REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 9 OF 2021

(Formally Machakos HCCA No. 15 of 2020)

Before Hon. Lady Justice Maureen Onyango

SLOK CONSTRUCTION LIMITED..... APPELLANT

VERSUS

ERICK ODHIAMBO ODONGO.....RESPONDENT

(*Being an appeal against the judgement and decree of Hon. J. A. Agonda, Senior Resident*

Magistrate delivered on 10th January 2020 at Mavoko in PMCC No. 702 of 2017 –

***Erick Odhiambo Odongo v Slok Construction Limited*)**

JUDGMENT

1. Slok Construction Limited, the Appellant herein filed an appeal against the Judgment and Decree of the Senior Resident Magistrate Hon. J. A. Agonda at Mavoko PMCC No. 702 of 2017 delivered on 10th January 2020. In the judgment the Learned Trial Magistrate ruled in favour of the Respondent and awarded him Kshs.1,601,600/- together with costs and interest thereon at Court rates as against the Appellant.

2. The Respondent sued the Appellant for damages arising out of the injuries he sustained due to an alleged industrial accident that occurred on 23rd July, 2016.

3. On 7th November, 2019 during the hearing of the matter, the parties recorded a consent on liability at the ratio of 80:20. The parties also agreed by consent that the Appellant's and Respondent's documents be admitted as exhibits without calling the makers.

4. The Appellant avers that order 3 of the consent was to have the medical report by Dr. Modi dated 12th May, 2018 produced without calling the maker. The medical report by Dr. Modi dated 12th May, 2018 was filed as part of the defendant's list of documents dated 18th July, 2018 and was part of the court record.

5. The Appellant avers that after conclusion of the case, the Trial Court on 10th January, 2020 made a final award of Kshs.2,000,000/- as damages.

6. Being aggrieved by the Lower Court's determination, the Appellant filed this appeal against the judgement of the Trial Court.

7. In the Memorandum of Appeal dated 12th February 2020, the Appellant raises the following grounds of appeal:

(i) THAT the Learned Trial Magistrate erred in law and in fact and misdirected herself by, failing to consider at all the submissions made before her by the defendant and reached an erroneous conclusion thereby occasioning a miscarriage of Justice.

(ii) THAT the Learned Trial Magistrate erred in law and in fact by holding that the medical report of Dr.Modi was not submitted when the same had already been filed in court, admitted as part of the record by consent of the parties and formed part, of the defendant's list of documents.

(iii) THAT the Learned Trial Magistrate erred in law and in fact by awarding general damages to the sum of KSHS.2,000,000/- that was manifestly high and the same was not proved and by having disregard of the submissions by the defendant and cited legal authorities.

(iv) THAT the Learned trial magistrate in assessing quantum of damages took into account irrelevant factors as well as wrong principles and therefore arrived at a wrong decision and made an excessive award on quantum of damages.

8. The Appellant prays for the following orders: -

(a) This Appeal be allowed.

(b) That the Judgement and Orders of the subordinate court dated 10th January, 2020 be set aside.

(c) The costs of this Appeal be borne by the Respondent herein.

9. The Respondent filed a notice of preliminary objection dated 9th March 2020 as hereunder: –

(i) The memorandum of appeal dated 12th February 2020 and filed on 12th February 2020 was filed out of time as per Section 79G of Civil Procedure Act without extension of time.

(ii) The Respondent prays that the notice of motion dated 21st February 2020 be struck out with costs.

10. The appeal was originally filed as Machakos High Court Civil Appeal No. 15 of 2020 but was later transferred to this Court by orders of Odunga J. made on 21st April 2021. At the time of transfer, parties had already taken directions on disposal of the appeal by way of written submissions and had filed their respective submissions. The Court therefore only took directions on date of delivery of the judgment.

Appellant's Submissions

11. The Appellant compressed its submissions into two heads being quantum and notice of preliminary objection.

12. On quantum the Appellant submits that in the past courts have decided cases with similar or relevant nature of injuries to those sustained by the plaintiff in the instant case. The Appellant relied on a number of decisions as cited below: -

(a) Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR

In this case the plaintiff sustained the following injuries:

lacerations on the occipital area,

- deep cut wound on the back, right knee and lateral lane,
- bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest,
- bruises on the left elbow,
- compound fracture of the right tibia/fibula,
- segmental distal fracture of the right femur

Majanja J. in his judgement set aside the trial court award of Kshs.1,000,000/- and made an award of Kshs.450,000/-.

(b) David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR

The Respondent herein suffered the following injuries:

- fragmental fracture midshaft femur
- Intertrochanteric fracture femur.

Taking into account the totality of all the circumstances in this case and in light of the injuries sustained by the Respondent, Gikonyo J. found the sum of Kshs.630,000/- awarded by the trial magistrate as General Damages for pain and suffering to be reasonable and fair estimation of damages.

(c) Paul Kithinji Kirimi & another v Gatwiri Murithi [2018] eKLR

According to the plaint, the plaintiff sustained the following injuries;

- cut on the upper lip,
- (hyperaemic) red right eye,
- Fracture of the right mandible
- Fracture of the distal third of the right femur.

Majanja J. in his judgement set aside the trial court award of Kshs.700,000/- and made an award of Kshs.450,000/-

(d) Mwavita Jonathan v Silivia Onunga [2017] eKLR

The injuries sustained by the respondent as follows:

- Left hip commuted intertrochanteric fracture
- Blunt chest injury
- Dislocated right knee joint
- Sprains at the cervical spine of the neck and the lumbar-sacral spine of the back
- Deep wound on the left lower leg which cause lot of blood Majanja J. in his judgement stated the award of general damages of Kshs.2,000,000/- was excessive and the Court was entitled to intervene. The Judge was of the view that a sum of Kshs.400,000/- would be reasonable in the circumstances.

13. The Appellant submits that taking into consideration the injuries sustained by the Respondent in the instant case, the past awards as stated above, Kshs.400,000/- would be a fair and reasonable amount as general damages for pain and suffering.

14. On the notice of preliminary objection, the Appellant submits that under Order 50 Rule of the Civil Procedure Rules, time does not run from 21st December to 13th January of the following year. That in this case the time started running 14th January 2020, the judgment having been declared on 10th January 2020. That the time for filing appeal therefore lapsed on 14th February 2020. This appeal was filed on 12th February 2020 and is therefore within the time contemplated under Section 79G as read together with Order 50 Rule 4 of the Civil Procedure Rules.

15. The Appellant submits that this was the position taken by the Court of Appeal in the case of **Gabriel Osimbo v Chrispinus Mandare [2020] eKLR** which was an appeal against a ruling delivered by the High Court dismissing the appellant's appeal for the reason that it was filed out of time.

16. That the Learned Judge found that the appellant filed the appeal out of time on 7th February, 2011 without leave yet the appeal ought to have been filed at least by 24th January, 2011 as per section 79G of the Civil Procedure Act. Further, the learned Judge found that the provisions of Order 50 Rule 4 of the Civil Procedure Rules cannot be availed in the computation of time prescribed by section 79 G of the Civil Procedure Act.

17. That one of the issues that emerged before the Court of Appeal for determination is whether the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, which provides for the exclusion of the period 21st December and 13th January in the next year in computing time, applies to the filing of appeals from the subordinate to the High Court. The Court of appeal was guided by the guided by the provisions of Section 57(b) le Interpretation and General Provisions Act and Rule 2(2) (b) of the High Court Practice and Procedure Rules, made pursuant to Section 10 of the Judicature Act, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January.

18. The Court of Appeal in its judgment held that:

> "*Therefore, applying the above to the instant matter, I find that the appeal to the High Court was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents."*

19. That the same was position was also held by the Court of Appeal in the case of **Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others [2013] eKLR**.

20. The Appellant further relied on the case of **Francis Likhabila v Barclays Bank of Kenya [2020] eKLR**, where Githua J. in holding that there was no conflict between section 79G of the Civil Procedure Act as well as Order 50 Rule 4 of the Civil Procedure Rules held as that:

> *"It is apposite to note that the Civil Procedure Act is silent on the formula courts should use in computing time limited under the Act. The respondent has urged me to be persuaded by the holding of my sister Kasango J* ***in Cook 'N' Lite Limited v Silvester Mutia Honatha, [supra]*** *and hold that the freezing of time from 21st December of any year to the 13th January of the following year does not apply to computation of time limited under Section 79G of the Act but only applies to time limited in the Civil Procedure Rules or in a court order with the exception of applications for injunctions. With much respect, though I agree with the Hon. Judge that Order 50 Rule 4 is indeed subsidiary legislation formulated under the Civil Procedure Act, I must say that I am not persuaded by the above holding because upon close scrutiny of the provision, I am not convinced that it contains anything that contradicts the provisions of Section 79G of the Civil Procedure Act. In my view, Section 79G of the Act prescribes the time within which appeals from decisions of the lower court should be filed in the High Court while Order 50 Rule 4 provides the formulae for computation of that time."*

21. Githua J. in the above case further held that:

> *"I am fortified in the above finding by the Court of Appeal's decision in* ***Keziah Stella Pyman & 2 Others v Paul Mwololo Mutevu & 8 others, [2013] eKLR*** *and its recent decision in April this year in the case of* ***Gabriel Osimbo v Chrispinus Mandare, [Supra]*** *where the court allowed an appeal which challenged the High Court's decision to strike out an appeal for being filed out of time after finding that Order 50 Rule 4 was not applicable in the computation of time limited under the Civil Procedure Act. In agreeing with the decision of J. Mohammed, JA, Okwengu JA held as follows:*
>
> *"I have read the draft judgment prepared by J. Mohammed JA. I am in agreement that this appeal should be allowed. With due respect, the learned Judge misconstrued the purport of Order 50 Rule 4 of the Civil Procedure Rules. The rule simply provides the manner of computing time. It does not provide for any specific time for doing or taking any action. Thus, Order 50 Rule 4 does not contradict section 75G of the Civil Procedure Act, which provides a time limit of 30 days for filing an appeal. Order 50 Rule 4 simply provides how these days are to be computed if the period falls within the High Court vacation."*
>
> *Taking into account Rule 4 in computing the 30 days, it is evident that the appellant's appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The Learned Judge was therefore wrong in dismissing the appeal.''*

22. The Appellant submits that the appeal is merited and ought to be allowed with costs while the preliminary objection dated 9th March 2020 is unmerited and should be dismissed with costs.

Respondent's Submissions

23. In the submissions of the Respondent dated and filed on 25th January 2021, he submits that there was no error of fact or

law in the judgment of the Trial Magistrate.

24. With respect to ground no. 1 of the appeal, the Respondent submits that the Trial Court took into account the submissions and list of authorities of the Appellant when the Court observed: -

> *"On the other hand, the Defendant's counsel submitted that Kshs.400,000/= would adequately compensate the Plaintiff for injury sustained and he relied on authorities of* ***Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR, David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR, Paul Kithinji Kirimi & another v Gatwiri Murithi [2018] eKLR*** *and* ***Mwavita Jonathan v Silivia Onunga [2017] eKLR."***

25. The Respondent submits that the Appellant cannot succeed on Ground 1 since the Trial Court took into account the Appellant's submissions on record.

26. In response to ground 2 of the appeal, the Respondent submits that the Trial Magistrate did not err in holding that the medical report of Dr. Modi was not submitted. That both the Appellant and Respondent in their respective submissions at pages 31 paragraph 2 and pages 36 paragraph 2 of the Record of Appeal submitted on the Dr Modi's Medical Report and the same confirms that the Respondent had suffered a comminuted fracture of the left femur one third.

27. That no prejudice was caused to the Appellant as the Trail Court took into account their submissions before awarding the Respondent herein the general damages.

28. That the medical report at page 30 of the Record of Appeal dated 12th May 2018, Dr Modi at the conclusion/comment stated that

> *"The Plaintiff herein sustained comminuted fracture of left femur following a fall from a height as mentioned above. The comminuted fracture means the bone was broken into move than two pieces. This suggests severity of injury. Fracture was fixed with internal fixation with interlocking nails. The fracture gradually healed well in satisfactory position, left leg is shortened by 1.0 cm. He can now walk full weight bearing without support but there is mild limp while walking. Hip range of movement is slightly reduced, knee mobility is full. Due to fracture femur, he is prone to develop arthritis of the left hip and knee joint in future. He has suffered permanent disability of 15% fifteen percentages."*

29. The Respondent submits that no prejudice was caused to the Appellant herein to warrant the Court to interfere with the Lower Court

judgment.

30. With respect to ground 3 and 4 of appeal, it is the Respondent's submission that the law is clear on the principles upon which an appellate court can interfere with quantum of damages awarded by a lower Court.

31. That since the assessment is an exercise of judicial discretion of the trial court, an appellate court should be slow to reverse the trial court's award unless it is shown that he/she "*acted on wrong principles or awarded so excessive or little damages that on reasonable Court would; or he had taken into consideration matters he ought to have considered or not taken into consideration matters he ought to have considered and, in the result arrived at wrong result."*

32. The Respondent relied on the decisions in **Butler v Butler [1984] KLR, 225, Butt v Khan [1981] KLR 349, Kemfro Africatla Meru Express & Another v A. M - Lubia & Another [1982-88] KAR 72.**

33. That the sum of Kshs.2,000,000/- less 20% liability agreed upon was not manifestly high considering the injury the Respondent herein sustained as the same was awarded for pain, suffering and loss of amenities taking into account that the Respondent herein was a casual worker doing construction work as per page 2 of the Record of Appeal paragraphs 3 to 5 of the plaint, therefore the said injury prevented him from fully discharging his duties which require a lot of physical strength especially on his legs, which was permanently affected. The Respondent urges the Court to find that the award of Kshs.2,000,000/- less 20% liability was not manifestly high but adequate compensation and uphold the same.

34. The Respondent submitted that the authorities the Appellant was relying on were not similar to the injuries the Respondent sustained but only as a guide the court can use in awarding damages since no case is exactly same, each case is unique on its own.

35. On the preliminary objection, the Respondent submits that the fact that judgment was delivered in the absence of the Appellant was the Appellant's own making. That time started running on 11th January 2020 and the appeal ought to have been filled in compliance with Section 79G of the Civil Procedure Act. That the appeal having been filed out of time, should be dismissed

36. since the Appellant did not apply for extension of time.

Analysis and Determination

37. In a first appeal like this one, the Court is called upon to subject the whole of the evidence to a fresh scrutiny and to make its own conclusions on the facts, bearing in mind that it did not have the benefit of hearing the witnesses first hand and observing the demeaner of the witnesses.

38. This duty was well articulated in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**,

> *"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

39. In the case of **China Zhongxing Construction Company Ltd v Ann Akuru Sophia [2020] eKLR**, Mwongo J. set out the appropriate standard for review under the following three principles –

> *i That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
>
> *ii That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and*
>
> *iii That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

40. The Judge went on to state –

> *"Thus, this court can only interfere with an award of damages if, as stated by Law J.A. in the case **of Butt v Khan (1977) KAR 1,** the aggrieved party satisfies one of two conditions:*
>
> *1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or*
>
> *2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.*

41. In the instant appeal, the issues for determination arising from both the grounds of appeal and the notice of preliminary objection are the following –

(i) Whether the appeal should be struck out for having been

filed out of time without notice;

(ii) Whether the Trial Magistrate erred in fact and in law in holding that the medical report of Dr. Modi was not part of the record by consent of the parties;

(iii) Whether the Trial Magistrate took into Magistrate irrelevant factors and principles and therefore arrived at a wrong decision and on excessive award;

(iv) Whether the Appellant is entitled to the orders ought.

42. Section 79G of the Civil Procedure Act provides as follows –

79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

43. Order 50 Rule 4 of the Civil Procedure Rules on the other hand provides as follows –

[Order 50, rule 4.] When time does not run

4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

44. This issue was the subject of appeal in **Gabriel Osimbo v Chrispinus Mandare [2020] eKLR** where J. Mohammed JA held as follows –

The time for filing appeals from the subordinate court to the High Court is governed by section 79G of the Civil Procedure Act which provides as follows: -

"79G. Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time."

From the above, it is clear that an appeal from a subordinate court to the High Court is to be filed within 30 days from the date of the decree or order appealed against. Though, in computing the 30 days, the period of time which the lower court certifies as having been requisite for the preparation and delivery, to the appellant, of a copy of the decree or order is to be excluded.

From the record, I note that the appellant filed the appeal on 7th February, 2011, which according to the respondent was out of time and was without leave of court. However, the appellant argues that, applying the provisions of Order 50 Rule 4 of the Civil Procedure Rules, the appeal was filed timeously.

Therefore, one of the issues that emerges for determination in this appeal is whether the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, which provides for the exclusion of the period 21st December and 13th January in the next year in computing time, applies to the filing of appeals from the subordinate to the High Court. Order 50 Rule 4 of the Civil Procedure Rules provides:-

"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction."

In determining this issue, I am guided by Section 57(b) of the Interpretation and General Provisions Act which provides that:-

*"**In computing time for the purposes of a written law, unless the contrary intention appears-***

> ***b. If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day"***
>
> *Regarding the vacations to be observed by the Courts and the offices of the High Court, Rule 2(2)(b) of the High Court Practice and Procedure Rules, made pursuant to Section 10 of the Judicature Act, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January.*
>
> *Therefore, applying the above to the instant matter, I find that the appeal to the High Court was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents. See, **Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others [2013] eKLR**.*

45. The issues in the above decision were similar to the issues herein where the Respondent contends that the judgement herein having been delivered on 10th January 2020 and the appeal filed on 12th February 2020 was out of time and no leave was sought to extend the time for filing the same. I find no merit in the preliminary objection and dismiss the same. I find that the appeal herein was filed in time and is therefore properly before the Court, having regard to the provisions of Order 50 Rule 4 of the Civil Procedure Rules.

Medical Report for Dr. Modi

46. As submitted by both the Appellant and Respondent and borne by the record of appeal, parties herein recorded consent as follows on 7th November 2019 –

*"**BY CONSENT***

1. *Judgment on liability be entered in ratio of 80%:20% in favour of Plaintiff against Defendant.*
2. *Plaintiff's list of documents dated 6/6/2017 be adopted as exhibits PEX - 1 to PEX - 4 without calling their makers.*
3. *Defendant's medical report by Dr. Muudi darted 12/5/2018 be adopted without calling the maker.*
4. *Issue of quantum be canvassed by way of submissions."*

47. I have further perused the original file from the subordinate court and confirm that the Defendant through the firm of S. M. RIGHA & COMPANY ADVOCATES FOR THE DEFENDANTS filed DEFENDANT'S FURTHER LIST OF DOCUMENTS with one item being medical report of Dr. Modi M. Y. dated 12th May 2018. The same is dated 18th July 2018 and filed on 3rd August 2018. This is further confirmed by Court receipt dated 3rd August 2018 for the sum of Kshs.160/- received from S. M. RIGHA for Case No. 702 of 2017.

48. It is therefore evident that on 7th November 2019 when the consent was recorded by the court, the medical report by Dr.

Modi was on record.

49. From the foregoing, I agree with the Appellant that there was an error on the part of the Trial Magistrate in rejecting the medical report of Dr. Modi on grounds that the same was not on record.

Whether the Trial Magistrate took into account irrelevant factors

50. It is the submission of the Appellant that the Trial Magistrate disregarded the authority filed by the Appellant on grounds that the same relate to road traffic accidents while the instant suit relates to an industrial accident.

51. At page 51 of the Record of Appeal, the Trial Magistrate states as follows in the judgment –

> *Accordingly, the Plaintiff's Counsel submitted that an award of Kshs.3,000,000/= would adequately compensate the Plaintiff as general damages in respect of the aforesaid injuries by relying on the case laws of: - **John Kuria Mbure v Magari Hire Purchase Ltd & 2 others [2019] eKLR** and **Catholic Diocese of Kisumu v Tete [2004] eKLR.** I have carefully perused the case law and do note that in the two authorities relate to load traffic accident yet the instant suit relates to industrial accident hence not comparable at all. I have not considered the same in this judgment. Consequently, I am of the humble view that the Plaintiff's counsel aforesaid quantification based on the above case laws is quite on the higher side.*
>
> *On the other hand, the Defendant's counsel submitted that Kshs.400,000/= would adequately compensate the Plaintiff for injury sustained and he relied on authorities of **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR, David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR, Paul Kithinji Kirimi & another v Gatwiri Murithi [2018] eKLR** and **Mwavita Jonathan v Silivia***

Onunga [2017] eKLR. *I have carefully perused the authorities and do note that all the authorities relate to road traffic accident yet the instant suit relates to industrial accident hence not comparable and I have not considered them in this judgment."*

52. As submitted by the Appellant, the guiding principles to be considered by the Court in awarding general damages for injuries is whether the authorities relied upon by the parties have similar or comparable injuries to those in the suit under determination before the Court and not the manner in which the injuries occurred. To this extent I agree with the Appellant that the Learned Trial Magistrate made an error in law in rejecting the authorities citied by the Appellant support of its case. The Trial Magistrate went ahead to rely on a case that was not submitted by the parties being the case of **Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR** where the Plaintiff suffered multiple fractures and extensive soft tissues injuries, was assessed to have suffered 30% disability and was awarded Kshs.1,500,000/- in general damages for pain and suffering, Kshs.2,362,320/- for loss of earnings, Kshs.50,000/- for future medical expenses and Kshs.20,385/- for special damages. Relying on this authority, the Trial Magistrate awarded the Respondent herein general damages of Kshs.2,000,000/- based on permanent disability of 45% as per medical report of Dr. Okere produced by the Respondent.

53. According to the medical report of Dr. Okere the Respondent suffered a fracture of the left femur. The report further states that the Respondent had recurrent pains on the left thigh and inability to perform heavy duty.

54. He found a surgical scar on the upper leg laterally. He assessed permanent incapacity at 45%. This was on 23rd May 2017, about ten months after the accident that occurred on 23rd July 2016.

55. Dr. Modi who assessed the Respondent on 11th May 2018, about a year after Dr. Okere, noted that the Respondent complained of recurrent pain in the left thigh at times, inability to perform heavy duty and inability to run. His findings were that-

"CURRENT FINDINGS:

Left thigh - surgical scars noted over lateral aspect of left thigh,

left leg 1.0 cm short, walks full weight bearing with mild limp, he walks without support, mild decrease in range of movement of hip, full range of movement of knee. "

56. His conclusions were as follows –

"CONCLUSION/COMMENTS:

Erick Odhiambo Odongo sustained comminuted fracture left femur following a fall from height as mentioned above. Comminuted fracture means the bone was broken into more than two pieces. This suggests severity of injury. Fracture was fixed with internal fixation with interlocking nail. Fracture gradually healed well in satisfactory position. Left leg is short by 1.0 cm. He can now walk full weight bearing without any support but there is mild limp while walking. Hip range of movement is slightly reduced. Knee mobility is full. Due to fracture femur, he is prone to develop arthritis of left hip and knee joint in future. He has suffered permanent disability of 15% fifteen percentages.

57. I have considered the authorities citied by the parties before the Trial Magistrate which I have already summarised elsewhere in this judgment.

58. In my view the closest to the injuries sustained by the Respondent is the case of **David Kimathi Kaburu v Dionisius Mburugu Itirai (supra)** where the Court confirmed the award of Kshs.630,000/- to be fair. The injuries therein were nevertheless more serious compared to the Respondent who suffered only a communited fracture of the femur and as at May 2018 the fracture had healed well according to Dr. Modi's report which assessed his permanent incapacity at 15%. I find the medical report by Dr. Modi more reliable as the Respondent had by then fully recovered as compared to the report of Dr. Okere which was prepared less than a year after the accident before the Respondent had fully healed.

59. It is my finding that the Learned Trial Magistrate relied on an authority that did not reflect the nature of the injuries sustained by the Respondent and that her assessment of damages was as a result excessive.

60. In the case of **William J Butler v Maura Kathleen Butler [1984] eKLR** the Court of Appeal held that as follows –

*"In **Zablon W Mariga v Morris Wambua Musila Civil Appeal No 66 of 1982 (unreported),** this court said that the assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would or he has taken into consideration matters he ought not to have considered, or not taken into account those matters he ought to have considered and in the result, arrived at the wrong decision."*

61. It is my finding that the award of the Trial Magistrate having been excessive, this Court is called upon to interfere with the said award.

62. I accordingly find the appeal merited, set aside the award of general damages by the Trial Court in the sum of Kshs.2,000,000/- and in place thereof award the Respondent the sum of Kshs.700,000/-. **I thus award as follows –**

General Damages..... Kshs.700,000.00

Less 20% contributory negligence.... (Kshs.140,000.00)

Net total..... Kshs.560,000.00

63. The Court will not interfere with the award of costs in the lower court. Each party shall bear its costs of the appeal.

64. The general damages shall attract interest from date of judgment in the lower court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE