IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 198 OF 2016

BETWEEN

STANLEY GICHERU NJOGO.....APPELLANT

AND

KIJARA JOSEPH KAGU.....1ST RESPONDENT

ELIZABETH KIHANDA.....2ND RESPONDENT

(Being an appeal from the judgment and orders of High Court

of Kenya at Nairobi by (Sergon, J.) dated 22nd July, 2016

in

Civil Appeal 592 of 2012)

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of **Sergon, J.** dated 22nd July, 2016 in which the learned Judge upheld the finding made by the trial court on liability but reduced the award of general damages.

A brief background to this appeal is that ***STANLEY GICHERU NJOGO***, the appellant herein (the then plaintiff) filed a plaint dated 29th November, 2010. In the plaint, the appellant averred that on or about 25th June, 2010, the 1st respondent whilst acting for the 2nd defendant drove motor vehicle registration No. KAJ 161 J. negligently, thereby causing an accident, the result of which he sustained injuries. He sought general damages for pain and suffering and loss of amenities; future medical costs and special damages of Ksh.34,900/-.

The respondents, ***KIJARA JOSEPH KAGU*** and ***ELIZABETH KIHANDA***, (the then 1st and 2nd defendants respectively) filed a joint statement of defence dated 24th February, 2011. In their statement of defence, the respondents denied that the 1st respondent was the driver of motor vehicle registration No. KAJ 161 J; denied that an accident occurred or that the 2nd respondent was the owner of the motor-vehicle. The respondents further contended that if the accident occurred at all, then the appellant was to blame. In the alternative, the respondents blamed the driver of motor – vehicle registration No. KBA 1959 for causation of the accident.

The matter was heard by **Hon. Obulutsa,** the then Senior Principal Magistrate, Nairobi. In a brief judgment dated 9th October, 2012, the learned trial magistrate found in favour of the appellant and entered Judgment for:-

a. General damages of Ksh.700,000/-

b. Special damages of Ksh.34,600/-

c. Future medical expenses of Ksh.814,600/-

The learned trial magistrate also awarded the appellant costs of the suit. The respondents were dissatisfied with the outcome of the trial and filed an appeal challenging liability and quantum. The appeal was heard and determined by **Sergon, J.** In his judgment, **Sergon, J**. dismissed the appeal against liability and reduced the sum awarded for general damages from Ksh.700,000/- to Ksh.400,000/-. He did not interfere with the award in respect of special damages and future medical expenses.

It was now the appellant's turn to be aggrieved by the said outcome. In his memorandum of appeal dated 15th August, 2016, the appellant listed 6 grounds of appeal which were canvassed in the submissions dated 24th May, 2017. The appellant faulted the learned Judge in reducing the award on general damages for pain, suffering and loss of amenities of life from Ksh.700,000/- to Ksh.400,000/-and for failing to award interest on all the awards made.

In opposition to the appeal, the respondent relied on their written submissions dated 13th July, 2017. It was the respondents' contention that the learned judge was justified in reducing the award of general damages from Ksh.700,000/- to 400,000/-; that the first appellate court's award on general damages was not manifestly low and finally that the award of Ksh.400,000/- was not unreasonable. It was the respondents' counsel's further contention that under **S.26** of the Civil Procedure Act Cap 21 of the Laws of Kenya, the issue of interest is discretionary and that if at all interest was payable, this would be from date of judgment. He contended that as the appellant had already been paid Ksh. 500,000/- and the balance of the judgment sum deposited in court as security as a condition precedent for granting an order of stay of execution, hence there was no basis to award interest.

The appeal before us is limited to the quantum of damages. In this Court's decision of ***Agnes Kamene Mulyali vs. Harvest Limited [2017] eKLR*** this court stated this 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).'"***

In his brief judgment, the learned magistrate took into consideration the injuries sustained and past decisions. The decisions considered by the trial magistrate included ***Joseph Kitheka vs Stephen Pius HCCC NO. 1750 OF 1999*** where an award of Ksh.700,000/- was made for fracture of tibia and fibula with no operation. He also considered the decision of ***Mary Bulinda vs. Kinyanjui Gakumu & 2 others HCCC No. 86 of 1998*** where an award of Ksh.650,000/- was made for compound fracture of the femur. The appellant sought Ksh.1.3 million for general damages.

