REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 161 OF 2012

NGUGI ELIZABETH.....1ST APPELLANT

PATRICK MUTUA MULU….....2ND APPELLANT

VERSUS

NAOM MBEKE KIMEU MUTIE...….....RESPONDENT

((An Appeal arising out of the judgment of Hon. M.K. Mwangi PM delivered on 13th September 2012 in Machakos Chief Magistrate's Court Civil Case No. 1076 of 2010)

JUDGMENT

The Appellants were the Defendants in Civil Case No. 1076 of 2010 at Machakos Chief Magistrate's Court, while the Respondents were the Plaintiffs in the said suit. The said parties entered a consent on 27th October 2011 in the trial Court, whereby judgment on liability was entered in favour of the Respondents as against the Appellants at the ration of 90:10. The trial magistrate in his judgment delivered on 13th September 2012 awarded general damages of Kshs 800,000/= and special damages of Kshs 85,639.38 to the Respondent.

The Appellants subsequently moved this Court through an Amended Memorandum of Appeal dated 4th April 2017, wherein they raised the following grounds of appeal:

1. The learned Principal Magistrate erred in law and fact by making an award on general damages which was manifestly excessive given the injuries sustained by the plaintiff and the relevant case law produced- by the defendant.

2. The learned Principal Magistrate applied wrong principles of law in assessing general damages hence arriving at manifestly excessive damages.

3. The learned Principal Magistrate erred in law and fact by ignoring the Appellant's submissions in his judgment without proper reason to do so .

4. The learned Principal Magistrate erred in law and fact by awarding excessive special damages that had not been proved .

The Appellants pray that this Court sets aside the lower court's Judgment on quantum, and substitutes it with a fair judgment on quantum that it deems fit, with costs of the Appeal to the Appellant

The Facts and Evidence

The brief facts of the case in the trial Court are that the Respondent instituted the suit in the lower court by filling a Plaint dated 13th August 2010. She stated therein that at the times material to this suit, the 1st Appellant was the registered owner of motor vehicle registration number KAJ 039L, a Suzuki Station Wagon, while the 2nd Appellant was the beneficial owner in possession thereof.

Further, that on or about 3rd August 2009, the Respondent was lawfully travelling as a passenger in motor vehicle registration no KAJ 039L along Wote-Kako Road, when at Watuka market the 2nd Appellant either by himself , his authorized driver servant and/or agent drove , controlled and/or managed the said motor vehicle registration no KAJ 039L so negligently, that he permitted the same to lose control, veer off the road and hit a tree, as a result whereof the Respondent was severely injured.

The Respondent gave the particulars of negligence on the part of the Appellants and also relied on the doctrine of *res ipsa loqituor*. He also gave the particulars of the injuries he suffered, and sought general damages for pain suffering and loss of amenities; special damages of Kshs 139,062/=; provision of future medical/surgical expenses of KShs 200,000/=; and costs of the suit.

The 2nd Appellant filed a Defence in the trial Court dated 7th January 2011, wherein he denied that he was the beneficial owner of motor vehicle registration number KAJ 039L, or that the Respondent was travelling as a passenger therein on 3rd August 2009 as alleged. He also denied all the particulars of negligence attributed to him as owner, driver, servant and /or agent as alleged, and that if any accident occurred it was wholly or substantially caused by the negligence of the Respondent which he particularized He also pleaded inevitable accident, and gave the particulars thereof.

From the record of the trial court proceedings, it appears that the parties consented to the production of the medical report as evidence and agreed to proceed by way of written submissions. The parties did not call any witnesses during the trial.

The Issues and Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.** The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. Manthi Masika & Company Advocates for the Appellants filed submissions dated 23rd November 2016 and 20th December 2016, wherein it was argued that the parties by consent presented two medical reports before the trial Court. The first report which was dated 12/8/2010 was prepared by Dr. Mulwa, and the second report by Dr. Gichohi of Meridian Medical Centre which was dated 5/7/2011. However, that the trial Magistrate, came up with a 3rd Medical Report of a Dr. R. G Kimuyu in his judgment which was not presented by any of the parties.

It was further submitted that the award of Kshs. 800,000/= by the trial magistrate was not based on any reasoning, and that the submissions of the Appellants and the Respondent and the case law they presented in the trial Court were never analysed and/or taken into account. Lastly, it was submitted by the Appellants that the Respondent in his submissions never showed how the sum of Kshs. 139,062/= for special damages was made up. On the contrary, that the Appellants analysed the special damages that were proved by receipts and the amount was Kshs. 56,925/=. However, that the trial Magistrate made an award of Kshs. 85,639.38/=.

The Appellants suggested an award of Kshs. 500,000/= as general damages , and relied on the decision in **Mugambi & Another vs Gitiru, (2004) eKLR** where the Respondent sustained shock and concussion and could not remember anything after 48 hours; an open fracture of his left femur, a closed fracture of

his right femur and other comparatively minor soft tissue injuries and lacerations, and where the trial Court made an award of Kshs. 1,000,000/= as general damages which was set aside and substituted with an award of Kshs 500,000/= by the Court of Appeal on appeal.

Reliance was also placed on the decision in **Florence Njoki Mwangi vs Peter Chege Mbitiru, Nyeri HC Civil Appeal No 102 of 2011,** where the Plaintiff suffered a fracture of the right mid shift femur; a degloving wound on the right fibula necessitating skin grafting; amputation of the right foot behind the ankle joint; and multiple cuts on the forehead, and the lower Court awarded the Plaintiff Kshs. 700,000/= which was upheld by the Court of Appeal. The decision in **Dickson Kariuki Nyaga & Anor vs Emma Mbandi Nyaga, Embu HC Civil Appeal No 13 Of 2013** was also cited, wherein the Plaintiff was awarded Kshs. 600,000/= by the trial Court which on Appeal was reduced to Kshs. 400,000/= for a fracture of the right fibula; multiple soft tissue injuries of the scale, multiple lacerator of the lower limbs, right shoulders wrist joint and back; and a likelihood of developing osteoarthritis and oesteomylleties in future.

The Appellants also distinguished the case cited by the Respondent of **Samuel Mwangi Kamau vs Joseph M Kimemia & Another, HCCC NO 192 of 2001** where an award of Kshs. 1,000,000/= was made as general damages, on the ground that it was not comparable to the present case because of the following reasons:-

1. The Plaintiff had a fracture of both tibia and fibula as opposed to the present case where the Plaintiff had a fracture of tibia

2. The head injury that the Plaintiff got in the cited case was very serious since it resulted into paralysis of the left upper limb due to intra cranial haemorhage

3. The was a depressed fracture of the left temporal bone in the cited case resulting to permanent disability.

4. The Plaintiff would not walk long distances.

The Respondent's Advocates, L.M.Wambua & Company Advocates, filed submissions dated 29th November 2016, in which it was argued that the medical reports by Dr. Mulwa A.M and Dr. Richard Gichohi captured the injuries sustained bythe Respondent. Further, that as at the time of examination by Dr. Mulwa on 12/8/2010, the Respondent was walking with a limp, had multiple healed scars on left leg with her left limb slightly shortened, and was walking with crutches. That it was also Dr. Mulwa's opinion that the Respondent would require to be on long term physiotherapy and that the limb shortening was permanent and not expected to recover.

It was further submitted that Dr. Richard Gichohi on the other hand classified the injuries as grievous harm occasioned by pain, blood loss and function. He also concluded that the plate on the left tibia was *in situ,* and that the Respondent had developed post traumatic arthritis of the left ankle and knee joints.

The Respondent relied on the decision in **Samwel Mwangi Kamau vs Joseph M. Kimemia & Another (2004) eKLR** where he submitted that Kshs. 1,000,000/- was awarded for injuries which did not greatly deviate from the injuries sustained by the Respondent. Further, that the Appellants had proposed an award of Kshs. 250,000/- a general damages, which amount is very low compared to the injuries sustained by the Respondent, and that the trial magistrate must have analysed both submissions and was convinced by the Respondent's submissions, thus awarding Kshs. 800,000/- According to the Respondent, it cannot therefore be said that the trial magistrate did not consider the Appellants' submissions, and the award of Kshs 800,000/= was in the circumstances fair and reasonable.

