**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, KARANJA & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 130 OF 2014**

**BETWEEN**

**AGNES KAMENE MULYALI.....APPELLANT**

**AND**

**HARVEST LIMITED.....RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Nairobi,***

***(Okwengu, J.) dated 27th October, 2009***

***in***

***H.C.C.A. NO. 454 OF 2004)***

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**JUDGMENT OF THE COURT**

This is a second appeal by the appellant **Agnes Kamene Mulyali**. Her first appeal against the apportionment of liability and quantum by the Chief Magistrate's Court for personal injuries sustained in a fall at her place of work some fifteen years ago was allowed in part by the High Court (Okwengu, J. as she then was). That court adjusted liability from 50:50 to 70:30 in favour of the appellant but left undisturbed the trial court's award of Kshs. 150,000 general damages and Kshs. 20,000 being the cost of future medical expenses.

Notwithstanding that in so deciding the learned Judge substantially found for the appellant and awarded her costs while dismissing the respondent's cross appeal against the Magistrate's attaching of any liability to it, the appellant, clearly an optimistic and intrepid pleader, was aggrieved and filed this appeal in which she charges that the learned Judge nevertheless fell into error by:

- ***Declining to enhance the award of general damages for pain, suffering and loss of amenities of life.***

- ***Failing to take into account legal precedents cited by the appellant on quantum.***

- ***Failing to apply the correct legal principles applicable to the appeal before her.***

- ***Deciding to award costs of the cross appeal to the appellant or alternatively for not giving any reasons for the refusal.***

It is plain then that the appellant's complaints are all on quantum and the adjunct issue of costs.

In written submissions filed on behalf of the appellant, her learned counsel Mr. Nelson Kaburu first pointed out that the appellant suffered fracture of the distal right radius bone as well as a fracture of the styloid process right ulna bone. She was in a plastic cast for ten weeks at the end of which the former fracture had united but not so the latter necessitating re-admission in hospital in May 2002 for open reduction and internal fixation using metal implants. These had to be later removed through a surgical procedure all of which predisposed her to the early onset of osteoarthritis. Her wrist joint had restriction of movements and her permanent disability was placed by the two doctors who examined her, one from either side, at 5%.

It was contended that given the nature and extent of those injuries, the learned Judge ought to have enhanced the general damages granted by the trial court and that it was therefore erroneous for her not to have done so. It was further contended that the learned Judge erred in not following this Court's binding decision of ***SAMUEL GIKURU NDUNGU vs. COAST BUS CO. LTD*** (**Civil Appeal No. 177 of 1999**) where an appellant who had suffered injuries comparable to those of the appellant herein was awarded Kshs. 300,000, overturning the High Court's dismissal of his claim.

The appellant's submissions assailed the learned Judge for wrongly relying on the case of ***DAVID KAMANDE MBUI vs. KENYA BUS SERVICES LTD*** (**Nairobi HCCC No. 281 of 1998**) not only because the injuries therein were less serious involving a fracture of the ulna only but also because there was no evidence of surgical operation, fixation, permanent incapacity or the risk of osteoarthritis. The said case also arrived at the figure of Kshs. 100,000 without reference to any cases in what the appellant's counsel termed. ***"a classic case of plucking a figure from the air."*** They asserted that the learned Judge in concluding that the Magistrate's award of Kshs. 150,000 was reasonable failed to re-evaluate the entire case and the evidence and arrive at her own independent conclusions. This she was bound to do being a first appellate court as set out in many cases including ***SELLE & ANOR vs. ASSOCIATED MOTOR BOAT CO. & ANOR*** **[1968] EA 123**.

The appellant contends that a reasonable award would have been in the region of between Kshs. 300,000 and Kshs. 450,000 in line with cases they cited before the learned Judge. To buttress that submission several cases were cited including ***SAMUEL OSORO NYAMWARU & 2 OTHERS vs. BONIFACE KAMAU & ANOR*** **Civil Appeal No. 197 of 1994**, a decision of this Court, and ***GEORGE KINGOINA MARANGA & ANOR vs. LUCY NYOKABI NDAMBUKI*** **[2006**] eKLR of the High Court. We were urged to enhance the award of general damages to at least Kshs. 300,000.

On costs of the dismissed cross-appeal, the appellant's submission was that the general principle being that costs follow the event, the learned Judge ought not to have made no order as to costs but rather awarded them to the appellant. This Court's decision of ***NELSON KABURU FELIX vs. PAUL MURUNGA*** **Civil appeal No. 143 of 2003** was cited in support.

In the respondent's written submissions filed by B. Mbai & Associates, it was contended that as a matter of principle damages must be awarded with moderation and comparable injuries compensated by comparable awards. It was submitted that the authorities cited by the appellant to urge enhancement were not relevant. The respondent therefore asserted that the learned Judge as was the trial Magistrate, was right to rely on ***DAVID KAMANDE MBUI vs. KENYA BUS SERVICES LTD*** (supra) and that the award of Kshs. 150,000 was not inordinately low and ought not to be interfered with.

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 & ANOR 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, a he then was, put it thus in KITAVI vs. COASTAL BOTTLES LIMITED [1984] LLR 213 (CAK);***
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> ***„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.***
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> ***Singh vs. Singh and another [1955] 22 EACR at 129; Butt vs. Khan [1977] LLR 2 (CAK).?***

See also ***SHABANI vs. CITY COUNCIL OF NAIROBI & ANOR*** [1984] LLR 208 and ***TEXCAL HOUSE SERVICES STATION LTD & ANOR vs. JAPPINEN & ANOR*** **[1999] 2EA 312**.

The question that we have to decide then is whether the award of Kshs. 150,000 granted by the trial Magistrate and affirmed by the learned Judge was so inordinately low as to amount to a wholly erroneous estimate of the damage or injury suffered and thus call for our interference. We have already set out the injuries that the appellant suffered as a result of falling and injuring her arm upon slipping on a muddy floor at her place of work at the respondent's green house where her job was to cut and chemically treat and arrange flowers. Those injuries involved fracture of two bones necessitating a plaster cast for ten weeks followed by hospitalization and surgery for open reduction and internal fixation. She would need further surgery to remove the metal implants and be disposed to early onset to osteoarthritis. She was left with 5% permanent disability.

We have looked at the decision that both the trial court and the learned Judge relied on, namely ***DAVID KAMANDE OMBUI vs. KENYA BUS SERVICES*** (supra) and are immediately struck by the fact that the injuries therein seem to be significantly less serious than those suffered by the appellant. There is no indication that the claimant there had to undergo surgery; whether he required further medical intervention in the future; whether he suffered any permanent disability and whether the accident had a pre-disposing potential towards early osteoarthritis. What is more, the damages awarded therein were not preceded by a careful or any analysis and comparison with other decided cases, which means the award of Kshs. 100,000 that was made therein begs questions as to how it was arrived at and therefore weakens its persuasive sway.

We think that the learned Judge ought to have given a more careful consideration of the cases cited by the appellant's counsel and in particular this Court's decisions of SAMUEL ***GIKURU NDUMBU vs. COAST BUS CO. LTD*** and ***GEORGE KINGOINA MARANGA & ANOR vs. LUCY NYOKABI NDAMBUKI*** (supra) which were binding upon her. She ought to have followed them or, if good reason existed for doing so, distinguished them. She did not do so and so erred. The injuries therein were comparable to those suffered herein and the awards were Kshs. 300,000 and Kshs. 420,000, respectively.

The process of comparison is key to the proper assessment of general damages because, as was stated by Lord Morris of Borthy-Guest in the English case of ***WEST (H) & SON LTD vs. SHEPH*** **[1964] A.C. 326** at 345;

> ***"… money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be an endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation.***
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> ***Furthermore, it is eminently desirable that so for as possible comparable injuries should be compensated by comparable awards …."***

Those sentiments were adopted by Potter J.A in ***TAYAB vs. KINANU*** **[1982-88] 1KLR 90** cited by the appellant. We could not agree more.

Being of that mind, we think that the sum of Kshs. 150,000 confirmed by the learned Judge was in the circumstances of the case inordinately low. It represented an erroneous estimate of the injuries or damage caused to the appellant. It also was arrived by the error of law of not considering properly or at all the binding authority that had been cited to the learned Judge. We therefore must interfere with it, and we do, enhancing the general damages for pain, suffering and loss of amenities to Kshs. 300,000.

Turning now to the last issue of costs, it is common ground that the learned Judge in dismissing the respondent's cross appeal, did not make any order as to costs. The dismissal of the cross appeal was a success to the appellant and ordinarily, costs following the event, she should have been awarded the costs. As the learned Judge did not give any reason for not following the general rule, we take it she had none. Thus on that, too, we must, with respect, reverse her. The appellant shall therefore have the costs of the dismissed cross appeal at the High Court.

The upshot is that this appeal succeeds in the terms we have set out herein, and with costs.

**Dated and delivered at Nairobi this 24th day of February, 2017.**

**P. N. WAKI**

**.....**

**JUDGE OF APPEAL**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**