REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL 170 OF 2009

ZAKAYO MAINGI...APPELLANT

VERSUS

HELLEN MUKII KILONZI...RESPONDENT

J U D G M E N T

The respondent/plaintiff in the subordinate court, filed a plaint dated 4th October 2007. It was alleged in the said plaint that she was injured on 4th March 2007 while lawfully travelling in a motor vehicle registration KAH 527Z along the Nairobi-Mombasa road. It was alleged that the vehicle was registered in the name of the appellant/defendant in the subordinate court, and either being driven by the appellant or his driver. In the plaint the respondent sought the following reliefs:-

(a) Special damages in the sum of Kshs.2,100/=.

(b) General Damages for pain, suffering and loss of amenities.

(c) Cost of this suit.

(d) Interest on (a) (b) above at court rates.

The appellant filed a defence. In general he denied liability and sought strict proof on the allegations of negligence.

On 18th June 2009 however, a consent judgment was recorded in the following terms:-

1. "By consent, judgment on liability to be entered against the defendant at 80% plaintiff to bear 20% contribution.

2. Medical reports by Dr Kimuyu and Dr R.P Shah be admitted on record by consent P3 form, police abstract, treatment notes and receipts on specials be admitted by consent. Submission on quantum to be filed."

After submissions were filed as agreed in the consent, the learned magistrate delivered a judgment on quantum stating as follows:-

"After considering this (sic) the consent on liability, the final judgment shall be:-

General damages Kshs.180,000/=

Special damages	**Kshs.**	**50/=**
Total	**Kshs.180,050/=**	
Less 20%	**Kshs. 36,010/=**	
Net award	**Kshs.144,040/=**	
	plus costs.	

And interest, at court rates."

Being aggrieved by the above award on damages, the appellant has appealed to this court on a single ground which states:-

"THAT the learned magistrate's award of Kshs.180,000/= to the plaintiff by way of general damages for pain and suffering and loss of amenities is so excessive in the circumstances as to amount to an erroneous estimate of the damages suffered by her."

Parties filed written submissions to the appeal, which I have perused. Ms. Kimani for the appellant and Mr Ngolya who appeared for the respondent, relied on submissions filed.

This being a first appeal, I am duty bound to re-evaluate the evidence, assess it and come to my own conclusions bearing in mind that I have not been able to see or hear the witnesses testify and giving due allowance for this fact – *See* **Selle –vs- Associated Boat Co. Ltd. (1968) EA 123 at page 126.**

In the subordinate court, no witness on either side testified. Instead, the parties relied on the submissions filed by the advocates. In the judgment, the learned magistrate stated with regard to quantum as follows:-

"On quantum, the plaintiff relies on medical reports by Dr Kimanza and Dr. R.P. Shah dated 18/5/2007 and 8/5/2009 respectively from both medical reports, the plaintiff's injuries were soft tissue in nature and involve a blunt injury to the right hip with deep muscle injury and swelling and another blunt injury to the lower abdomen. The plaintiff complained of pains in the injured muscles and an haematoma caused by a bruise was found to be exciding (sic) fluid from time to time. The haematoma was organized into a hard dark mass which is of cosmetic significance to a young girl."

On appeal, counsel for the appellant, Ms Lilian Njuguna, has argued that the learned magistrate should have relied on the notes from Machakos General Hospital where the respondent was first treated. Counsel contended that, the only injuries mentioned therein were soft tissue injuries on the right iliac region/hip. There was no mention of the injury to the lower abdomen.

That reasoning of the appellant, with due respect, cannot be sustained. There are two reasons for that. Firstly, all the medical reports/notes were admitted by consent of the parties without any reservation. Therefore, the trial court could consider them in their totality. Secondly, it is known that the first observations of injuries and effects of injuries from an accident victim can be misleading. After some time, the real consequences and impact of the injuries suffered as from an accident on the victim will show. The scar or spot on the abdomen was, from the medical reports an after effect of the impact of the injury on the victim. In my view, therefore, the learned magistrate was correct in coming to the conclusion that the effect of the injuries suffered in the accident affected the lower abdomen of the respondent.

What about quantum? I fully agree with the reasoning of the Court of Appeal in **Stanley Maore –vs- Geoffrey Mwenda (2004) e KLR** cited by the appellant's counsel in which the Court stated:-

"Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in

mind the correct level of awards in similar cases."

I also agree with what was stated by Kneller JA in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini –vs- A M Lubia and Olive Lubia (1982-1988) 1 KAR 727** that an appellate court should disturb the quantum of damages awarded by a trial court, only when it is satisfied that either the court in assessing damages took into account an 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 the damages.

The appellant's counsel's view is that the magistrate arrived at an inordinately high award because he accepted and found more serious injuries than those noted in the first report at Machakos District Hospital. Having found that the learned magistrate's findings on the injuries were correct, I also find that the general damages awarded were consonant with those injuries suffered. The amount of award is not so inordinately high as to attract its being disturbed.

In the result therefore, I find that the appeal has no merits. I dismiss the same, with costs to the respondent.

Dated and delivered this **24th** day of **July** 2012.

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George Dulu

Judge
In the presence of:
Court clerk – Nyalo
Counsel for Appellant – N/A

Counsel for Respondent – Mr S.A Makau holding brief for Mr Ngolya