Coming to the award of special damages, the Respondent submitted that a perusal of the documents attached to the plaint showed that the special damages amounted to Kshs. 85,639.38/-, and therefore the trial Court was right in awarding this amount.

I have considered the evidence given in the trial Court and the arguments made by the parties. From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the issue of quantum of damages.

It is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

On the question whether the amount of Kshs 800,000/= awarded by the trial court as general damages was based on any known factors or principles of law, this Court is guided by the legal principle that applies to an award of damages, which is that a sum should be awarded which is in its nature a conventional award. This is in the sense that awards for comparable injuries should be comparable, and the amount of the award influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard **Kemp & Kemp on The Quantum of Damages, Volume 1** paragraphs 1-003.

From the medical reports by Dr. Mulwa A.M dated 12th August 2010 and by Dr Richard Gichohi dated 5th July 2011 that were filed by the parties in the trial Court by consent, the major injuries suffered by the Respondent were fractures of the 2nd toe on the left foot, fractures of the 3rd toe on the right foot, and a fracture of the tibia of the left foot. The rest of the injuries were soft tissue injuries of the head , neck , upper limbs, chest , abdomen and left leg.

I note in this respect that the trial magistrate did indicate in his judgment that he did take these injuries into account, together with the submissions of the parties and inflation rates in awarding Kshs 800,000/= as general damages. On the submissions made by the parties, the injuries suffered by the Plaintiff in **Samwel Mwangi Kamau vs Joseph M. Kimemia & Another (2004) eKLR** where Kshs 1,000,000/= was awarded as general damages were more serious than in the present case, as the Plaintiff therein sustained a depressed fracture of the skull; fractures of the right tibia and fibula; and a permanent disability of paralysis of the left upper limb whose degree was assessed at 50%.

The most comparable judicial authority in my view is the one cited by the Appellants in **Dickson Kariuki Nyaga & Anor vs Emma Mbandi Nyaga, 2015 e KLR** wherein on appeal an award of Kshs. 400,000/= for general damages was made where the Plaintiff suffered a fracture of the right fibula and multiple soft tissue injuries, with the likelihood of developing osteoarthritis and oesteomylletis in future. In that case it was opined that the fracture and soft tissue injuries had healed without any complications.

However, in the present appeal, in addition to the injuries suffered, both medical reports that were submitted by Dr. Mulwa and Dr. Gichohi noted that the Respondent herein was not fully recovered and needed to undergo further physiotherapy and removal of the plate that was still *in situ* on the left tibia. In addition Dr. Gichohi noted that the Respondent had developed post traumatice arthritis of the left ankle and knee joints, and Dr. Mulwa also reported that the Respondent's left limb was permanently shortened. He estimated the future medicial expenses to be Kshs 200,000/=.

Therefore taking these additional medical expenses and permanent disability into account, I am of the view that the award of Kshs 800,000/= as general damages by the trial magistrate was fair and reasonable.

Lastly, on the submissions made by the Appellants that special damages awarded but were not proved during the hearing, this Court notes that the Rspondent pleaded a total of special damages of Kshs 139,062/= made up of medical related expenses of Kshs 135,562/=, a medical report of Kshs 3,000/= and for a search certificate of Kshs 500/= . The receipts filed by the Respondent for medical expenses however totalled Kshs 46,424/=, and there was a receipt for the search certificate filed of Kshs 500/=. There was therefore an error in the award by the trial Court of special damages of Kshs 85,639.38/=,

which were not proved, as only Kshs 46,924/= was proved by production of receipts.

The Appellants appeal therefore only succeeds as regards the award of special damages. I therefore set aside the award of damages in the trial court and substitute it with a total award of Kshs 762,231.60/= to the Respondents as against the Appellants, which has been computed as follows arising from the findings in the foregoing:

	Kshs
(a) General Damages	800,000.00
(b) Special Damages	46,924. 00
Sub Total	846,924.00
Less 10% contribution	84,692.40
Total	**762,231. 60**

The Appellants shall bear 90% of the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 10TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE