irrelevant and improper considerations and took into account irrelevant factors and this warrants interference by this Honourable Court.

13. According to the appellant, as per the case **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR** the general method of Approach for assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. In this regard the appellant relied on **Florence Njoki Mwangi vs. Peter Chege Mbitiru [2014] eKLR** where the court awarded General damages at Kshs 700,000.00 and same was upheld on Appeal where claimant had suffered fracture of the right mid shift femur, fracture of the left mid shaft femur, degloving wound on the right fibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead. To the appellant had the trial court acted more cautiously and looked at comparable cases with similar injuries as per the initial treatment notes, it would have arrived at a different conclusion.

14. According to the appellant, similar and comparable cases are as follows:

a. In **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR** the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp. The Court of Appeal awarded **Kshs. 1,500,000** general damages when in fact the fractures in the case were much more serious

b. In **Joseph Musee Mua vs. Julius Mbogo Mugi & 3 Others [2013] eKLR**, the claimant sustained much more serious injuries resulting in surgeries in several hospitals and treatment. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected. The Court awarded **KShs.1,300,000.00** general damages.

c. In **Mwaura Muiruri vs. Suera Flowers Limited & Another [2014] eKLR** the Plaintiff sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left sub-axillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia compound double fractures of the right leg upper and lower third tibia fibula. Court awarded **Kshs. 1,450,000.**

d. In **James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & another [2015] eKLR** the Plaintiff suffered compound comminuted fracture of the right tibia Compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological /re-fracture of the right leg. Court awarded **KShs. 1,500,000.**

15. Accordingly, it was the appellant's view that this Honourable Court ought to re-examine, re-evaluate and review the award on quantum based on actual and current trends and court awards pursuant to the decision in **Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR**.

16. Accordingly, the Appellants urged that the trial court's award on general damages of Kshs. 2,150,000.00 be set aside and replaced with an award of between Kshs. 1,000,000.00 – 1,300,000.00 which is reasonable and in line with current trends for similar injuries.

17. On the part of the Respondent it was submitted that as a consequence of the accident 21.10.2012, the plaintiff/Respondent sustained deep cut wound on the face (stitched), fracture of the right collar bone, compound fracture of the right hand, fracture of the right femur, deep pierce wound on the lower lip, loss of lower teeth denture and injury to the gum, fracture and dislocation of the left foot at the ankle joint and generalized body pain and was still complaining of pain- sites of injuries and is on clutches, has weakness – right arm, experiences pain- right shoulder, right arm, right thigh and left ankle on exertion. As a result he was totally incapacitated for 3 months and had residual scars- face, lower lip, right thigh, right shoulder and right arm.

18. It was submitted that the trial court had an opportunity to see the plaintiff in court and notably is the fact that he is a complete shadow of his former self and his life will never be the same again and noted the same. Notably the fractured leg is crooked and he walks with a limp. To the Respondent, the lower court properly and in detail analysed the plaintiffs injuries and all of which were confirmed by **Dr. Kungu Mwaura** for the plaintiff and by **Dr. Leah Wainaina** for the defendant and awarded the plaintiff Kshs. 2,150,000/=in general damages.

19. In support of his submissions the Respondent relied on **Peter –vs- Sunday (1958) E.A 424** and submitted that the trial court in the lower court applied the right principles in analysing the evidence before it including that of **Dr. Leah Wainaina** for the defendant and also applied that evidence on the case law submitted by both parties.

20. It was submitted that the court itself even researched and came up with authorities and in a reasoned judgement awarded the plaintiff Kshs. 2,150,000/= for general damages though he was asking for Kshs. 2,200,0000/=. According to the Respondent, the appellants have not shown to this court how the learned magistrate failed to consider their evidence, defence, submissions and the cases cited by them the learned magistrate appreciated the medical report by **Dr. Leah Wainaina** and the authorities relied on by the defendant/appellant that the plaintiff has sustained compound fractures.

21. It was the Respondent's submission that it is totally unacceptable that the defendants have now changed and filed quite new submissions and authorities that were not made before the trial court. It was the Respondent's view that having not placed all these authorities relied on in this appeal before the trial court they ought not to seek to have the Hon. Magistrate condemned for what was not placed before her and which is wrong. In the Respondent's view, this appeal is misplaced because it is purely intended to introduce fresh submissions on quantum and authorities that were not before the trial court. In any event, it was submitted that the authority quoted by the appellants in their submissions in the lower court were of the year 2004 hence over 10 years old than the authorities that the court had at its disposal.

22. It was therefore contended that the allegations in prayer 2 and 3 of the memorandum of appeal cannot stand for they are purely alarmist in order to discredit the trial court which even did its own research on relevant case law. This Court was therefore urged to dismiss the appellant's appeal with costs to the plaintiff/Respondent.

Determination

23. As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

24. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

25. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."**

26. The Respondent herein took issue with the fact that the Appellant relied on authorities which were not cited before the Learned Trial Magistrate. However the Respondent himself appreciated that the Learned Trial Magistrate in arriving at her decision researched and came up with authorities. The role of submissions and to an extent authorities was clarified by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR** as hereunder:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

27. Similarly in **Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

28. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

> **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."**

29. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

30. In other words a court is not bound to decide a matter in accordance with the submissions cited before it by the parties. A court of law, in my view, is obliged to carry out its research and study in the area under litigation and ought not to swallow the material placed before it line, hook and sinker as it were. Therefore nothing bars an appellant from relying on fresh authorities which were not relied upon before the Trial Court as long as they are relevant to the appeal.

31. In this case it is agreed by the parties that the Respondent sustained a deep cut on the forehead which was stitched, fracture of the right collar bone (clavicle), compounded fractures on the right hand (both bones of right radius spinal bones and fracture of the femur, deep cut on the lower lip, loss of the lower teeth denture and injury to the gums, fracture on the left ankle and dislocation to the ankle joint and

generalised body pain. According to the Appellant, the Learned Trial Magistrate erroneously relied on the case of **Edward Nzamili-Vs-C.M.C Motor Groups Mombasa HCCC 70 of 1977**. Whereas the Learned Trial Magistrate cited the decisions cited before her she did not state which particular decision swayed her decision. It is therefore incorrect to state that she relied on a particular decision and not the other. It is however clear that in all the decisions cited by the Respondent, the injuries sustained by the plaintiff were more serious than those which were sustained by the Respondent herein. It must however be noted that the said decisions were handed down in 2005 and 2006 yet the decision being appealed against was delivered on 5th March, 2015, some 9 years later. In my view the decisions cited by the Appellant in this appeal were more relevant since the injuries sustained, though not exactly the same were more similar to those sustained by the Respondent herein and the period of the award was also the same.

32. It is therefore my view that the Respondent ought to have been awarded Kshs 1,500,000.00 as general damages for pain, suffering and loss of amenities. In the premises I allow the appeal to the extent that the award of Kshs 2,150,000.00 as general damages is hereby set aside and substituted with an award of Kshs 1,500,000.00. The Respondent will have interests thereon at Court rates from the date of the judgement of the trial court till payment in full. The special damages awarded by the trial court will however accrue interest at the same rate from the date of filing of the suit till payment in full. The Respondent will have the costs of the lower court while the Appellant will have the costs of this appeal.

33. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 6th day of November, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Muthee for Mr Kariuki for the Appellant

Mr Makau for Mr Muindi for the Respondent

CA Geoffrey