The learned trial magistrate also considered the respondents' proposal that a sum of Ksh. 350,000/- would be sufficient compensation under the head of general damages. In so doing, the defendant cited the decision of ***Mark Wanyonyi vs. Samuel Mbugua Mombasa HCCC No. 88 of 1999*** where the court assessed general damages at Ksh.750,000/- where the plaintiff sustained fracture of the right femur, right tibia and fibula, fracture of the left femur and cuts and bruises on both thighs. It was the respondents' case that the appellant herein only sustained fracture of the left femur.

After considering the appellant's and respondents' submissions the learned trial magistrate rendered himself as follows:-

> ***"The medical report by Dr. Wokabi shows he sustained fracture of the left femur requiring internal fracture and wound requiring removal at a cost of shs.70,000/-.***
>
> ***Of the plaintiff's authorities, they give far more serious injuries except the third authority. The defendant's authorities also give far more serious.*** *(sic)*
>
> ***The court however, takes into account when the authorities were delivered and following the inflation, the court finds an award of shs.700,000/- adequate general damages****."*

The trial magistrate further ordered that "***The plaintiff will have costs of the suit and interest."*** However, on appeal **Sergon, J.** reduced the general damages from Ksh.700,000/- to Ksh.400,000/- he stated thus:

> ***"With respect, I agree with the learned Senior Principal Magistrate that the authorities relied upon by both sides relate to more serious injuries. The case before him was in respect of a fracture of the left femur which the doctor formed the opinion that it will fully heal with time. I have already pointed out that in the more serious cases, this court awarded between 650,000/- and 800,000/-. A less serious injury like that the respondent suffered should in circumstances attract a sum of Ksh.300,000/-. Even if one took into account inflationary trends it cannot double the figure award. On this head I think the learned Senior Principal Magistrate fell in error, the award was manifestly excessive hence it must be interfered with on appeal. In view of the inflationary rates I will award the respondent Ksh.400,000/- for pain and suffering."***

The learned Judge was of the view that the award was "**manifestly excessive**" to warrant interference on appeal. In our view that was not correct. A sum of Ksh.700,000/- given the considerations made by the trial magistrate cannot be said to have been manifestly excessive. The decisions cited by and relied upon by the learned trial magistrate were appropriate in light of the injuries suffered by the respondent which were detailed in the medical report by **Dr. Wokabi**, the doctor who also testified before the learned magistrate. Those injuries were in our

considered opinion, serious enough as to attract an award of Ksh.700,000/- as general damages which the trial court awarded. This award was not erroneous or excessive in the circumstances and we are of the respectful view that the learned judge on first appeal erred by finding, that the award was excessive. We are in the premises entitled to interfere with the finding of the learned Judge. The learned trial magistrate took into account the injuries and comparable decisions as well as inflationary trends. His award cannot be said to be excessive in the light of injuries sustained, the past decisions cited before him and inflation. We think it was wrong for the Judge to find that the award was **"manifestly excessive**" without giving the rationale for his findings, unlike the trial magistrate who pegged his findings on the injuries, past decisions and the fact of inflation.

It would also appear that the learned judge did not address himself on the issue of interest. The record is completely silent on this. This appears to have been an omission on his part. **S.26 (1**) of the Civil Procedure Act Cap 21 of the Laws of Kenya provides:-

> ***"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."***

On the sum awarded the respondent was entitled to interest at court rates on general damages from the date of judgment and interest from the date of filing in respect of special damages, again at court rates. In calculating the interest the sum/s already paid to the appellant shall be taken into account.

The upshot of the above is that the appeal is allowed and the judgment of **Sergon, J.** is set aside. The Judgment of the trial Court **Hon. Obulutsa** is affirmed. The appellant shall have the costs of this appeal.

Dated and delivered this 2nd day of March, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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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