REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 26 OF 2020

JUSTINE NYAMWEYA OCHOKI ..... 1ST APPELLANT

JARED NYANG'AU OBINO ..... 2ND APPELLANT

VERSUS

PRUDENCE ANNA MWAMBU .....RESPONDENT

(Being an appeal from the Judgment and decree of the Senior Principal Magistrate's Court at Kilifi dated 3rd June 2020 in SPMCC No. 151 of 2019 by Hon. S. D. Sitati (RM))

CORAM: Hon. Justice R. Nyakundi

Munyao Muthama & Kashindi Advocate for the appellants

Wambua Kilonzo Advocate for the respondent

JUDGMENT

The respondent to this appeal filed a claim for general and special damages arising out of a collision between motor vehicle registration No. KBU 396T and KCK 338X which was allegedly being negligently driven by the 2nd appellant. The Learned trial Magistrate held the appellants liable for the accident and awarded the respondent general damages of Kshs.650,000/=, specials of Kshs.2,500/= making a sub total of Kshs.652,550/= plus costs and interest.

The appeal before Court is premised on four grounds but in all its about the general damages for pain, suffering and loss of amenities being excessive.

The appellant counsel in his submissions admitted that the respondent suffered injuries but submitted nevertheless not of a nature to attract an award of Kshs.650,000/= as ordered by the Learned trial Magistrate.

For this reason, Learned counsel referred the Court to past decisions which he thought were of great assistance in the exercise of discretion to assess general damages by the trial Court. **James Nganga Kimani v Giachigi Njoroge & Others CA No. 48 of 2015, Titus Mburu Chege v JKN {2018}.** In that circumstances, Learned counsel urged the appeals Court to be guided as such and interfere with the decision on question of damages.

The respondent counsel on the other hand opposed the appeal reiterating that the award of general damages was commensurate with the serious injuries suffered by the respondent. One other point raised by the respondent counsel was on the issue of the execution and attachment of a decree under Section 79 (G) of the Civil Procedure Act.

Further, Learned Counsel cited and relied on the following cases in support of his contention that comparable awards have been made on such injuries suffered by the respondent **Johnstone Mutuku Kilango v Elijah Wambu HCC 173 of 2013, Henry Mbogo Gitau v Edwin Irungu Mburu {2016} eKLR.**

One other factor which both counsels submitted on was in regard to interest. The bone of contention arises out non-compliance by the respondent to abide by the terms of the order to have the decretal sum being deposited in a joint earning interest account with a reputable financial institution.

Apparently, the two counsels seemed not to have agreed on this issue to perfectly satisfy the order of the Court. Having considered the background facts and further submissions on appeal, I prefer to express my opinion to the extent of the appeal and rejoinder by the respondent.

Determination

It is the exercise of discretion of the trial Court that the appellant counsel challenges with his arguments of error in principle and misdirection in Law on assessment of general damages.

However in his submissions, he also accepts that the trial Court has wide discretion when it comes to an assessment of damages. It has so far been said that the appellate Court has unlimited discretion to scrutinize, evaluate and re-hear the case afresh and come to its own conclusion on the matter (this is in tandem with the principles in the case s of **Sumaria & Another v Allied Industries Ltd {2007} KLR and East African Portland Cement Company Ltd v Tilikia Keloi {2016} eKLR**

The dominant consideration concerning the exercise of discretion is found in one of the leading cases of **Mbogo v Shah {1968} EA Pg 93 and De Lestang V. P.** guidance remains valuable thus:

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have been into consideration and in doing so arrived at a wrong decision." (See also H. Hidaya Ilanga v Mangena {1967} – 1 EA 705).***

It is a well known principle that an appellate Court would not interfere with the exercise of discretion of the trial Court, merely because if the appeal's Court was adjudicating the issue it would have reached a different decision.

The judicial dictum in **Kimaru Mbuvi T/a Kimaru Mbuvi & Bros v Augustine Munyao Kioko C. A. No. 203 of 2001.** The Court of Appeal while citing the case of **H, West & Sons Ltd v Shepherd {1964} AC No. 326** held:

> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of Judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong, the best that can be done is to pay regard to the range of limb of comment thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have awarded. Having done so and remembering that in this sphere there are inevitably different of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."***

A major part of the appellant's counsel submission was that there exist compelling reasons to vary the award of general damages for being erroneous estimate of the loss and damage suffered by the respondent.

In that regard, I will only make reference to the piece of evidence of the respondent and the one by **Dr. Adede** who prepared the medical Legal report. From the respondent own testimony and as further predicated in the medical report. She suffered the following injuries:

(a). Loss of upper front incisor tooth.

(b). Deep cut on the chin

(c). Cut on the lips

(d). loosing of the upper teeth.

(e). Blunt object

(f). Injury to the right forearm.

(g). Loss of consciousness.

In the report by **Dr. Adede** describes the prognosis in summary involving the respondent to comprise of 2% permanent partial disability, due to loss of one front incisor tooth. The loss of consciousness in this case is due to pain and anxiety (vaso-vagal response accompanying soft tissue injuries with no residual disability.)

Considering **Dr. Adede's** medical examination of the respondent and the treatments notes from Kilifi County Hospital it becomes clear to the Court that as Learned Counsel succinctly pointed out the nature of injuries suffered by the respondent were substantially soft tissue. So now the question is whether the assessment of general damages for Kshs.650,000/= for pain, suffering and loss of amenities was commensurate with the laid down principles and similar awards. In **Livingstone v Raywards Coal Co. {1880} 5 APP Case 25 Lord Black Beem** stated on assessment of damages:

> ***"I do not think there is any different of opinion as to its (sic) being a general rule that where any injury is to be compensated by***

damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong."

In **Kigaragari v Aya {1982-88} 1 KAR 768 and Chege v Vesters {1982 – 88} 1 KAR 1197**:

"The Courts observed interalia that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs for insurance cover or increased fees."

At this stage it becomes relevant to quote the passage from the dictum in **Cornilliac v St Louis {1965} 7 WIR 491. In that case Wooding C. J.** said that:

"the Court in assessing damages should adopt the following guidelines:

(a). The nature and extent of the injuries sustained.

(b). The nature and gravity of the resulting physical disability.

(c). The pain and suffering which had to be endured.

(d). The loss of amenities suffered.

(e). The extent to which, consequently the claimant's pecuniary prospects have been materially affected."

To what extent have the Courts quantified damages under this head which may be applicable to the facts of the case before the trial Court. As mentioned by the **Court of Appeal in Derrick Munroe v Gordon Robertson {2015} JMCA CIV 38**:

"There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum Judges are not entitled to simply phial a figure from the air. Regard must therefore be had to comparable cases in which complainants have suffered similar injuries." (See Denshire Mutei v KPLC Ltd {2013} eKLR)

In terms of this appeal its plausible to make reference to the awards made for pain and suffering, loss of amenities closely comparable with the respondent's case. In **Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichumbi Nyeri HCC 320 of 1998**, the respondent suffered soft tissue injuries to the left ankle, legs and chest. She was awarded Kshs.300,000/=. In the case of **Global Trucks Ltd v Titus Osule Osoro HCCA No. 6 of 2012 at Bungoma**, the Court awarded Kshs.200,000/= for pain suffering and loss of amenities for loss of an incisor tooth, injuries to the left elbow and the abdomen with residual permanent disability.

In my considered view the respondent largely sustained soft tissue injuries and loss of one tooth. The respondent's compensation ought to be within limb of comparable awards by other Courts. It becomes quite apparent in assessing damages under this limb the Learned trial Magistrate misapprehended the evidence in the all aspects or take into account relevant factors to award a reasonable figure for the loss and damage. It is clear even if the Learned Magistrate was to give due weight to **Dr. Adede's** medical report in my view it could not have arrived at exercise of discretion to award Kshs.650,000/= for moderate suffered soft tissue injuries.

This Court is in agreement with the principles as laid own in **West (H) Son Ltd v Shephard (supra)** which I find helpful in certifying the issues at hand thus:

"But 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 is giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation ……"

In the appeal raised before the trial Court while undertaking assessment of damages failed to award and compensate the respondent fairly and reasonably. Keeping in mind the principles illustrative of the fundamental ground of appeal the Learned trial Magistrate fell into error and somewhat awarded excessive damages which in my view was erroneous to merit interference.

Consequently, the appellants appeal on assessment of damages succeeds by setting aside the award of Kshs.650,000/= with a substituted figure of Kshs.300,000/=.

The other question raised by the respondent counsel touches on Section 79 (G) of the Civil Procedure Act on the mandatoriness of annexing the extract of a decree of the trial Court Judgment. There is certainly no ambiguity in this provision. As regards the application of this Section there are prerequisites to an appeals Court.

1. First is notice of appeal.

2. Second factoring of the record of appeal which in this case an assumption of a decree of the impugned Judgment having been exercised and annexed to the record the justiciability of an appeal between the parties is actually concretized substantially in the

decree of the Court.

The points an appellant must prove on appeal are couched in the form of grounds of appeal of that appeal. I hold the view that so long as the appeal discloses and or raises some grounds fit to be decided by a Judge sitting on appeal, the noncompliance to extract the decree should not be a ground for striking out the appeal in its entirety.

In legal parlance an appeal to this Court from a trial Court is by way of a retrial. Briefly, put this Court must reconsider the evidence evaluate it, by itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses. In particular, the objective of the Civil Procedure Act under Section 1A is for the Court to purpose to facilitate the just, expeditious, proportionate, affordable resolution of disputes.

A major part of Section 79 (G) of the Act contains the provision that what is appealed against is the decree or order of a particular subordinate Court. The word decree is an ordinary words as defined under Section 2 of the Civil Procedure Act to mean:

> ***"The formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy. In the suit and may either preliminary or final, it includes the striking out of a plaint and the determination of any question within Section 34 and Section 91 of the Act. 'Provided that for the purposes of appeal, decree includes Judgment and a Judgment shall be appealable notwithstanding the fact that the formal decree in pursuance of such Judgment may not have been drawn up or may not be capable of being drawn up."***

The notion that an appeal filed without a decree is a nullity seems never to be the letter and spirit of the Civil Procedure Act and Rules 2010 nor it is true this Section does address the case of complying with an order of annexing a certified decree of the subordinate Court, but the language therein does not carry with it a draconian sanction of striking out the appeal.

In my view being guided by the provisions under Section 1 (A) and (B) of the Civil Procedure Act the dominant consideration is the interest of justice. It is therefore, for this Court to interpret and construe the words in a statute to determine whether the recourse to the rules demanded by the statute occasions prejudice or an injustice to the adverse party. This Court's sense of justice must be its guide, what makes this so compelling is the persuasive passage in **Hing v Hing {1978} 2 WIR 391** in which the Court stated;

> ***"But it must be in the interest of justice according to Law. This consideration includes not only the interests of the dissatisfied litigant who wishes to pursue a right of appeal, but those of the successful one in the satisfaction of the Judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation. We have to balance the two compelling interests; bearing in mind the sense of justice."***

In my view the principle stated under Section 79 (G) of the Act does not conflict with other provisions of the statute like Section 1 (A) and 1 (B) on oxygen Rule aforementioned above.

I do not think on my part that the absence of a decree must inevitably result in the dismissal of an appeal. That leaving matters as they are on the requirements of mandatoriness of the extract of a decree would apparently occasion a serious miscarriage of justice to warrant locking out a party being given an opportunity to ventilate before this Court his appeal on the merits is moot. In making these observation, I am in no way down playing the reasoning in cases of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kaumbo {2016} eKLR**. The approach taken by the Court is consistent with the ethos of the provisions under Section 79 (G) of the Act. I find inspiration in so far as Section 2 of the Act is concerned. That gives the appeal Court a wide discretionary power to entertain an appeal to avoid a miscarriage of justice notwithstanding the provision under Section 79 (G) of the same Act.

The Supreme Court in **Wilcox v Billings, 200 Kan 654 {1968}** held interalia that in determining whether a statutory provision is directory or mandatory expressed itself as follows:

> ***"words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word 'shall' is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. It is the duty of the Court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or a phrase under consideration the word 'shall' though primafacie gives impression of being mandatory character, it requires to be considered in the light of the intention of the legislation by carefully attending to the scope of the statute, its nature, and design and the consequences that would flow from the construction thereof one way or the other."***

The question to ask is whether the statutory requirement has been substantially fulfilled, if so has there been substantial compliance in the case in issue even though there has not been strict compliance.

Further, in the comparative jurisprudence in **Raza Buland Sugar Co. Ltd v The Municipal Board Air {1965} SC 895** a Constitutional Bench of the Supreme Court held:

> ***"that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and that it would depend upon the facts of each case. The court has to consider the purpose for which the provision had been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting therefrom within the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject as well as other considerations which may arise on the facts of a particular case, including the language of the provision."***

It is the view of the Court that Section 79 (G) of the Act read in conjunction with Section 2 of the same Act the use of the word shall while enacting the provisions on filing appeals is not conclusive on the question of absence of the decree rendering the appeal fatally defective. It follows therefore, that I disagree with the submissions by Learned counsel for the respondent.

It bears emphasis to state that the appeal partially succeeds in terms of a variation in the original award of damages from Kshs.650,000/= to a less quantum of Kshs.300,000/=. The respondent decretal sum to attract interest at Court rates from the date of Judgment of the trial Court. Costs of this appeal be equally shared between the appellant and the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Kariuki advocate for the appellant