**IN THE COURT OF APPEAL**

**AT NYERI**

**SITTING IN NAKURU**

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

**CIVIL APPEAL NO. 166 OF 2013**

**BETWEEN**

**SAMUEL KIMEMIA GATHOGA …….. APPELLANT**

**AND**

**NJORO CANNING FACTORY (K) LTD ……..RESPONDENT**

***(Appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Hon. Lady H.A. Omondi, J.) Dated 8th March, 2013***

**in**

**Nakuru Civil Appeal No. 52 of 2010)**

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**JUDGMENT OF THE COURT**

This is an appeal arising from the Judgment of the High Court of Kenya at Nakuru **(H.A. Omondi, J.)** dated the 8th day of March, 2013.

The background to the appeal is that the appellant, **Samuel Kimemia Gathoga** (the appellant) sued the respondent **Njoro Canning Factory (K. Ltd)** seeking both special and general damages together with attendant costs and interests for injuries sustained on 3rd August, 2005, while working for the respondent company, which he attributed to the respondent's breach of contract and or negligence as particularized in the plaint.

The respondent denied liability and attributed the injuries suffered by the appellant, if any, to the appellant's own negligence as particularized in the defence, to which the appellant joined issue in his reply to defence.

The trial court after considering the evidence before it, ruled that the appellant was injured while on duty. Of the two contradictory medical reports that he was confronted with, the trial court believed the one of **Dr. Omuyoma** who had said that he had based his findings on the original treatment notes on the appellant. On that account, the trial court found the respondent 100% liable for the appellant's injuries and assessed Kshs. 150,000 as general damages.

The respondent was aggrieved and appealed to the High Court. After a merit disposal , the learned Judge affirmed the trial courts findings on liability but found cause for interfering with the award of damages which the learned Judge revised downwards to Kshs. 70,000.

The appellant was aggrieved. He is now before us on a second appeal raising two grounds of appeal. He complains that the learned Judge erred in law:-

> ***(1) by misdirecting herself in making a finding that Dr. Mugenya's medical report was more credible and logical as opposed to the medical report by Dr. Omuyoma thereby erroneously interfering with the trial Courts' exercise of discretion on assessment of quantum.***
>
> ***(2) by misdirecting herself in failing to give due consideration and weight to the testimony of the appellant and the treatment card in resolving the conflict in the two medical reports as to the nature and extent of the injuries suffered by the appellant and***

***thereby arrived at an erroneous findings that the appellant did not suffer prolapsed inter vertebral disc.***

The appeal was canvassed by way of oral submissions by learned counsel.

Learned counsel **Mr. Robert Ndubi** instructed by the firm of **Robert Ndubi** & Co. Advocates in his submissions invited us to fault the learned Judge for preferring the medical report of **Dr. Mugenya** over that of **Dr. Omuyoma** which was supported by the appellant's testimony and a treatment card; and for failing to give due regard to the appellant's evidence. He cited the case of **Kemro Africa Ltd T/A Meru Express Services [1976] & another versus Lubia & another [1987] KLR 30 Henry Hidayo Ilanga versus Manyama Manyoke [1961] EA 705; Butt versus Khan [1982-88] KAR 1 and Madrugada Limited versus Cosmas Kipkoech Sged [2016] eKLR** all on the principles that guide an appellate court in the exercise of its discretion in the case of **Mbogo and another versus Shah [1968] EA 93** on the parameters that guide an appellate court on the exercise of Judicial discretion; and the case of **Alfred Mutuku Muindi versus Rift Valley Railways Ltd [2015] eKLR** for the proposition that while an appellate court has jurisdiction to review the evidence of the trial court to determine whether the conclusions reached by the trial court should stand or not, this jurisdiction has to be exercised with caution.

In opposing the appeal, learned counsel, **Mr. Kamonjo Kiburi,** instructed by the firm of **Kamonjo & Kiburi** & Co., urged us to dismiss the appeal on the grounds that the learned Judge was entitled to re-evaluate the two contradictory medical reports and determine which of them was more plausible; that the learned judge gave reasons as to why she preferred the medical report of **Dr. Mugenya** as opposed to that of **Dr. Omuyoma**; that the learned Judge exercised her discretion properly in revising the award made by the trial court downwards as she gave reasons for the said revision which we should not disturb.

This is a second appeal and our mandate is restricted to considering matters of law. See Onyango **& Another Vs. Luwayi [1986] KLR 513** wherein this Court held *inter alia* that:

> ***"the Court of Appeal would not interfere with the findings of fact of the two lower courts unless it was clear that the magistrate and the Judge had so misapprehended the evidence that their conclusions were based on incorrect bases.***

We have given due consideration to the record in the light of the above rival submissions and the principles of case law relied upon by the appellant. In our view, only one issue falls for our determination namely, whether the learned Judge exercised her discretion judiciously and with reason when she interfered with the award arrived at by the trial court and revised it downwards.

The findings of the trial court were briefly as follows:-

> ***"I have carefully appraised the evidence on record. Clearly the plaintiff was injured while on duty. Dr. Mugenya disagreed with the findings of Dr. Omuyoma. He observed that the photocopy presented to him of a treatment card was not clear. The original treatment notes were with the defendant and were actually produced by DW1.***
>
> ***On a balance of probabilities, I believe he sustained the injuries observed by Dr. Omuyoma. I also hold the defendant 100% liable. In view of the injuries sustained and having considered submissions before me I am minded to assess general damages at Kshs. 150,000."***

When interfering with the conclusions reached by the trial court as above, the learned Judge reasoned *inter alia* thus:-

> ***"The defence witness Leonard Odhiambo also confirmed that the respondent was injured. There was no X-ray carried out on the respondent and this coupled with the fact that the respondent recovered and resumed his duties within a week is what led Dr. Mugenya to conclude that there was no significant back injury and no evidence of prolapsed intervertebral disc. The conclusion by Dr. Mugenya follows a very systematic analysis and rational path and it is not clear to me why the trial magistrate opted to disregard his evidence and rely on Dr. Omuyoma merely saying he believed him on a balance of probability. Perhaps Dr. Omuyoma simply relied on the treatments notes from Nakuru Provincial General Hospital and did not make an Independent assessment- certainly his report does not give any analytical approach as to why he came to the particular conclusion.***
>
> ***If due regard had been given to the analysis by the doctors, I am certain that the trial magistrate would have come to a different conclusion in terms of general damages. My observation is that Dr. Mugenya's report is properly detailed and backed with an explanation as to why he made certain conclusions, and in my view, it was the more credible and logical one. I find that the trial magistrate erred in rejecting the findings by Dr. Mugenya.***
>
> ***I have no doubt that the respondent was injured but on the face of the observations I have made, then I think the general damages of Kshs. 150,000/= was indeed disproportionally high. This resonates with the views expressed by Nyarangi, J. in the case of Nyambura Kigaragari versus Agripina Mary Aya Civil Appeal No. 580 of 1983 (unreported) that for the court to interfere with an award, it must be demonstrated that the award was based on a wrong principle and is so manifestly excessive or in ordinately high.***
>
> ***The decided cases before the trial court and before this Court in particular by the respondent address far more extensive and significant injuries involving cuts and not restricted to purely soft tissue injuries. I have also carefully considered the decisions cited by the appellant's counsel; some dating to over 5 years ago, certainly the trial magistrate would be guided by a list of factors, including the current economic trends and the conduct of the Kenyan shillings in assessing damages.***
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> ***Having made all these observations, I am of the view that the general damages awarded ought to be reduced and the proportionate sum be Kshs. 70,000. (seventy thousand only) and I so award."***

From the above, there is no doubt that the learned Judge revisited the record on her own and reanalyzed it as she was obliged to do so as a first appellate court. She was indeed entitled and had jurisdiction to review the evidence tendered before the trial magistrate to determine whether the conclusions reached on the award of damages made by the trial Court were to stand or otherwise. We however note that the learned Judge failed to remind herself of the fact that this jurisdiction was exercisable with caution; that she was only entitled to interfere if satisfied that there was no evidence to support the trial magistrates conclusion; or, if there was demonstration that the trial magistrate had failed to appreciate the weight of the evidence or plainly went wrong. See **Alfred Mutuku Muindi versus Rift Valley Railways (Limited) [2015] eKLR.**

On our part, the principles we are enjoined to apply in deciding either way herein, were set out by **Kneller JA** (as he was then) in **Kemfro Africa Limited t/a Meru Express Services [1976] & another versus Lubia & another (No.2) [1987] KLR 30,** at page 35 had this to say:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that, short of this the amount is so in ordinately low or so in ordinately high that it must be a wholly erroneous estimate of the damage. See Ilanga versus Manyoka [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co- Operative Society Ltd Versus Kalovoto [1979] EA 414, 418,419 (CA-K)."***

See also **Law JA** (as he was then) in **Butt versus Khan [1982-88] 1KAR**, 1 at page 4 where it was stated thus:-

> ***"An appellate court will not disturb an award of damages unless it is so in ordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles; or that he must have apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

Bearing the above principles in mind, it is not disputed that two medical reports featured and were considered by the two courts below. The injuries were suffered on 3rd August, 2005. The appellant attended treatment at the company clinic the same day with a follow up treatment the same week at the Provincial General Hospital, Nakuru. The medical report of **Dr. Obed Omuyoma** was earlier in time as it is dated the 7th day of July, 2007 (07/07/2007). It was clearly indicated in the said medical report that an X-ray was viewed by the said Doctor and it revealed a prolapsed interverterbral disc. The Doctor also gave evidence in court and he was cross-examined. He indicated clearly that he had recourse to an X-ray and a treatment card from Nakuru Provincial General Hospital.

The medical report by **Dr. George W.O Mugenya** was much later on 19/06/2009. There is indication that the treatment card was illegible and no X-ray was produced by the appellant when demanded of him by **Dr. Mugenya.** From the observations by the trial magistrate, it is the respondent who kept the appellants' medical documents and in fact tendered these in evidence. It was therefore not surprising that when the appellant attended **Dr. Mugenya** all that he had on him was an illegible copy of the treatment card and not the original treatment card and the X-ray. From the undisputed evidence on the record, these were with the respondent. The appellant could not therefore be punished for the failure to produce them before **Dr. Mugenya.**

In the light of the above observations, it is our finding that the learned Judge did not only misapprehend the above evidence but also failed to consider it and yet this is the evidence that the learned trial Magistrate said went to support the testimony of **Dr. Omuyoma** which was tested in cross-examination. **Dr. Omuyoma's** findings as put by him in the evidence in chief and cross-examination were based both on physical examination of the appellant and appraisal of medical documents inclusive of an X-ray. On the other hand, the evidence of **Dr. Mugenya** which was not tested in cross-examination as he never gave any testimony in court and which he acknowledges did not have the benefit of a back up treatment card and X-ray. It is therefore our finding that had the learned Judge properly appreciated the above evidence, she would not have interfered with the trial magistrates' exercise of discretion in arriving at the award he made solely on the grounds that she believed in the contents of the medical report of **Dr. Mugenya** as opposed to those of that of **Dr. Omuyoma.** We therefore find justification in the appellants invitation for us to interfere with the learned Judges' exercise of discretion in interfering with the trial court's award and revising it downwards.

In the result, we allow the appeal, set aside the learned judges' order revising the award made by the trial court downwards and restore the award arrived at by the trial magistrate which we find was commensurate to the injuries the appellant had suffered. We find nothing in it to suggest that it was inordinately too high or too low.

The appellant will have the costs of the appeal both here and the Court below.

**Dated and Delivered at Nakuru this 22nd day of November, 2017.**

**P. N. WAKI**

**…….……..…….**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**…….**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**……...…….....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**