IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, OKWENGU & KANTAI, (JJ.A)

CIVIL APPEAL NO. 254 OF 2018

SOSINES ORINDO.....APPELLANT

VERSUS

EMKAY BUILDERS LIMITED.....RESPONDENT

(Being an appeal from the judgment/Decree of the High Court of Kenya at Nairobi* (*L. Njuguna, J) dated 7th June, 2018

in

HCCA NO. 637 OF 2012)

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JUDGMENT OF THE COURT

[1] This is a second appeal arising from the judgement of the High Court (L. Njuguna, J) in which the learned Judge allowed an appeal that had been lodged by **EMKAY BUILDERS LIMITED** (respondent), by reducing an award of general damages made by the Chief Magistrates Court at Nairobi from Kshs.900.000/- to Kshs.500,000/-.

[2] Litigation leading to this appeal was commenced by **SOSINES ORINDO** (appellant) by way of a plaint dated 2nd March 2010 and filed in court on 1st April, 2010, in which the appellant sought general and special damages for personal injuries suffered by him as a result of negligence and/or breach of contract and statute on the part of the respondent as an employer. In the plaint, the appellant averred that on 16th April, 2009, whilst working for the respondent at a construction site off Muringa Road, a crane broke and metal bars fell onto him. As a result of the accident the appellant sustained injuries on the mouth with loss of teeth, fracture of the right femur and a blunt injury to the chest and back. The appellant attributed the accident to the respondent's negligence and/or breach of contract and statute, for which he claimed general and special damages, costs of the suit and interest against the respondent.

[3] The respondent filed a defence dated 15th February 2011, denying that the alleged accident was in any way caused by the negligence and/or breach of statutory duty on the respondent's part as particularized in the plaint and attributed the accident to the negligence of the appellant as he carried out his duties.

[4] On 2nd November 2011, parties adopted a consent order dated 12th October 2011 on liability at the ratio of 10% as against the,appellant and 90% as against the respondent. After parties recorded the consent, the matter proceeded for assessment of damages. The trial court awarded the appellant general

damages of Kshs. 900,000/-, special damages of Kshs. 2,000. - and costs of the suit.

[5] The respondent filed an appeal against the judgment of the trial magistrate challenging the award of Kshs. 900,000/- as general damages. The respondent claimed the award was too high and an erroneous estimate of the loss suffered by the appellant. As already stated, this appeal resulted in the judgment subject of this second appeal now before us.

[6] In his memorandum of appeal dated 19th July, 2018, the appellant has posited three grounds of appeal which are:

> **"(a) That the learned Judge erred by reducing the award of damages**
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> **(b) That the learned Judge erred in her appreciation of the appellant's injuries.**
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> **(c)That the learned Judge erred by finding that the award was excessive"**

[7] At the hearing of the appeal, learned counsel Mr. Nelson Kaburu appeared for the appellant. Although the date had been fixed by consent there was no appearance by the respondent. Both parties had however filed and exchanged written submissions as regards the appeal, and Mr Kaburu having opted to rely entirely on the written submissions, we have determined the appeal relying on the written submissions filed by both parties.

[8] In his submissions, the appellant relying on **H. West & Son Ltd –vs- Shepherd (1964) AC 326 at 353** urged that an award appealed from should not be disturbed by an appellate court for the reason that the appellate court would have made a lesser or higher award had it been the one sitting as the first court. He faulted the learned Judge for interfering with the trial court's award on damages, firstly, without demonstrating how the trial court erred in assessing the damages awarded to the appellant; and secondly, in failing to take into account in arriving at her award any authorities with comparable injuries to those suffered by the appellant. Thirdly, the appellant submitted that the learned Judge failed to take into account the aspect of inflation and appropriate comparable cases presented in support of the appellant's case. The appellant therefore urged the Court to allow the appeal.

[9] In his submission the respondent opposed the appeal contending that the appeal before the Court being a second appeal, this Court could not revisit the issue of gravity or severity of injuries as these were questions of fact. In his view the major issue in the appeal is whether the appellate court took into account the applicable principles in assessing damages. He argued that the learned Judge could not be faulted as she appreciated and reminded herself of the applicable principles in the assessment of damages, and compared the injuries suffered by the appellant to most recent authorities. The respondent therefore urged the Court to find that the learned Judge was justified in reducing the award of general damages to Kshs. 500,000/- and dismiss the appeal.

[10] The appeal herein is limited to the quantum of damages. In ***Agnes Kamene Mulyali vs. Harvest Limited [2017] eKLR*** this Court stated as follows concerning a second appeal on quantum:

> "***As this is a second appeal, we address issues of law only and the quantum or assessment of damages is a question of law. We have before us two concurrent findings on quantum with which we are asked to interfere. Awards of damages of course lie in the discretion of the court but it is exercisable on settled principles. Appellate courts are slow to interfere with the same and will do so only in well- known circumstances. In KENYA BUS SERVICES & ANOTHER VS. MAYENDE [1992] 2 EA 232 at 235, this court put it thus*: *'The principles on which an appellate court will interfere with a trial court's assessment of damages are now settled in Kenya. Kneller, JA. as he then was, put it thus in KITAVI vs. COASTAL BOTTLES LIMITED [1984] LLR 213 (CAK); 'the court of appeal in Kenya then should as its forerunners did only disturb an award of damages, when the trial judge has taken into account a factor he ought not to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. Singh vs. Singh and another [1955] 22 EACR at 129; Butt vs. Khan [1977] LLR 2***

(CAK).' "

[11] This Court in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR** in addressing a trial court's duty in assessment of damages held:

> ***"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. West & Son Ltd v Shephard [1964] AC 326 at page 353.***
>
> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of 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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."***

[12] The trial court in assessing damages of Kshs. 900,000/-considered the case of **Lucas M. Kinoru & Anor V Hakika Transport Limited & Anor HCCC No. 7 of 1998 Mombasa** where the 1st plaintiff sustained a fractured femur, fracture of the 6th rib, 6 lost teeth and a brain concussion, and the court granted him damages of Kshs. 950,000/-. However, on appeal, the learned Judge (L, Njuguna, J) reduced the damages that had been awarded by the trial court from Kshs. 900,000/- to Kshs. 500,000/- stating as follows:

> ***"8. The Respondent was examined by two doctors. From the medical reports, the outstanding injuries sustained by the Respondent were the fracture of the right femur and loss of three teeth. The other injuries were soft tissue injuries. The authorities cited by the parties are helpful but not exactly comparable to the injuries. In the case of*** *Kinoru (supra)* ***relied on by the Respondent, in which the plaintiff was awarded Kshs, 950,000/= the Plaintiff, in addition to the fractured femur, also suffered a fracture of the 6th rib and lost 6 teeth. In our case the Respondent only lost 3 teeth. The injuries were therefore more severe in that case. On the other hand, the authorities cited by the Appellant had lesser injuries. In both authorities the Plaintiff had suffered a fracture of the Femur but the rest were soft tissue injuries. No teeth were lost in those authorities.***
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> ***9. In line with the above and considering the injuries suffered by the Respondent in comparison with the authorities cited, I find that the award of Kshs. 900,000 was excessive. The Respondent suffered a fracture to the right femur and lost three teeth with soft tissue injuries to chest and back. I find that an award of Kshs. 500,000/- would be appropriate and sufficient in the circumstances and a true estimate of the injuries suffered."***

[13] The learned Judge was of the view that the award was excessive because in the **Lucas Kinoru case** (*supra*), the plaintiff therein lost six teeth while in this case the appellant lost three teeth and that the injuries suffered by the plaintiff in that case were more severe than what the appellant suffered and for this reason, the award warranted to be interfered with. There were two medical reports presented by Dr. Wokabi and Dr. Shah and both reports confirmed that the appellant suffered a head injury with loss of three teeth, a fracture of the right femur and injury to the back and chest.

[14] In our view, the award of the trial court was not erroneous. The trial court analyzed the authorities presented by both parties and considered the authority that had the most comparable injuries in granting the appellant damages of Kshs. 900,000/-. The learned Judge on the other hand noted the injuries sustained by the appellant and the authorities relied on by the trial court, but went on to term the trial

court's award as excessive merely because the injuries suffered by the appellant differed slightly from those in the cited case. However, the learned Judge failed to take into account the element of inflation as the damages in the cited case were awarded on 7th November 2008, which was 4 years before the judgment of the trial court and over 10 years before the judgment of the High Court. Furthermore, in reducing the damages to Kshs,500,000/-. the learned Judge did not cite any authorities with comparable injuries or justify how she arrived at that figure.

[15] We come to the conclusion that the circumstances before the learned Judge did not meet the threshold set out in **Kitavi vs. Coastal Bottlers Ltd [1985] KLR 470** for an appellate court to interfere with an award of damages. This is because the trial magistrate properly directed himself by taking into account appropriate authorities, and the award was not too excessive as to justify interference. To the contrary it is the learned Judge who failed to take into account relevant factors.

[16] For these reasons we find that this appeal succeeds. We therefore allow the appeal, set aside the judgment of the High court on the quantum of damages, and reinstate thereto the judgment of the trial magistrate and the award of KShs. 900,000/- as general damages. The appellant shall also have the costs of the appeal.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 22nd day of November, 2019

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

…….....……

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR