REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 233 OF 2006

BENJAMIN SHELEMIA ……APPELLANT

-VERSUS-

SCOOBY ENTERPRISES LIMITED……RESPONDENT

JUDGMENT

(Being an appeal from Decree of the Honourable Senior Resident Magistrate at Kisii (A.A.Ingutya Esq.SRM) dated 20th November, 2006 in KISII SPMCC.NO. 1452 OF 2004)

This appeal is essentially against the quantum of damages awarded to the appellant by **Hon. A.A Ingutya**, SRM in Kisii SPMCC.No. 1452 of 2004. Having sustained chest contusion, fracture of the right tibia bone, fracture of the right fibula bone, dislocation of the right ankle joint and bruises on left knee in a road traffic accident on 17th January, 2004, he was after a full trial awarded Kshs. 250,000/= on 20th September, 2006 as general damages for pain, suffering and loss of amenities. He was also awarded Kshs. 4,600/= as special damages, costs of the suit and interest.

The appellant was aggrieved by the award of damages aforesaid which he considered very low. He therefore lodged this appeal complaining that:-

"***1. The trial magistrate erred in law and fact in assessing general damages in the sum of Kshs. 250,000/= which was inordinately low as to present a miscarriage of justice.***

2. The learned trial magistrate applied wrong principles in law in assessing general damages at Kshs. 250,000/= which was inordinately low.

3. The award of Kshs. 250,000/= as general damages was an erroneous estimate of the damages and (sic) severe injuries suffered by the appellant.

4. The award of Kshs. 250,000/= as general damages was inordinately low as to present a miscarriage of justice.

5. The learned trial magistrate erred in law and fact in failing to award to the appellant loss of responsibility allowance which was pleaded and specifically proved……..".

The appellant's case in the subordinate court was that on 17th January, 2004, he was travelling aboard motor vehicle registration number KAR 359J along Kisii-Kisumu road and while at Mosocho the

respondent's motor vehicle registration number KAP 118A Tata Canter was negligently or recklessly driven that it collided with the motor vehicle in which the appellant was travelling as aforesaid. As a consequence the appellant was seriously injured. Following the accident, the appellant was admitted at Kisii District hospital and later transferred to Matata Nursing home where he was admitted for 4 days. X-rays were done which confirmed the fractures. Thereafter plaster of Paris was applied. He was subsequently examined by **Dr. P.M.Ajuoga** who prepared a medical report dated 12th October, 2004 and his major finding was that the appellant suffered a serious potts fracture of the right ankle joint whole. He stated that this type of fracture required long sessions of physiotherapy which is costly. According to the appellant these were serious injuries which should have attracted an award of upward of Kshs. 750,000/= instead of the miserly Kshs. 250,000/= . The latter award ideally should have sufficed for soft tissue injuries. The award of Kshs. 250,000/= for fractures of both the right tibia and fibula, dislocation of the ankle together with soft tissue injuries was thus inordinately low and an erroneous estimate of the damage by the learned magistrate.

In the subordinate court, the appellant in asking for the award of Kshs. 750,000/= had relied on the case of **Marco Nyagowa .v. Benson Mwangi Macharia, NRB HCCC NO. 2812 of 1985(UR)**. In this case the plaintiff had suffered fractures of the right tibia and fibula, multiple lacerations on the right upper arm, left thigh and chin. He was awarded Kshs. 220,000/= on 16th March, 1992 as general damages for pain, suffering and loss of amenities. No doubt this case was comparable with the instant case with regard to the injuries sustained by the appellant. However, the decision in the above case had been made almost over 14 years ago at the time. In those days the rate of inflation was low and the general cost of living had not skyrocketed to present levels. The appellant's injuries should therefore have attracted the award of Kshs. 750,000/= at current levels so the appellant's counsel submits. The sum awarded was thus wholly erroneous estimate of the monetary compensation to which the appellant was entitled to.

