IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPEAL NO. 167 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. 51 of 2010)

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JUDGMENT OF THE COURT

The appeal arises from a decision of the High Court **(H. A. Omondi, J.)** dated the 8th day of March, 2013, on an appeal arising from the Judgment of the Senior Principal Magistrate's Court at Molo **(S.M.S. Soita. PM).**

The background to the appeal is that, the appellant was an employee of the respondent. He sustained injuries on the 7th day of June, 2007 while in the course of his employment with the respondent. He blamed the respondent for the injuries suffered on account of either a breach of contract or negligence as particularized in the plaint. The respondent resisted the claim. After the trial, the learned trial magistrate after assessing and analyzing the record before him and applying the law cited to him by either side, found the respondent 100% liable for the injuries suffered by the appellant in the course of duty and awarded him Kshs. 130,000 general damages.

The respondent was aggrieved and appealed to the High Court. The High Court after re-evaluating and re-analyzing the record before it affirmed the learned trial magistrate's finding on liability but found cause to interfere with the award of damages which the learned Judge reduced to Kshs. 30,000.

The appellant was aggrieved. He is now before us on a second appeal raising three grounds of appeal. It is the appellant's complaint that the learned Judge erred in law:-

> ***(1) in making an erroneous finding that the appellant exaggerated the nature of injuries that he had sustained in an industrial accident thereby wrongly interfering with the trial courts' exercise of discretion in assessment of quantum of damages.***
>
> ***(2) in substituting the discretion of the trial magistrate on assessment of quantum with hers arbitrarily without appreciating that the trial court had the advantage of observing the injuries and the demeanor of the appellant.***
>
> **(3)** ***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 finding that the appellant did not suffer prolapsed interverterbral disc.***

The appeal was canvassed by oral submissions. In support of the appeal, learned counsel **Mr. Robert Ndubi** instructed by the firm of **Robert Ndubi & Co.** Advocates urged us to interfere with the learned Judge's findings on the grounds that the learned Judge misdirected herself when she *suo motu* attacked the evidence adduced before the trial court; that the learned Judge reduced the award of damages that had

been awarded by the trial court to Kshs. 30,000 a figure below what the respondent had offered in their submissions of Kshs. 50,000 though the said amount (offered by the respondent) cannot suffice now due to the passage of time; and that we should therefore either restore the award made by the trial court or substitute that award with one that is reasonable.

To buttress the above submissions, **Mr. Ndubi** cited **Kemfro Africa Ltd T/A Meru Express services [1976] & another versus Lubia & another [19870 KLR 30, Henry Hidaya Ilanga versus Manyema Manyoke [1961] EA 705; Lukenya Ranching and Farming Cooperative Society Ltd versus Kalovoto [1970] EA 414, Butt versus Khan [1982-88] 1 KAR 1** and lastly, **Madrugada Limited versus Cosmas Kipkoech Sigei [2016] eKLR,** all on the principles that guide an appellate court in the exercise of its mandate in deciding whether to interfere with an award of damages by the court below. Also cited is **Mbogo & Another versus Shah [1968] EA 93** on the principles that guide the court on interference with the exercise of judicial discretion.

In opposing the appeal, learned counsel **Mr. Kamonjo Kiburi,** instructed by the firm of **Kamonjo & Kiburi** Advocates, urged us to dismiss the appeal on the grounds that the learned Judge was in order when she revised downwards the award made by the trial Court for the reasons that the injury suffered was a minor cut on the finger, which was treated in a local clinic and took no time to heal as the appellant was back on duty within three (3) days. The award made by the trial court was on the higher side and the learned Judge was therefore in order when she revised it downward; that the basis on which the learned Judges exercised her discretion in revising the award downwards was well supported by the facts on the record.

In reply to the respondent's submissions, **Mr. Ndubi** reiterated the principles in the case law relied upon by him and urged that sufficient ground has been laid by the appellant to warrant interference with the learned Judge's exercise of discretion and revise the award upwards.

This is a second appeal. Our mandate is restricted to considering only matters of law. In **Onyango & Another Vs. Luwayi [1986] KLR 513** the 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 totality of the record in the light of the rival submissions set out above. Only one issue falls for our determination namely, whether the learned Judge fell into error when she revised downwards the award of damages that had been awarded by the trial court. The principles that we are enjoined to apply when deciding either way have been stated in a long line of cases decided by this Court, some of which are cited above by the appellant.

See **Butt versus Khan** (supra) for the holding *inter alia* that:

> ***"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 misapprehended the evidence in some material respect, and so arrived at a figure which was either in ordinately high or low"***

An appellate court is also not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. See **Lukenya Ranching and Farming Cooperative Society Ltd Versus Kalovoto** (supra).

In arriving at the initial award, the trial Magistrate had this to say:-

> ***"He was examined by Dr. Obed Omuyoma who found that he had sustained a cut wound on the left small ring and middle fingers. He classified these injuries as harm***
>
> **….**
>
> ***In view of the injuries sustained and having considered submissions filed herein, I am minded to assess general damages at Kshs. 130,000."***

On appeal, the learned Judge had this to say:-

> ***"The injuries suffered were soft tissue injuries in the nature of cut wounds which did not require stitching. They were easily managed with dressing and antibiotics. The decided cases referred to by the respondent's counsel dealt with far more intensive injuries. I have also considered the decisions cited by defence counsel especially the case of Wambaira & others Vs. Kiogora and 2 others 2004 e KLR. I can do no better than draw from the sentiments expressed by the Judge in that case when referring to the claim in Arrow Car Ltd Vs. Elijah Shama Ka Bimomo and others CA 344 of 2001 which stated:***
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> > *"What about the injuries sustained by the respondent in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards, and……Respondents herein suffered what doctors described as soft tissue injuries, an award……for such injuries as made are inordinately high and warrant our interference."*
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> ***It is this line of thought that guides me too, that the soft tissue injuries suffered by the respondent were such that a sum of Kshs. 130,000/= is inordinately high and warrants interference. I would in the circumstances award general damages of Kshs. 30,000/=***

(Thirty thousands only).

We have considered the above reasoning, by the learned Judge as to why she exercised her discretion in revising the trial courts' award downwards, and it is our view that in arriving at the revised award, the learned Judge failed to take into consideration the figure of Kshs. 50,000.00 suggested by the respondent as an appropriate award in the circumstances of the appeal before the learned Judge. We also do not find in the said Judgment mention of the age of the comparable case law awards that were relied upon by the learned Judge. There is nothing in the learned Judges reasoning to suggest that the inflationary trend and the decline in the purchasing power of the Kenyan shilling over that period was ever considered. These were material considerations the learned Judge ought not to have over looked. Taking the totality of the above in mind and doing the best we can , it is our view that sufficient cause has been shown for us to interfere with the learned Judges' exercise of her discretion. In doing so, we bear in mind the cardinal principle that an award of damages is meant to compensate the victim for the injuries suffered and where possible restore him/her to his/her former position before the injury was suffered and not to enrich him/her.

In this regard, we are inclined to revise the said award upwards from Kshs. 30,000 to Kshs, 80,000. The amount will carry interest at Court rates from the date of judgment in the trial court until payment in full.

The appellant will have costs both on this appeal and the appeal before the High Court.

Orders accordingly.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR