REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.E012 OF 2021

BETWEEN

PLATINUM CREDIT LTD.....1ST APPELLANT

MICHAEL WESONGA OPERE.....2ND APPELLANT

AND

ERICK OLOO OKELLO.....RESPONDENT

(Being an Appeal from the judgment in Homa Bay Chief Magistrate's CMCC No. 62 of 2018

by Hon. Tom Mark Olando–Principal Magistrate).

JUDGMENT

1. Platinum Credit LTD and Michael Wesonga Opere, the appellants herein, were the defendants in Homa Bay Chief Magistrate's CMCC No. 63 of 2018. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCJ 976H owned by the appellants. The respondent sustained injuries. The learned trial magistrate delivered judgment dated 27th January, 2021. She made an award of Kshs. 600,000.00 in general damages before factoring liability.

2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:

a) That the learned trial magistrate erred in law and in fact in awarding kshs.600,000/- as general damages which amount was excessive, unjustified and contrary to the evidence on record.

b) That the learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.

c) That the trial magistrate erred in law and fact by failing to consider the appellants' evidence and submissions on record.

3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company Advocates. It was argued that the award was reasonable in the circumstances of this case.

4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The parties herein entered consent on liability on 29th July, 2020. The consent was recorded at the ratio of 80:20 in favour of the respondent. Parties having agreed on liability and recorded a consent on the same, the trial court had only one task; assessing the quantum of damages.

6. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

> **…an appellate court will not disturb an award of damages unless it is so inordinately 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 a figure which was either inordinately high or low.**

7. The respondent as a result of the complained of accident sustained the following injuries:

a) Dislocation of the right shoulder joint;

b) Dislocation of the left ankle joint;

c) Chest injury;

d) Blunt injury on the right pelvic bone; and

e) Blunt injury.

8. Due to these injuries, she was put on treatment as follows:

a) X-ray on the right shoulder;

b) X-ray on the left ankle joint;

c) I.V cetrimine 2gstal;

d) Cap Ampridox 500mg;

e) POP on the right leg

f) Daily dressing and cleaning of the wounds; and

g) Physiotherapy on the pelvic bone.

9. In the trial court, the appellant made a proposal of Kshs. 200, 000.00 while the respondent made a proposal of Kshs.1, 500,000.00. Each party cited decided cases to support their proposal.

10. The respondent relied on the case of **Zachary Kariithi v. Jason Otieno Ochola 2016 eKLR.** In this case an award of Kshs. 2,000,000.00 was given for the following injuries:

a) Chest pains;

b) Injuries to the waist,

c) Compound fracture of the right tibia/fibula;

d) Compound fracture of the left femur bone mid shaft;

e) Fracture of the right femur bone;

f) Fracture of 3rd, 4th & 5th ribs of the right side;

g) Injuries to the forehead;

h) Injuries to the hip joint; and

i) Injuries to the big left toe.

11. The appellants on their part relied on the decision in **Damaris Ombati v. Moses Mogoko Levis & another [2019]** and **Hassan Farid & Another vs. Sataiya Ene Mepukori & 6 others [2018] eKLR.** In the case of Damaris Ombati Kshs. 300,000.00 general damages was awarded for:

a) A cut wound on the forehead and cheek;

b) Dislocation on the left shoulder joint;

c) Tenderness on the anterior chest wall; and

d) Fracture on the left tibia.

12. In the case of Hassan Farid an award of Kshs.200,000.00 was given for the following injuries:

a) Fracture and dislocation of the right hand fingers; and

b) Soft tissue injuries.

13. In the above two cases the injuries sustained were less severe compared to what the respondent sustained. I have not therefore been persuaded to interfere with the trial court's award.

14. The appeal is therefore dismissed with costs.

DELIVERED and SIGNED at HOMA BAY this 31st day of March, 2022

KIARIE WAWERU KIARIE

JUDGE