The respondent's take is that on the evidence, it was doubtful that the appellant ever suffered any fracture from the accident. The medical chits from the Kisii District hospital dated 10th January, 2004 hardly showed the alleged fractures. That the medical report by **Dr. P. Ajuoga** prepared nine months down the line from the date of the accident had no probative value and even contradicted the contents of the medical chits, that the negligence attributed to the respondent was in any event not proved. Finally, it has been submitted on behalf of the respondent that this court should make a finding on the evidence adduced that the appellant suffered soft tissue injuries and award him a sum of Kshs. 80,000/= and since there is no evidence to distinguish the blameworthiness or otherwise of the two drivers, both should shoulder negligence at 50% as was held in **Berkely Steward Ltd, David Cottle & Jean Susan Cottle .v. Lewis Kimani Waiyaki (1982-88) 1KAR**

The principles upon which an appellate court may interfere with an award of damages by the trial court were stated in the following cases:-

1. **Butt .v. Khan (1981) KLR 356**

"….An appellate court will not disturb an award of damages unless it is so inordinately high or low as to present an extremely 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….."

2. **Robert Msioki Kitavi .v. Coastal Bottlers Limited (1982-88) 1 KAR 891**

"…….The court of appeal in Kenya, then should as its forerunners did , only disturb an award of damages when the trial judge has taken into account a factor he ought not have taken into account or failed to take into account something he ought to have taken into account…."

3. **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1982-88) 1 KAR 727**

"…..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 that the judge, in assessing the 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 ought be a wholly erroneous estimate of the damage…..".

Before I address the issue of damages, perhaps it is opportune now for me to comment further on the submissions of the respondent. It cannot be true that it was doubtful whether the appellant sustained the injuries. All the documents tendered in evidence including the medical report by **Dr. P. Ajouga,** the P3 form and medical chits from the Kisii District hospital attests to this fact. In any event the respondent did not raise nor canvass the issue before the trial court. It is only being raised for the very first time in this appeal and from the bar which is not permissible. Whether or not negligence, contributory or otherwise was proved is a non issue. There is no cross-appeal on the issue by the respondent. The appeal here is by the appellant and is limited to quantum of damages only. That is all we have to deal with.

Besides the aforesaid authorities with regard as to when an appellate court should interfere with the award of damages by the trial court, there are also other considerations. First, assessment of damages is a matter of discretion of the trial court and like every discretion it must not be exercised capriciously or whimsically but judiciously and on sound legal principles. Secondly, in assessing damages, the nature and extent of the injuries sustained by the plaintiff must be considered. Thirdly, comparable injuries should as far as possible be compensated by comparable awards. Finally, the awards must be reasonable, appropriate and moderate.

Applying all the foregoing to the circumstances of this case, I am satisfied that the award of Kshs. 250,000/= considering the injuries sustained by the appellant and there after effects, was inordinately low as to amount a wholly erroneous estimate of damages. I do not think that the trial court took into account the nature and extent of the seriousness of the injuries. He also did not consider that the authority he was referred to by the appellant and which seems to have persuaded him to arrive at the award sought to be impugned had been made almost 14 years to the date he crafted and delivered his judgment. At the time, the Kenya shilling had not taken a beating, inflation was low and the general cost of living was manageable. It appears to me that the learned trial magistrate did not consider the high inflation rate as at the date of the judgment compared to 14 years ago. It is clear that the trial magistrate did not exercise his discretion judiciously and fairly while assessing damages due to the appellant. He misapprehended the evidence of some material aspects and as such, arrived at a figure which was inordinately low in the circumstances. This court is therefore entitled to disturb the same. I think that an award of Kshs. 450,000/= as general damages for pain, suffering and loss of amenities would suffice.

On the issue of loss of responsibility allowance of Kshs. 300/= per month till retirement by the appellant allegedly as a result of the accident, it is not in doubt that the appellant was redeployed to Kachieng primary school as an assistant teacher. However the letter of redeployment is silent on the reasons for such redeployment and or demotion. This court cannot just assume that the redeployment was as a result of reduced work capacity following the accident. As correctly observed by the respondent, in its written submissions, this court cannot at this stage be invited to fill in the gaping holes in the appellant's case by forming an opinion that the demotion was as a result of the accident. No evidence was ever tabled to support the contention that the accident led to the appellant's demotion.

For the above reasons, this appeal succeeds to the extent that the award of general damages for pain, suffering and loss of amenities is varied and enhanced to Kshs. 450,000/= from original Kshs. 250,000/=. The award on special damages, costs and interest shall remain undisturbed. The appellant too shall have the costs of this appeal.

Judgment dated, **signed** and **delivered** at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA
JUDGE