REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MACHAKOS

CIVIL APPEAL 59 OF 2009

JOSEPH NJOROGE KARIUKI……..……APPELLANT

VERSUS

DENNIS KIATU MALOMBE……..…….RESPONDENT

(*Being an Appeal from the Judgment in Machakos Chief Magistrate's Court CMCC NO. 221 of 2008 by Hon J. Munguti on 7.4.2009)*

JUDGEMENT

1. This is an Appeal from the judgment of the Honorable Senior Resident Magistrate **Hon. Munguti** (as he then was) in Machakos CMCC No. 221 of 2008 in which the original plaintiff in the case (the "Respondent" herein) was awarded damages amounting to **Kshs. 243,000/=** as against the original defendant in that action ("Appellant" herein).

2. The original suit arose out of a road traffic accident which occurred on **01/02/2008.** The Respondent was travelling in Motor Vehicle Registration No. **KAU 196P** along **Machakos-Kitui Road.** The Motor Vehicle was driven by the Appellant or his agent or employee. The parties had agreed on attribution of liability by consent whereby the Appellant agreed to shoulder **90%** of the liability. The matter went before the magistrate for determination of quantum of damages only. After considering all the authorities cited before him, the Learned Magistrate fixed the quantum of damages of **Kshs. 270,000/=. 90%** of that is **Kshs. 243,000/=** which is the amount ultimately awarded to the Respondent.

3.Dissatisfied with the decision of the trial Court, the Appellant has preferred the present appeal citing two grounds:

a. **THAT** the Honorable Learned Magistrate erred in law and in fact in awarding damages to the Respondent amounting to Kshs. 243,000/=.

b. **THAT** the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent with due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

4. The two grounds are really one: the Appellant is aggrieved that, in his view, the quantum of damages awarded to the Respondent is so inordinately high as to be a wholly inaccurate estimate of what is due to the Respondent. I have put it this way so that we can easily test the Appellant's language against the applicable legal principles. The principles upon which an Appellate Court will interfere with quantum are well settled in Kenya. The leading authority is *Butt v Khan* (1977) KAR 1 where Law JA held:

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 at a figure which as either inordinately high or low.

5. Can we say, in the circumstances of this case, that the assessment of damages is so inordinately high as to violates the famous principle set out in *West (H) & Sons v Shepherd* (1964) AC 326, 345 that "it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards"?

6. To determine that, it is imperative that we consider the injuries suffered by the Respondent. The medical reports of **Dr. Ndambuki** and **Dr. Wairioko** are nearly identical. They both establish that the Respondent suffered the following injuries:

a. Blunt injury to the neck;

b. Blunt injury to the chest;

c. Blunt injury to the back;

d. Blunt injury to the right knee.

7. Both doctors confirm that there was never any fracture and no permanent or long term disabilities or injuries. **Dr. Ndambuki,** however, concludes that the Respondent is "prone to post-traumatic oseo-arthritis of the right knee joint." However, **Dr. Warioko** found no reason for such extrapolation.

8. In the face of these injuries, in the Court below, the Respondent suggested an award of **Kshs. 450,000/=** as a reasonable one. Relying primarily on the case of *Sarina Suleiman Omar v Comboni Missionaries & Another* (HCCC No. 105 of 1996 at Mombasa), the Learned Magistrate awarded the sum of **Kshs. 270,000/=** as general damages for the injuries. He then reduced it by **10%** to come up with the figure of **Kshs. 243,000/=.**

9. Both in the Court below and here, the Appellant had sought to rely primarily on two cases: *Miriam Abdsheik v Charles Kennedy Wanja & Another* (Mombasa HCCC No. 381 of 1989) which awarded a sum of **Kshs. 40,000/=** for soft tissue injuries and *Justus Muema Malinga & Another v Wilson Kadzoyo Karisa* (Nairobi HCCC No. 2760 of 1987) where a sum of **Kshs. 35,000/=** was awarded.

10. It is easy enough to conclude that the authorities suggested by the Appellant are inapplicable by virtue of being dated. Filed in **1989** and **1987** respectively, one can be forgiven for thinking that the Appellant's counsel performed his research in a legal museum rather than a legal library. The *Sarina Suleiman Omar Case* relied on by the Respondent and the Learned Magistrate was decided in **1996**, about a decade and a half ago. The injuries suffered by the Plaintiff in that case are also soft tissue injuries which healed without any permanent damage. Yet, damages in the amount of **Kshs. 250,000/=** were awarded in that case. We note, however, that, here there was a head injury involved which led to a concussion and loss of consciousness. There was no concussion in the present case. It is also appropriate to ask if the award in *Sarina Suleiman Omar Case* is an outlier. If it is, it follows that it is not appropriate to try to grant an award that is comparable to it.

11. In the case of *Arrow Car Ltd V. Elijah Shamalla Bimomo and others*, Civil Appeal No. 344 of 2001 (unreported), the Court had this to say:

What about the injuries sustained by the respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1st and 3rd respondents herein suffered what the doctors described as soft tissue injuries the award of **Kshs. 350,000/=** for such injuries as made by the superior court are in our view high as to warrant our interference. We must now consider what we think ought to have been awarded in respect of each respondent. Taking into account other decided cases on soft tissue injuries, we think that the 1st respondent's injuries should have attracted an award of **Kshs. 150,000/=** as general damages. We therefore, award him that sum.

12. As aforesaid, the cardinal principle in awarding damages is that comparable injuries should, as far as possible, be awarded comparable damages. Hence, while I cannot say that the Learned Magistrate took into account a wrong factor or failed to take into account a relevant factor in coming to his decision on quantum, it would appear from a survey of other cases involving soft tissue injuries, an award of **Kshs. 270,000/=** is manifestly excessive in the circumstances of this case. This is especially given the fact that there was no head injury, no lasting injury and no permanent disability to any percentage. In the circumstances, I would reduce the award to one of **Kshs. 150,000/=.** Since the parties had agreed on a **90%:10%** apportionment of damages, the amount recoverable by the Respondent will then be **Kshs. 135,000/=.** This will be the orders of the Court.

DATED at **MACHAKOS** this **13TH** day of **MARCH 2012**.

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J.M. NGUGI
JUDGE

DELIVERED at **MACHAKOS** this **19TH** day of **MARCH 2012**

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ASIKE-MAKHANDIA
JUDGE