



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 142 OF 2007

FRED MOHINGA
KIPKIGIYA.....APPELLANT

=VERSUS=

DAVID AGREEY
ZIMBIRU.....RESPONDENT

JUDGMENT

This is an appeal by **Fred Mohinga Kipkigiya**, the defendant in the original action from the judgment and decree of the Senior Resident Magistrate (**Grace Mmasi**) at Eldoret in CMCC No. 338 of 2006. (**David Aggrey Zimbiru** (suing as next kin and father to **Silver Mideza**) =vrs= **Fred Mahinga Kipkigiya**. In that action, the parties agreed on liability as between the respondent and the appellant at 80% and 20% respectively. After hearing evidence, the learned Senior Resident Magistrate made the following award:-

- (a) Special damages - Kshs 2,000/=
 - (b) General damages - Kshs 800,000/=
- (pain and suffering)**

The appellant was not satisfied and has appealed to this court on three grounds expressed as follows:- That

- 1). the learned trial magistrate erred in law and in fact by awarding a manifestly excessive amount of General Damages of Kshs 800,000/= and by having disregard of the medical reports produced and the injuries suffered by the respondent.
- 2). the learned trial magistrate took into account wrong principles in awarding the respondent the sums.
- 3). the learned trial magistrate failed to take into account and/or took into account matters she ought not to have taken into account and arrived at an entirely erroneous estimate of General Damages.

The appeal was canvassed before me on 23/11/2010, by **Mr. Onyinkwa**, learned counsel for the appellant

and **Mr. Andambi**, learned counsel for the respondent. For the appellant, it was contended that the said sum of Kshs 800,000/=, awarded as general damages for pain and suffering, was excessive in the circumstances and that wrong principles were applied by the learned Senior Resident Magistrate. Counsel felt fortified in that view because the learned Senior Resident Magistrate awarded the maximum under her pecuniary jurisdiction. In response, counsel for the respondent submitted that the learned Senior Resident Magistrate had committed no error of principle and that the sum she awarded for pain and suffering was commensurate with the injuries sustained by the respondent in view of the medical reports produced at the trial.

This is a first appeal. The court is therefore duty bound to reconsider the evidence adduced before the lower court and make its own evaluation and draw its own conclusions. In doing so, the court should bear in mind that it has not had the advantage of the trial court of seeing and hearing the witnesses testify. The court should therefore be slow to disturb findings of fact of the trial court (see **Peter –vrs- Limited (1958) EA 424**)

I must therefore examine, with care whether the findings of fact were not based on evidence adduced before the learned trial magistrate or whether there was a misapprehension of the evidence or that the learned trial magistrate acted on wrong principles in arriving at those findings of fact. **Sylvia Mideva**, the minor victim's case was presented by **David Agarey Simbiru**. He testified at the trial that the said minor, who is his daughter, was knocked by a motor vehicle and received injuries on the head, a fracture of the right hand and right foot. She was then taken to Moi Teaching and Referral Hospital and later examined by **Dr. Aluda**. He further told the trial court that the minor now walks with a limp. In cross-examination, **David** reiterated that his daughter suffered a fracture of the right knee and right arm.

The medical evidence was produced by consent. It consisted of the following:

- 1). A Medical Report by **Dr. S.I.Aluda**;
- 2). A 2nd Medical Report by **Dr. Z. Gaya**
- 3). Moi Teaching and Referral Hospital Discharge Summary

Notes.

- 4). Police P.3.

The Medical Report prepared by **Dr. Gaya**, the Discharge Summary from Moi Teaching and Referral Hospital and the P.3 show that the minor sustained two fractures in addition to soft tissue injuries. **Dr. Gaya** described the said fractures as fracture of the right femur and fracture of the distal femur. The discharge summary from Moi Teaching and Referral Hospital described the fractures as fractures of the right distal femur and right humerous and the P.3 described the fractures as fracture of the right humerous and fracture of the right distal femur.

It is only in the medical report prepared by **Dr. S. Aluda** where four fractures were detected. He described them as “**fractures of the right humerous, right femur, right tibia and left inferior pubic ramus**”. It is not easy to appreciate how **Dr. Aluda** found fractures which no other doctor saw and which infact the victim's father never mentioned in his testimony at the trial. Yet, the learned Senior Resident Magistrate without analyzing the crystal clear differences in the medical reports accepted that the minor sustained four fractures. The learned Senior Resident Magistrate obviously took those fractures into account in assessing the general damages payable for pain and suffering. On the material availed to her, I find and hold that she ought not to have taken into account four fractures in assessing the appropriate damages for pain and suffering.

In **Bashir Ahmed Butt –vrs- Uwais Ahmed Khan [1982-88], KAR 5**, the Court of Appeal held as follows:

“ 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 was either inordinately high or low.”

As I have found above, the learned Senior Resident Magistrate made her award of Kshs 800,000/= as damages for pain and suffering on the basis that the minor suffered four fractures. The clear evidence from three documents, produced before her referred to above, however demonstrated that the minor in fact sustained only two fractures, of course, in addition to soft tissue injuries. The learned Senior Resident Magistrate in my view therefore misapprehended the evidence in some material respect and further took into account factors which she ought not to have taken into account and therefore erred in principle. I am therefore entitled to interfere with the award of Kshs 800,000/= awarded as general damages for pain and suffering. The sum is reduced to Kshs 650,000/=. The net award, taking into account the agreed apportionment of liability of 80% and 20% P.C. against the appellant and the respondent respectively becomes Kshs 526,000/= which is substituted for Kshs 800,000/=.

The appellant has partly succeeded. I award him 1/3 of the costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

1. **Chege Msfor** for the appellant and
2. **Mr. Songok** holding brief for **Mr. Andambi** for the respondent.

F. AZANGALALA

JUDGE

25/1/2011.