REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 209 OF 2012

RAPHAEL MAKAU LONZI

ANDREW MUSIVO KIMATU.....APPELLANTS

VERSUS

JACKSON MUITO NDUTU…….....RESPONDENT

(An Appeal arising out of the judgment of Hon.P.N. Gesora SPM delivered on 12th November 2012 in Machakos Chief Magistrate's Court Civil Case No. 321 of 2011)

JUDGMENT

The Facts

The Appellants were the Defendants in Civil Case No. 321 of 2011 at Machakos Chief Magistrate's Court, while the Respondent was the Plaintiff in the said suit. The Respondent had filed an amended plaint at the Chief Magistrate's Court at Machakos seeking general damages for pain, suffering and loss of amenities, special damages costs and interests at courts rates. He claimed that on the 23rd December 2010 he was a cyclist cycling a bicycle along the Machakos-Kathiani Road when the motor vehicle registration number KAP 044C hit him causing him to sustain injuries.

The Respondent blamed the 2nd Appellant, who was the driver of the said motor vehicle, for turning without indicating, and gave other particulars of the 2nd Appellant's negligence. He claimed that as a result of the accident he sustained a blunt injury on the right femur region (thigh), fracture of right femur and injury on the right knee.

The Appellants filed a defence in the trial Court on the 15th November 2011 denying the occurrence of the accident in total and any negligence on its part in the occurrence of the alleged accident if at all it occurred as claimed, and blamed the Respondent for riding a bicycle carelessly on a highway. The parties filed consent on liability in the trial Court at 90:10% and admitted the P3 form, treatment notes and medical reports by Dr Kimuyu and Dr. P.M. Wambugu by consent.

The trial magistrate thereupon entered judgment in the sum of Kshs 450,000/= as general damages, Kshs 100,000/= for future medical expenses and special damages of Kshs 2,000/= in favour of the Respondent.

The Appeal

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 4th October 2013, wherein they raised the following grounds:

1. THAT the learned magistrate erred in law and in fact in his assessment of quantum of damages and future medical expenses.

2. THAT learned magistrate misdirected himself on the assessment of quantum on general damages in the sum of Kenya shillings 450,000/= which was excessive in the circumstances .

3. THAT the learned magistrate misdirected himself on the assessment of future medical expenses in the sum of Kenya shillings 100,000/= which was excessive in the circumstances

4. THAT the learned trial magistrate erred in law and in fact by failing to give reasoning for his determination and finding.

5. THAT the learned trial magistrate erred in law and in fact by failing to look at the defendants submissions.

The Appellants are praying for orders that the appeal be allowed, and that the award of quantum of damages and future medical expenses in Machakos CMCC NO. 321 of 2011 be set aside.

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. Onsando Ogonji & Tiego Advocates for the Appellants filed submissions dated 15th November 2016, wherein it was argued that the discharge summary from Machakos General Hospital stated the Respondent's injuries as a fractured distall/3 of the right femur, and that he was put on skeletal traction and a k-nail inserted. Further, that the medical report by Dr Kimuyu dated 1st March 2011 stated that the injuries were bone and soft tissues injuries, and a second medical report done by Dr P.M Wambugu termed the injuries as soft and skeletal tissues injuries of a closed fracture of the right femur treated by open reduction and internal fixation using a metal implant. Therefore that the injuries were agreed by both doctors as soft and bone injuries of a fractured right femur.

The Appellants submitted that the trial Court's award was in excess in respect of the Respondent's injuries and relied in this regard on the decisions in **Kenyatta University vs Isaac Karumba Nyuthe, (2014) eKLR** where the High Court awarded damages of Kshs 350,000 as general damages less 20% contribution for a fractured right femur, and set aside the lower Courts award of Kshs 700,000/=; and in **Anne Muriithi & Others vs the Headmistress Machakos Girls & 2 others, (2003) eKLR** where the High Court awarded Kshs 320,000/= as general damages and Kshs 70,000 for future medical expenses for a broken leg injury which was operated on and a metal plate inserted. The Plaintiff therein also attended physiotherapy for two months and the metal plates had not been removed.

The Appellants urged that the award of the trial Court should be set aside and a reasonable award made. Their proposal in this regard was an award of Kshs 350,000/= as general damages and Kshs 75,000 as future medical expenses.

The Respondent’s Advocates, Magare Musundi & Company Advocates filed submissions dated 27th January 2017, in which it was argued that the Respondent sustained a blunt injury right femur region (thigh); fracture of right femur; and injury to the right knee as a result of the accident, and was treated at Machakos Level 5 Hospital where he was admitted for three weeks and five days. Further, that the medical documents that were produced by consent clearly showed that the Respondent sustained the

above mentioned injuries, which were not disputed by the Appellants . The Respondent submitted that the trial Court's award of Kshs. 450,000/- was therefore fair and reasonable in the circumstances and urged this Court to adopt it.

Reliance was placed on the decisions in **Wamunyu Children's Development Fund -vs- Michael Mutuku, Machakos HCCA No. 125 "B" of 2001** where the Appellate Court maintained the award of Kshs. 420,000/- for similar injuries sustained in a road traffic accident; in **Njenga Karanja vs Transami Transporters (K) Limited (1999) e KLR** where the Plaintiff sustained similar injuries and was awarded Kshs. 750,000/-; in **Carolyne Indasi Mwonyonyo vs Keya Bus Services, Kakamega HCCA No. 17 of 2007** where the Plaintiff sustained less severe injuries and was awarded Kshs. 350,000/-; and in **Yunis Malik -vs- Eliud Muriithi & Another , Nakuru HCCC No. 354 of 2000** where the Plaintiff sustained similar injuries and was awarded Kshs. 400,000/=.

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 450,000/= 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 applys to 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. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

From the judicial authorities cited by both the Appellants and Respondent, I note that the Courts therein awarded general damages of between Kshs 320,000/= and 700,000/= for similar injuries, and the injuries suffered in all of those cases save for **Kenyatta University vs Isaac Karumba Nyuthe, (2014) eKLR** were suffered many years before the ones suffered by the Respondent.

The injuries suffered by the Plaintiff in **Kenyatta University vs Isaac Karumba Nyuthe, (2014) eKLR** were the ones most comparable to the ones suffered by the Respondent in terms of their nature and timing, and an award of general damages of Kshs 350,000/= was made in that case. However, there were no long term effects suffered by the Plaintiff therein, unlike in the present case where it was noted in the report by Dr. P.M. Wambugu that the Respondent would be predisposed to early onset of osteoarthritic changes across the hip and knee joints, and had suffered 6% degree of permanent incapacitation.

The award of Kshs 450,000/= as general damages by the trial magistrate was therefore comparable and reasonable taking into account inflationary trends and injuries suffered by the Respondent.

Likewise, both Dr. Kimuyu J.M. and Dr. Wambugu in their medical reports dated 1st March 2011 and 22nd May 2012 respectively which were produced and admitted by consent of both parties, confirmed that there was a metal implant that was used to treat the fracture of the right femur that was suffered by the Respondent that was still *in situ*.

Their only difference of opinion was the amount it would cost to remove the same, with Dr Kimuyu opining it would cost Kshs 100,000/=, while Dr. Wambugu stated that removal of the metal implant would require Kshs 65,000/= and specifically at the Kenyatta National Hospital. The award of Kshs 100,000/= for future medical expenses was therefore informed by the medical reports on file and was reasonable.

Lastly, I note that the award of special damages of Kshs 2,000/= was not contested, and was pleaded and proved by production of receipts by the Respondent.

I accordingly find that the appeal has no merit and dismiss the same with costs to the Respondent.

It is so ordered.

DATED AT MACHAKOS THIS 5TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE