REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 602 OF 2009

ROBERT NGATIA.....1ST APPELLANT

APPOLO MUSYOKA MUTISYA.....2ND APPELLANT

VERSUS

MARCO NDOME MADINA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Senior Principal Magistrate,

E. Maina on 9th October 2009 in Milimani Commercial Courts in Civil Suit No. 3182 of 2005)

J U D G M E N T

1. This appeal arises from the judgment and decree of Hon. Maina given at the Chief Magistrates Court Nairobi in CMCC No. 3182 of 2005 on 9th October 2009.

2. The appellant Robert Ngatia and Appollo Musyoka Mutisya had sued by the respondent Marko Ndome Madina for general and special damages, costs of the suit and interest following a road traffic accident which occurred on 13th may 2003 along Machakos, Kitui road involving motor vehicle registration No. KAP 359J wherein the respondent was travelling as a fare paying passenger, occasioning him serious bodily injuries.

3. On 27th July 2008, the parties appeared before Hon. V.W. Wandera Ag SPM and recorded a consent on liability entering judgment on liability and apportioning it at the ratio of 90:10 in favor of the plaintiff. The matter was then slated for mention on 28th August 2008 for recording of consent on quantum but the parties were unable to agree hence they set down the suit for hearing to assess damages on 27th July 2009.

4. The plaintiff testified and called the Doctor Cyprianus Okoth Okere who had examined him to produce a medical report. He testified on the extent of the injuries sustained by the respondent. The defense did not call any witness.

5. Judgment was delivered on 9th October 2009 awarding the respondent general damages of Shs. 750,000/- less 10% = 675,000/-. Special damages Shs. 187,800 less 10% = 169,020 witness expenses 3000/=

Costs

Interest

6. Dissatisfied with judgment and decree issued on 9th October 2009, the appellants lodged this appeal setting out 5 grounds of appeal on 4th November 2009. They contend that:-

1. The Honorable Magistrate erred in law and fact by awarding general damages in respect of pain and suffering which were excessive in the circumstances considering the evidence adduced by the plaintiff.

2. That the Hon Magistrate erred in law are fact in awarding excessive general damages in the circumstances and in total disregard of the established principles of law and practice.

3. The trial Magistrate erred in law and fact in disregarding the appellant's submissions on quantum and in applying the wrong principles of law, that is to say, by failing to consider the evidence before her.

4. That the Hon Magistrate erred in law and fact in awarding costs to the plaintiff despite the lack of any evidence that any notice of intention to sue the appellants was ever served.

5. They prayed for the setting aside of the award on general damages and or that the same be reviewed or valued; that the award made on costs be set aside; and that this court do make its own orders in respect of the evidence on record and award costs of the appeal to the appellants.

7. This appeal was admitted to hearing on 12th May 2014. Directions were given on 17th September 2014 under Order 42 rule 13 of the Civil Procedure Rules. The parties agreed to dispose of the appeal by way of written submissions.

8. The appellants filed their written submissions attaching authorities on 2nd October 2014, whereas the respondents filed theirs together with case law on 15th October 2014.

9. I have carefully considered the grounds of appeal, the record and of the lower court on quantum of damages and costs, the written submissions both in the lower court and appeal herein together with the authorities cited by both parties for and against the appeal.

10. There are mainly two issues for determination. The first one is whether the trial Magistrates erred in law and fact in awarding the respondent damages of shs.750,000/= for pain, suffering and loss of amenities; and or whether the said award was manifestly excessive and made in total disregard of the laid down legal principles.

11. The second issue for my determination is whether the learned trial magistrate erred in law and fact in awarding costs of the suit in the absence of evidence that notice of intention to sue the appellants was issued by the respondent prior to filling of suit for damages.

12. The commencement point is whether this court should interfere with the award of damages by the trial court and if so, what quantum of damages should be awarded to the respondent for the injuries sustained by him.

13. The Court of Appeal has propounded on principles to be applied while considering whether to interfere with damages awarded by the trial court. In the case of **Kemfro Africa Ltd t/a Meru Express Service & Gathogo Kanini – Vs - A.M.M Lubia $ Another[1982-88]1KAR 777 at page 730, Kneller JA** held that**:**

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the

damages took into account irrelevant factor or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages"

14. The above principle was also cited and upheld in the cases of **Arrow Car Ltd – Vs - Bimomo & 2 Others (2004) 2 KLR 101(CA); Ilango – Vs – Manyoka [1961] EA 705, Lukenya Ranching And Farming Cooperative Society Ltd Vs Kavoloto [1970] EA 414** and applied verbatim in the case of **Denshire Muteti Wambua – Vs - Kenya Power & Lighting Co Ltd CA 60 of 2004**; **GBM Kariuki, P Kiage & K. Murgor JJA** on the 21st June 2013.

15. In deciding the above issue, this court is alive to the provisions of Sections 78 of the Civil Procedure Act which imposes on this court a duty as a first appellate court, to

"...determine the case finally; remand a case; frame issues and refer them for trial; take additional evidence or to require evidence to be taken; order for a new trial; and is so doing, the court has the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Act on the court of original jurisdiction."

In other words, this count is under a duty to examine and re-evaluate the evidence as adduced in the trial court and make its own conclusions; but in doing so, pay regard to the fact that it neither heard nor saw the witnesses as they testified hence, give an allowance to that effect. (See the case of **Selle – Vs - Associated Motor Boat Co. Ltd [1968] EA 123**.

16. The respondent's injuries in the plaint before the subordinate court were pleaded at paragraph 8 as follows:-

a. Compound fracture of the right humerous with a degloving injury in the right arm;

b. Fracture of the radius

c. Fracture of the right ulna

d. Profuse haemorrhage

e. Lacerated scars on the right arm and elbow and that he experienced recurrent pains in the arm, weakness of the right hand and as a result he lost his job.

17. The medical treatment notes (case summaries from Machakos General Hospital dated 13th May 2003 show fracture of right radius grade III; guistilly Anderson open fracture, and heavy haemorhage. He was operated on for internal fixation and treatment for soft tissue injuries before being transferred on request to Kenyatta National hospital.

18. The case summary from Kenyatta national Hospital showed that the respondent was admitted in hospital on 15th May 2003 and discharged on 20th June 2003, one month and 5 days diagnosed with compound fracture of

- Left humerus
- Radius
- Ulna
- Degloving injury on left arm and forearm

He continued with follow up clinic on discharge, and on 19th March 2004, the implants inserted in the

humerus were removed at the St Mary's Mission Hospital, Nairobi.

19. On 10/8/2004 the respondent was examined by Dr Cyprinus Okoth Okere whose medical report show the following injuries:

i. Compound fracture of the right humerus with a degloving injury to the arm.

ii. Fracture of the right radius and ulna

iii. Profuse haemorrhage

On examination the respondent had:

a. Stiffness in the right elbow

b. Recurrent pains in the right arm

c. Weakness of the right hand

The right arm and forearm had lacerated scars laterally measuring 23cm x 12 cm

- Lacerated scar on the elbow measuring 12cm x 6 cm
- An operational scar on the arm posteriorly.
- Elbow joint fixed on flexion at about 100^0 and he is unable to pronate and supinate the forearm. He was unable to fully clench the fingers.

The doctor concluded that the respondent's degree of permanent incapacity was about30%.

20. The respondent testified that after the ill-fated accident, he saw his right hand hanging down. The elbow and upper arm were crushed. He sustained compound fractures and still had scars. He could not stretch his hand and he could not lift anything with the hand. He was a science teacher and after the accident he could not hold a chalk and had to retire because of the accident and he cannot get a teaching job due to the disability.

21. The trial magistrate in her judgment outlined the injuries as a set out in the medical report by Dr. Cyprianus Okoth Okere and the testimony by the respondent. It should be noted that these is no discrepancy noted between the injuries as pleaded, those contained in the treatment notes produced and medical report as assessed by Dr. Okere.

22.Counsel for the appellant had proposed an award of Shs. 150,000/= being adequate compensation, relying on the case of **Christian Ombeta –Vs - Kenya Bus service Ltd HCC 529 of 1990** - **Mwera J** on 18th February 1993 awarded the plaintiff Sh.100, 000 damages for pain, suffering and loss of amenities for injuries involving:

- Fractures of the right radius and ulna which had healed well

- Both flexion and extension on the elbow joint were normal

- Full supination in the right fore arm was still restricted by 30% but with more physiotherapy the plaintiff could have full supination of the arm. Permanent impairment was put at 5%.

- He had been in plaster for 6 months without working.

23. The respondent's counsel submitted a figure of Sh.750, 000 citing **Machakos HCC 579/1994 Dickson Muia Nzioka – Vs - Eastern Bus Service & Others** where the plaintiff sustained injuries involving:

- ❍ fracture of the left radius
- ❍ Fracture of ulna
- ❍ Posterior nerve palsy
- ❍ Lost his job

He was awarded Shs. 455,000 general damages for pain, suffering and loss of amenities on 3rd March 2002 by **Nambuye J** (as she then was). He also cited **NRB HCC 3214 of 1993 Mary Mwihaki Mutie – Vs - Joseph Katunge Muswili** where the plaintiff sustained:

- Fractures of the left ulna.
- Fracture of the left femur which had K-nail inserted; and.
- Injuries on the fore arm

She underwent 3 surgeries and developed large discharging sinuses after a deep infection. Her permanent incapacity was assessed at 15%. She could not continue with her employment with Central Bank of Kenya. She was awarded Sh.500,000/=general damages for pain and suffering on 3rd March 2002.

24. The trial magistrate in awarding Shs. 750,000/= proposed by the respondent's counsel observed that the injuries sustained by the respondent were serious leading to his being operated on five times. Further, that the proposal was reasonable and fair and adequate compared to the appellant's advocates proposed at sh 150,000/= which she found to be unreasonably low for the injuries sustained.

25. What then would be the basis for this court to interfere with that award by the trial magistrate?

Counsel for the appellant has submitted that,

> ***"Although the injuries were multiple fractures, the same had healed with only about 30% permanent incapacity and the Honorable magistrate should have considered that fact in making its (sic) decision."***

He further submitted that,

> ***"The learned magistrate was wrong in its (sic) estimation since it made unreasoned judgment and arrived at an inordinately excessive figure,"***

26. They have urged this court to review that award and substitute it with Sh. 300,000/=

27. In this court's view the above submission by the appellant's counsel in support of ground 1 of the memorandum of appeal lacks any basis. The respondent gave his testimony in court on oath, stating how he saw his hand hanging after the accident. He was operated on 5 times with his flesh rotting. He sustained multiple fractures as confirmed by medical notes from different hospitals and as confirmed by Dr. Okere who testified for the plaintiff and produced a medical report, giving the prognosis of permanent incapacity of 30%. The evidence as adduced for and on behalf of the respondent was uncontroverted. In my view, therefore, the trial court having analyzed the testimony, the respondent's documentary evidence and that of the doctor, and having compared and referred to the submissions by both counsels and the cited authorities by comparing the injuries suffered in the cited authorities did not err in making an award that she did. The learned trial magistrate in my view, took into account all the evidence adduced which clearly showed that the injuries sustained by the respondent were, in this courts view as well, severe and more extensive, compared to those suffered in the authorities cited by the appellant.

28. This court does not find any irrelevant factor or omission by the learned trial magistrate in assessing or estimating the damages as awarded to come to the conclusion that the award was wholly erroneous. I have no hesitation therefore in stating that there is no sound basis in this appeal for interfering with the award of general damages awarded to the respondent.

29. Further, it is clear that the trial magistrate did appreciate that in assessment of damages for personal

injuries the general method of approach is that *"Comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases,"* as was held in the case of **Arrow Car Ltd – Vs – Bimomo & 2 others [2004] 2 KLR 101**. The trial magistrate had thus this to say in her judgment,

> ***"The plaintiff's injuries resulted in weakness of his right hand which does not stretch anymore. They were serious injuries which led to his being operated on 5 times. I consider an award of Sh.750,000/- proposed by his advocate more reasonable and fair. it is also adequate. The sum of Sh. 150,000/- is unreasonably low for the injuries sustained."***

30. The above finding followed an analysis of evidence before her and at paragraph I lines 1-6 of the page 12 of the judgment, she demonstrates that she had before her sufficient material including submissions by both advocates, on which to assess damages.

31. The advocate for the appellant, in my view, has tended to trivialize the injuries sustained by the respondent and in reclassifying the said injuries, he no doubt attempts to adduce evidence from the bar on behalf of his client. He states as follows at page 3 of his submissions on appeal:

> ***"Even though the injuries were multiple fractures, the same had healed with only about 30% permanent incapacity and the honorable magistrate should have considered that fact in making its decision."*** Which submission is not supported by any prognosis.

32. From the evidence a record and more particularly the respondent's own testimony and the doctor's medical report and testimony, which was watertight and unshaken in cross-examination at page 4, 5, 6 & 7 of the proceedings of the lower court, it is clear that the respondent suffered severe injuries and what the advocate for the appellant calls healing with only 30% permanent incapacity is an under estimation. The doctor confirmed the stiffness in the right elbow, pains in the injured areas, weakness of the right hand, lacerated scars ,surgical scars with the elbow joint fixed on flexion at about 100?, inability to prolate and sipulate the forearm and he could not fully clench the fingers, which condition as assessed cannot change, (see page 5 of proceedings evidence by the doctor). The respondent also suffered profuse hemorrhage and was hospitalized for nearly 1½ months beside the 5 operations to correct the degloving injury to the right arm.

33. Those are not injuries that can be trivialized. In as much as the respondent's advocate, regrettably, did not plead loss of future earnings and earning capacity and therefore no such damages could be awarded as parties are bound by their pleadings.

34. Neither was it submitted under the omnibus prayer of any other relief. It is further observed that the consent on liability apportioned liability between the respondent and applicant at 90:10 yet the respondent was a passenger in the ill-fated motor vehicle KAP 359J and when no cross suit was brought against him and neither did the appellants plead contributory negligence on the part of the respondent.

35. The appellants pleaded contributory negligence against a third party Michael M. Kimeu who had no relation with the respondent, yet the respondent had to shoulder the 10% liability which was uncalled for. However as the matter was resolved by consent, I say no more.

36. It is the trite law that the award of damages is the discretion of the trial court and as it is not shown from the record that the discretion was not exercised judicially, this court hesitates to interfere.

37. From the trial magistrate's analysis although she did not specify which authority she relied on in awarding Shs. 750,000/=, it is clear that she considered the submissions before her on quantum which, in this court's view, could have played out to the disadvantage of the respondent in any event. However, as there is no cross appeal and since the respondent was given what they asked of the court, I leave it at that.

38. This court is further satisfied that the trial magistrate in making that award had seen that the same was in consonance with decided cases as cited by the respondent, having regard to the nature, severity and

extent of the injuries suffered by the respondent which, as admitted by counsel for the appellant in his submissions, were multiple, and therefore the reason for his seeking a revision by double what he had submitted in the lower court.

39. The authorities that were cited by both advocates were not current or recent. Accordingly, having regard to the cited authorities and the multiple injuries sustained by the appellant, it is this court's view that there is no basis for interfering with the discretion by the trial magistrate. I find the judgment well reasoned. She considered comparable awards, submissions and made an award that was commensurate with the injuries sustained by the respondent. I hasten to add that all the authorities cited on the appeal herein by the appellant had no corresponding injuries to those sustained by the respondent. They relate to injuries on the hip, patela, fibula and foot, contrary to what the respondent suffered as I have elaborated in this judgment.

40. Accordingly, all the grounds of appeal challenging the award of Shs. 750,000/= general damages for pain, suffering and loss of amenities to the respondent fail and the findings of the trial magistrate are upheld.

41. As there was no quarrel with the special damages awarded, I do not interfere either. I however observe that special damages are usually the actual expenditure incurred and the practice of the courts has been that no contribution should be attributed to special damages.

42. Nonetheless, as there was no cross appeal on the award on contribution, I leave it undisturbed.

43. The other issue for determination is whether the trial magistrate erred in law in awarding costs of the suit to the respondent in the absence of evidence that notice to institute suit was served on the appellant.

44. I have carefully perused the pleadings ,evidence and submissions by both parties in the court below and this appeal. Paragraph 11 of the plaint pleaded that:

> ***"Despite demand and notice of intention to sue having been given, the defendants have failed, and refused and or neglected to co-operate with the plaintiff."***

45. In their defence, the defendants contended that they

> ***"deny having been served with any demand or notice of intention to sue as alleged in paragraph 7 of the plaint and puts the plaintiff to strict proof thereof and therefore contend that the plaintiff is not entitled to any costs in this suit."***

46. During the hearing, for assessment of damages, the respondent never produced any demand notice issued to the defendants and neither was he cross examined on the same by the defense counsel.

47. In their submissions, the appellants' advocate did not urge the court to deny the respondent costs of the suit.

48. It is worth noting that in this matter, judgment on liability was entered by consent and therefore no evidence was led to prove the liability of the appellate in negligence as pleaded.

49. In his submissions on the appeal, counsel for the appellant did not advance any arguments in favor of that ground. Instead, he simply urged in his concluding prayers (b) that, *"the award made by the Honorable Court on costs be set aside."* This was after he plainly set it out in paragraph 1.8 the same way it is set out in ground 4 of the memorandum of appeal.

50. The law is clear that costs are in the discretion of the court, and follow the event.

51. Section 27 of the Civil Procedure Act provides that,

27(1) subject to such conditions and limitations, as may be prescribed, and to the provisions of any law for the time being in force, <u>the costs of and incidental to all suits shall be in the discretions of the court or judge,</u> and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: <u>provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge</u> shall for good reason otherwise order." (Emphasis added)

It should be noted that the power to grant or deny costs as espoused in Section 27 of the Civil Procedure Act is a discretionary power, which, nonetheless, must be exercised judiciously.

52. In **<u>Catherine Ngore Obare – Vs – Stephen Mulatya Kula & 2 Others [2104] eKLR HCCA 63 of 2010 Nakuru</u>** per **Emukule J**, it was held that:

"The basis of denial of costs for failure to give notice to sue is founded upon the principle that where the claim is for liquidated damages, it is considered that had the defendant been notified of the debt due, he would have paid, and the necessity of suit would have been avoided. The principle also applies where though suit has been filed, the defendant pays the claim well before the hearing of the suit. The general rule and principle of law however, is that costs follow the event, unless there is reason for denial of costs."

53. In that case, the appellant who was the plaintiff had been denied costs by the lower court for reasons that there had been no notice of intention to sue. On appeal, the learned judge found that it was erroneous for the trial court to deny the appellant costs in a suit which was contested, and that having found the respondents liable there was no reason to deny the appellant costs.

54. The learned judge went further to explain that, that is the reason why Order 4 rule 6 provides inter alia that

"it shall not be necessary to ask for costs, interests or general or other relief which may always be given as the court deems just, whether or not it should have been asked for or granted when the suit was filed", which rule equally applies to a defense or counter claim.

55. The above decision, though persuasive is good law and I adopt it.

56. In this case, the respondent sued for both general and special damages, costs of the suit and interest, and any other relief the court may deem fit to grant. The special damages claimed could only be awarded if the respondent proved the liability of the appellants in negligence and therefore, an entitlement to general damages. Special damages thus flow from the claim for general damages. The suit was contested and there was no admission of liability before the suit was set down for hearing.

57. Furthermore, the appellants put in the respondent to strict proof of both general and special damages after recording a consent apportioning liability. It cannot be said that in the circumstances of the case, the necessity of the suit could have been avoided.

58. Accordingly, I find that the ground of appeal on the award of costs fails and I dismiss it and uphold the order of the trial magistrate.

59. In summary this appeal having failed on all grounds of the damages and costs, I dismiss it entirely and uphold the decision of the learned trial magistrate awarding the respondent Sh. 750,000/= general damages less 10% contribution, special damages of Sh.187,000/= less 10% contribution as awarded. Costs in this appeal and in the lower court.

60. Interest on general damages apply from the date of judgment in the lower court whereas interest on special damages run from the date of filing suit in the lower court.

61. Those shall be the orders accordingly.

Dated, signed and delivered at Nairobi 18th of December 2014

R.E ABURIRI

JUDGE

18/12/2014