REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 15 OF 2015

TAITA TAVETA MATATU COOPERATIVE SAVINGS…...APPELLANT

AND

ZAINA LOZUTU RUKOO…….……..…....…..RESPONDENT

(Being an appeal from the whole Judgment of Hon S.M. Wahome, Senior Principal Magistrate delivered on 8th April 2015)

IN

REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT VOI

CIVIL SUIT NO 61OF 2013

ZAINA LOZUTU RUKOO…….……....…….PLAINTIFF

VERSUS

TAITA TAVETA MATATU COOPERATIVE SAVINGS…….DEFENDANT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 8th April 2013, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 256,312/=. However, the said Learned Trial Magistrate's computation appeared to have been erroneous and increased by a sum of Kshs 97/=. The correct amount ought to have been Kshs 256,215/= made up as follows:-

a. General damages **Kshs 250,000/=**

b. Special damages **Kshs 6,215/=**

together with costs and interest thereon until payment in full.

2. The Learned Trial Magistrate found the Appellant to have been wholly liable for the accident that occurred on 5th April 2013 along Mombasa- Nairobi Highway as the Respondent herein was a passenger

and did not contribute to the causation of the accident. Notably, the Appellant did not call any witnesses after the Respondent closed her case during the Trial.

3. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 10th July 2015 on 16th July 2015. The grounds of appeal were as follows:-

> **a. THAT the Learned Magistrate erred in fact and law in awarding General damages that were inordinately high considering the nature of injuries that were suffered by the Plaintiff.**
>
> **b. THAT the Learned Magistrate erred in fact and law in failing to/ and not giving due regard to the defence evidence on record on injuries that were sustained by the Plaintiff.**
>
> **c. THAT the Learned Magistrate erred in fact and law in wholly disregarding or failing to accord due and proper consideration of the Defendant's Submissions on quantum and authorities attached thereto.**

4. The said Memorandum of Appeal was filed pursuant to leave granted in the Appellant's Notice of Motion application filed on 10th June 2015to file the same out of time. The Appellant's undated Record of Appeal was filed on 21st March 2016. It filed its Supplementary Record of Appeal dated 23rd June 2016 on even date. Its Written Submissions dated 4th July 2016 were filed on 6th July 2016. The Respondent's Written Submissions were dated and filed on 19th July 2016.

5. Notably, although the Appellant's Record of Appeal was undated, this court nonetheless determined this matter on its merits the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 mandate courts to administer justice without undue regard to technicalities.

6. When the parties appeared before the court on 25th July 2016, they requested that Judgment be delivered based on the said Written Submissions which they did not highlight but relied on the same in their entirety.

LEGAL ANALYSIS

7. Having looked at the Appellant's grounds of appeal and in particular to its Written Submissions, it was clear that the said grounds all related to the question of whether or not the Learned Trial Magistrate was justified in awarding the Respondent the aforesaid sum of Kshs 256,312/=.

8. The Appellant referred the court to the case of **Kemfro Africa Limited t/a Meru Express Service (1976) &Gathogo Kanini vs A.M. Lubia & Olive Lubia [1982-88] 1 KAR 727 AT P. 730**where it was held that an appellate court will interfere in an award if the amount awarded is so inordinately high or inordinately low so as to have been a wholly erroneous estimate of the damages awarded.

9. This is a position that the Respondent concurred with and referred the court to the case of **United Millers Limited vs Yano Omoro Oindo [2007] eKLR**in which the decision on **Kemfro Africa Limited t/a Meru Express Service (1976) &Gathogo Kanini vs A.M. Lubia & Olive Lubia** (Supra) that was relied upon by the Appellant herein was cited.

10. The Appellant was categorical that the damages awarded to the Respondent herein by the Learned Trial Magistrate were inordinately high and opined that an award of Kshs 60,000/= general damages was adequate to compensate her for the injuries that she sustained. It therefore urged this court to interfere in the said award and award the said sum it had proposed.

11. During the trial, the Appellant had relied on the case of **Silas Ayaya vs Bernard Muthaura HCCC No 54 of 1989 Mombasa** which the Learned Trial Magistrate termed as too old and also observed that in any event, the plaintiff therein had been awarded Kshs 150,000/= general damages for pain, suffering and loss of amenities in 1989.

12. Notably, the said case of **Silas Ayaya vs Bernard Muthaura** (Supra) was outdated and to be fair, it could not give a comparable figure of what the Learned Trial Magistrate could have awardedthe Respondent as general damages in 2015. The Appellant was obligated to have furnished the Trial Court with a case that was relatively close to the time this case was being adjudicated upon with a view to offering a good comparison as far as inflationary trends were concerned.

13. The Learned Trial Magistrate was therefore right in concluding that the said case was too old. In any event, the court therein had awarded the plaintiff therein a sum of Kshs 150,000/= for having sustained fractures of the lower jaw, loss of teeth and a cut wound under the chinin 1989. If the Learned Trial Magistrate was to have adopted the said case, bearing in mind the inflationary trends, any award for similar injuries would definitely have been higher than Kshs 150,000/=.

14. Going further, the Appellant's argument that the sum of Kshs 60,000/= was one (1%) of the sum of Kshs 3,000,000/= indicated in the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act could not hold water for the reason that in the case of**Law Society of Kenya v Attorney General & 3 others [2016] eKLR**, Onguto J who was hearing a Petition on the constitutionality of the amendment to the said Act declared Section 3 (a) Insurance (Motor Vehicle Third Party Risks)(Amendment) Act ,2013, proviso to subsection 1 of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act(Cap 405) and Section 6 of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act,2013 and Schedule it sought to introduced as unconstitutional, null and void.

15. As at the time of writing the judgment herein, this court was not aware of any Court of Appeal decision that hadoverturned the decision of the said Learned Judge. Although decisions of courts of equal and competent jurisdiction like that of the said Learned Judge are not binding on this court, this court nonetheless wholly concurred with his said decision for the reason that a court's discretion to award general damages under common law ought not and should not be fettered by Statute. Indeed, the discretion to award general damages is inherent in a court.It is for those reasons that this court associated itself with the decision of the said Learned Judge until of course the same is overturned by the Court of Appeal or Supreme Court whose decisions are binding on it.

16. It was the considered view of this court that it would make a mockery of justice if compensation of serious injuries such as those that were sustained by the Respondent herein were so inordinately low as to be wholly erroneous of the correct estimate of what would ordinarily be awardable as general damages by a court in any jurisdiction.

17. If a serious injury such as permanent loss of teeth can only be compensated by an award of Kshs 60,000/= under the said Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, how much then would a person who has sustained severe soft tissue injuries be awarded?

18. Turning to the issue of quantum, it must be understood that money can never really compensate a person who has sustained any sort of injury. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents.

19. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, where it was held that:-

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

20. This court perused the Medical Report dated 27th May 2013 that was prepared by Dr Hanif MZ and noted that the Respondent herein suffered loss of two (2) lower teeth, dental alveolar fracture upper teeth and soft tissue injury to the leg following the aforesaid accident. She was admitted at the Moi Hospital Voi for two (2) days and was put on conservative management. At the time of the medical examination,

she had difficulties in chewing and had a small scar on the left knee. The injuries in the P3 Form dated 10th May 2013 were indicated to have been "Grievious **(sic)** harm."

21. Unfortunately, both the Appellant and the Respondent did not furnish this court with comparable case law on quantum. Be that as it may, this court had due regard to the case of **Francis Ochieng & another v Alice Kajimba [2015] eKLR** where on appeal, Majanja J awarded a sum of Kshs 350,000/= general damages for loss and pain and loss of amenities where the plaintiff therein suffered head injuries and multiple soft tissue injuries with no fractures. There was also no evidence of broken teeth as the plaintiff therein had claimed.

22. Accordingly, having had due regard to the Written Submissions and the case law in support of their respective cases and comparable cases, this court was not persuaded by the Appellant's submissions a sum of Kshs 60,000/= was adequate to compensate the Respondent herein. It thus declined to accede to its prayer to interfere with the said Learned Trial Magistrate's award of general damages. On the other hand, it accepted the Respondent's submissions that the amount awarded by the Learned Trial Magistrate was not inordinately high as to warrant its interference with the said award as she had suffered permanent loss of her teeth.

23. Although this court noted that the Learned Trial Magistrate had erroneously increased his award by Kshs 97/=, this court did not find it necessary to interfere with the same as it was so negligible as not to cause any prejudice to the Appellant. In any event, the Appellant had not any issue about the said variance.

24. Turning to the provisions of Section 3(e) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act which the Appellant placed reliance, the aforesaid Learned Judge did not find Section 3(e) of Amendment Act and the subsections it sought to introduce to and indeed introduced to the Principal Act to have been unconstitutional null and void, a finding this court also associated itself with.

25. Indeed, it was correct as the Appellant argued that no judgment or claim would be payable by an insurer if a claimant had not availed himself or herself for a second medical examination as provided in. The said Section 3(e) of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act stipulates as follows:-

"No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified practitioner."

26. In this respect, the Respondent submitted that she was referred for a second medical re-examination at the request of the Appellant herein, a fact that was confirmed by its counsel on 23rd January 2013 when she sought an adjournment that was allowed to enable her obtain the Medical Report before the next hearing date. The Appellant did not proffer a plausible reason to explain why it wanted the Respondent go for another medical re-examination when the matter subsequently came up for hearing.

27. The proceedings were clear that the Respondent had actually been referred for a second medical examination at the Appellant's instance. The Appellant's arguments that the Respondent had not complied with the provisions of Section 3 (e) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act were thus incorrect and could not be sustained on this appeal.

DISPOSITION

28. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was lodged on 16th July 2015 was not merited and the same is hereby dismissed with costs to the Respondent.

29. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **September** 2016

J. KAMAU

JUDGE