REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCA NO. 142 OF 2011

SILA TIREN ….. 1ST APPELLANT

KIMITEI ARAP LIMO …... 2ND APPELLANT

=VERSUS=

SIMON OMBATI OMIAMBO …... RESPONDENT

JUDGEMENT

The Appeal before me is only in relation to the quantum of damages which the trial court awarded to the Respondent.

The issue of liability was resolved amicably. The parties agreed that the Plaintiff would bear 20% of the liability, whilst the Defendant would bear 80%.

It is common ground that the plaintiff was injured in an accident which occurred on 7th March, 2006. At the material time, the Plaintiff was riding a bicycle along Eldoret-Nakuru road, near the junction to Elgon View Estate.

The 1st Defendant was the registered owner of the motor vehicle Registration KAG 346 K, and the 2nd Defendant was driving that vehicle at the material time.

The 2nd Defendant lost control of the said vehicle, resulting in an accident with the Plaintiff's bicycle. The Plaintiff sustained injuries. In the Plaint, the Plaintiff particularized the injuries he sustained, as follows:-

" (i) Head injury – he was confused after the accident and became well oriculated some days later. This means that he sustained brain concussion during the accident.

(ii) The scalp was swollen and tender with wound on the left pevictal region.

(iii) He was bleeding from the left ear and left nostril indicating that he sustained a fracture of the base of the skull.

(iv) He sustained a fracture of the left temporal bone with mostoid involvement".

Those particulars of the injuries sustained by the Plaintiff were picked straight out of the medical report dated 4th July, 2006, which was prepared by **Dr. S.I. Aluda** of the Eldoret Medical Clinic.

Dr. Aluda's report indicated that the injuries were severe but that they had all healed, save for the headaches.

After giving consideration to the submissions made before her, the learned trial magistrate awarded kshs 700,000/= as General Damages. Thereafter, the sum was reduced to Kshs 560,000/=, due to the 20% contributory negligence attributed to the Plaintiff.

In this appeal, the Appellant's contention was that the trial court awarded an excessive amount. In their view, the sum which should have guided the trial court was Kshs 90,000/= as spelt out in their written submissions.

But the Respondent's view was that the trial court carried out a proper assessment of the compensation payable to him.

The Appellant cited the following two authorities;

(a) **PYRAMID PACKAGING LIMITED =VRS WESLEY GESANDA OMWENGA (ELD) HCCA NO. 11/2004.**

(b) **KIKARAGARI -VRS- AYA [1985] KLR 273.**

On the other hand, the Respondent placed reliance on the authority of :

(i) **JOEL TEKETI TIKANI =VRS= CHARLES MACHARIA KAMAU & ANOTHER (NKU) HCCC NO. 163 OF 2001.**

Those authorities have been cited by the respective parties, in their submissions before this court.

None of those 3 cases were placed before the trial court. Before the learned trial magistrate, the Plaintiff cited the authority of;

(a) **PETER GATONYE =VRS= TAHIR GATONGE SAID (MSA) HCCC NO. 379 OF 1991.**

And the Defendant had cited the following three (3) authorities;

i. **PATRICK MUIRURI NDUATI =VRS= LAURA NJAMBI MURIGI, HCCC NO. 2594 OF 1992;**

(ii) JOHN NJUGUNA MUNGAI =VRS= POSEIDON INVESTMENT CO. LTD HCCC NO. 4801 OF 1989;

(iii) **JAMES GATURU KIMANI =VRS= KAMANGA WAIREGI HCCC NO. 4133 OF 1991.**

In effect, the learned trial magistrate was not given the benefit of the case-law which has now been placed before me, on this appeal.

That means that this court has been invited to assess the decision arrived at by the rial court, using a yardstick that was not made available to that court.

In my understanding of the law, an appeal process is intended to correct the errors made by the trial court. And in order for the appellate court to be fair to the trial court, it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the

trial court.

The first appellate court is enjoined by law, to re-evaluate all the evidence on record, and to draw its own conclusions. The appellate court is not, ordinarily, expected to receive new or further evidence.

To my mind, the the exercise of parties placing wholly new authorities before the appellate court, and using them to either challenge or to otherwise support the decision of the trial court, is not a proper use of the mechanism of an appeal.

In this case, the Plaintiff had told the court that he should be awarded Kshs 750,000/=, as general damages . To support his said claim, the plaintiff cited an authority in which the plaintiff had been awarded Kshs 300,000/=.

A perusal of that authority **(PETER GATONYE =VRS= TAHIR GATONGE SAID),** reveals that it was determined in 1994. The Plaintiff suffered a fracture of the occipital bone of the skull, with bruises on the face and his right knee. He was unconscious at the time of the accident, and only regained consciousness on admission at the hospital. He remained hospitalized for 3 days. After discharge, he continued to complain of headaches. The doctor assessed the Plaintiff's likelihood of epilepsy in future, at 4 to 5 %.

To my mind, that case was determined so long before happening of the events, which gave rise to the current case, that it was not immediately helpful in guiding the trial court.

Secondly, in the current case, there was no assessment by the doctors, about the likelihood of the Plaintiff suffering epilepsy in the future.

Of course, I am alive to the fact that the court can take into account the trends of inflation, when assessing compensation in reliance upon older decisions. However, parties would then do well to address the court on the issue of inflation, to justify the award sought

In this case, the Plaintiff did not seek to justify his claim for Kshs 750,000/= on the basis of inflation or any other basis.

In similar vein, the Defendants' authorities were dated 1995 and 1997. And the Defendants also failed to justify their reliance on those old authorities, when assessing an appropriate sum for compensation. They made reference to the need to give consideration to;

"the current inflation of the Kenya Shilling and effluction of time".

However, the Defendants then invited the trial court to award Kshs 90,000/=, as had been awarded in 1995 ! They even failed to take heed of the case of JAMES **GATURU KIMANI =VRS= KAMANGA WAIREGI, HCCC NO. 4133 OF 1991**, which was decided on 22nd May, 1997. That case had been cited by the Defendants, and in it the Plaintiff was awarded Kshs 150,000/=.

To my mind, the Plaintiff failed to justify the claim for Kshs 750,000/= which he claimed, and the Defendants also failed to justify their offer of Kshs 90,000/=.

Bearing in mind that the authority cited by the Plaintiff had awarded Kshs 300,000/= in 1994, I find that that sum should have guided the trial court in arriving at an appropriate measure of damages.

Similarly, the sum of Kshs 150,000/= which was the highest sum in the Defendants' authorities, should have informed the final sum.

The other factor to be taken into account would have been inflation.

All considered, I find that the award of Kshs 700,000/= was excessive. I therefore set it aside. In its

place, I assess the sum of kshs 450,000/= as a reasonable sum, to compensate the Plaintiff.

After taking into account the 20% contributory negligence, I find that the Plaintiff is entitled to Kshs 360,000/=.

Accordingly, the appeal is successful. The General Damages are thus reduced from Kshs 560,000/= to Kshs 360,000/=.

As regards the costs of the appeal, I order each party to bear his own costs . I so order because, as earlier alluded to in this Judgment, the parties criticism or support of the judgment of the trial court, was not founded upon the material which they had made available to that court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 6TH DAY OF MARCH, 2014.

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FRED A. OCHIENG

JUDGE.