



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 44 of 2009

JOSEPH NJOROGI KARIUKI.....APPELLANT

VERSUS

FELIX NDOLO MBALUKA.....RESPONDENT

(Being an appeal from the original judgment in Machakos SPMCC No. 438/2008 by Hon. Munguti, SRM on 26/3/2009)

JUDGMENT

This appeal is limited to quantum of damages awarded by the learned magistrate to the respondent in a running down suit filed in the Chief Magistrate's Court at Machakos. The respondent claimed to have been involved in a road traffic accident whilst travelling as a lawful passenger in motor vehicle registration number KAU 196P owned or driven by the appellant on 1st February, 2008 along Machakos – Kitui road at Katangi area. As a result of the accident, he sustained the following injuries;-

§ Concussion of the brain

§ Tenderness and swelling above the left eye

§ Blunt injury to the back upper region with tenderness

§ Blunt injury to the right shoulder with limited range of movement.

§ Blunt injury to the back and,

§ Blunt injury to the neck.

The respondent attributed the accident wholly to the negligent driving, control and management of the motor vehicle by the appellant, his driver and or agent. He claimed that as a result of such negligence, the driver lost control of the vehicle causing it to Veer off the road and overturn.

As expected the appellant denied each and singular the allegations by the respondent. In the alternative, he claimed that if indeed such an accident occurred, the same was not and could not have been caused by any actions attributed to the appellant nor any person acting under or on his behalf. The accident was therefore inevitable.

Eventually, the hearing commenced before **Hon. Munguti, R.M.** As the hearing progressed, parties were able to record consent on liability on 20th February, 2009. The consent apportioned liability at 90% in

favour of the respondent. Thereafter, the learned magistrate was left with the simple task of assessing the quantum of damages payable to the respondent by the appellant for pain, suffering and loss of amenities. Having regard to the medical reports tendered in evidence by both **Dr. Ndambuki** for the respondent and **Dr. Ndiba** for the appellant and further considering the written submissions and cited authorities on record, the learned magistrate settled for Kshs. 180,000/= as adequate recompense for the injuries sustained by the respondent.

That award triggered this appeal which as I have already stated is limited to quantum. The appellant takes the position that the award was excessive considering the fact that the injuries sustained by the respondent were not of a serious nature and having regard to comparable awards by court at the time. In his view an award of Kshs. 80,000/= would have represented a fair assessment had the trial court applied right principles in assessing damages.

On the part of the respondent, he takes the view that he sustained serious injuries which were extensive. That in the premises the award of Kshs. 180,000/= was in order and that infact it was even insufficient.

What is my take on these contrasting positions of the appellant and respondent? In the case of **Kimotho & Others vs Vesters and Another, C.A. No. 4 of 1984**, the Court o Appeal 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 in arriving at the award, the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect. The consideration that should bear heavily upon the courts in making awards in these types of cases or in any other similar ones is that the awards must be seen not only to be within the limits set by the decided cases but also to be within what Kenyans can afford...”

Further it must be appreciated that assessment of damages is an exercise in discretion by the trial court, which the appellate court ought to be slow to upset. Again it is also important to note that in awarding damages in these kind of cases, the courts must strive to maintain a degree of uniformity or balance by paying regard to recent awards in comparable case. These are the injunctions that will guide me in determining this appeal.

According to the medical report by **Dr. Ndambuki**, the respondent’s doctor, the respondent sustained injuries already set out elsewhere in this judgment. His conclusion was however, that the respondent sustained severe multiple soft tissue injuries with joint involvement. He would be prone to develop post traumatic osteoarthritis of the involved joint and will therefore require analgesic and physiotherapy for a long term. On the other hand **Dr. Ndiba**, a doctor called in by the appellant summarized the respondent’s injuries as non penetrative blunt injury to the head, neck, back and right shoulder. He described the injuries as minor and superficial. Indeed they had healed fully by the time of his examination. For these injuries the respondent in his submissions in the trial court suggested an award of Kshs. 450,000/= whereas the appellant counter offered Kshs. 50,000/=. They all based their offers on authorities which they cited before the trial court. Having taken into account the incidence of inflation and the period of time that had elapsed since the authorities were decided, the learned magistrate felt that an award of Kshs. 180,000/= was appropriate. I do not discern any error in the approach adopted by the learned magistrate in assessing the damages as aforesaid. The learned magistrate did not take in account irrelevant matters and or left out relevant matters in arriving at his decision. Nor is the award inordinately high as to amount to a wholly erroneous estimate. The judgment took into account all the relevant issues and he was guided by the relevant authorities tendered before him in arriving at his assessment.

The appellant has claimed that the trial court took into account the fact that the respondent had sustained concussion of the brain, when none of the medical reports pointed to such an injury. Accordingly, the learned magistrate took into account an irrelevant consideration, hence the excessive award. I do not think that the accusation is valid. Nowhere in the judgment has the learned magistrate reverted the issue of brain concussion as part of injuries sustained in the accident by the respondent. In the judgment, the learned magistrate relied on the medical reports by **Dr. Ndambuki**, **Dr. Ndiba** and the P3 form. All these

documents do not show that the respondent sustained brain concussion as a result of the accident. It is therefore not right to accuse the learned magistrate of having been swayed by an injury that did not exist.

The upshot of the foregoing is that the award was not excessive as claimed by the appellant. It was within the limits of the awards for those kind of injuries at the time. The appeal is therefore unmeritorious and is accordingly dismissed with costs to the respondent.

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of NOVEMBER, 2012.

**GEORGE DULU
JUDGE**