RUNNING DOWN CASE

· **Soft tissue injuries. Award by the lower court of Kshs. 160.000/= would not attract interference.**

· **What are the principles to guide the court in its appellant's jurisdiction when considering interfering with award of damages?**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 74 OF 2005

ESTHER KIMATHI IKUNYUA .....1ST APPELLANT

FRANKLINE KARANI MWIRIGI .....2ND APPELLANT

VERSUS

RAEL GAKII ..... RESPONDENT

(An appeal from the judgment an decree of Hon. K. Kadet Resident Magistrate dated and delivered at Meru on 19th August 2005 in Meru CMCC No. 648 of 2003)

JUDGMENT

The respondent filed an action against the appellant in the lower court claiming special and general damages in respect of an accident involving the 1st appellant vehicle which was driven by 2nd appellant which hit the respondent. After trial, the lower court by its judgment dated 19th August 2005 found that the appellants were 80% liable while the respondent was 20% liable for the accident. The court awarded the respondent general damages of Kshs. 160,000/= less 20%. The total award for the respondent in general damages was Kshs. 128,000/=. In addition the court awarded the respondent in special damages Kshs. 3,000/=. The appellants were aggrieved by that judgment and filed this appeal. In this appeal, they rely on the following grounds:-

1. The learned Resident Magistrate erred in law and in fact in holding that the appellants were 80% to blame for the accident despite there having been overwhelming evidence showing that the 2nd appellant and the respondent were equally to blame for the accident.

2. The award of Kshs. 160,000/= in general damages was excessive regard being had to the injuries sustained and was against the weight of binding precedents.

This is the first appellant court. That being so, it is my duty to reconsider the evidence of the lower court. That duty was well set out in the case **Eveready Batteries (K) Limited vs. Simon Kinyua** Civil Appeal No. 281 of 2004. The Court of Appeal set out that duty as follows:-

"This being a first appeal it is our duty to re-evaluate the evidence, analyze it and come to our own conclusions but in so ding we must give allowance to the fact that we have neither seen nor heard the witnesses – see Selle vs. Associated Motor Boat Company [1968] E.A. 123 and Jivanji vs. Sanyo Electrical Company Ltd [2003] KLR 425."

The respondent in evidence stated that on 28th May 2003 she was at her place of work in Meru near the Uchumi Supermarket. She was a hawker. She was seated on a stool at her place of business near the road kerb. She was near the edge of the road. She was seated facing the shops and her back was to the road. The 2nd appellant was driving motor vehicle registration number KRL 593. She said that he did not hoot and suddenly the vehicle hit her at the back. She fell down and sustained injury on the face, elbow and knees. She said that she was seated outside the road. She reported the accident at the Meru Police Station and attended hospital but was not admitted. Her witness PW2 said that she and the respondent were doing their hawking business next to the Uchumi Supermarket. The respondent was at her stand seated on a stool. The motor vehicle which was being driven by the 2nd appellant hit the respondent. After that accident, the driver tried to flee but was restrained. PW2 said that the motor vehicle before it hit the respondent was speeding. PW3 was a doctor who prepared a medical report for the respondent. He stated that the respondent suffered soft tissue injury to the forehead, left back and bruises on the knees and elbow. She was treated at Meru District Hospital as an out patient. He finally stated that the soft tissue injuries were treated and healed. In defence, the 2nd appellant stated that on 28th May 2003 at around midday he was driving motor vehicle registration no. KRL 593 near Uchumi Supermarket. He was driving towards Kenya Commercial Bank. He was driving on the hilly part which was leading to a sharp bend. He met a lorry parked on his path as he was driving. This led him to drive on the right lane in order to overtake the lorry. It was then that he saw a lady seated on the road side facing the shops. He then stated:-

"I pressed the brakes and the car nevertheless came into contact with the said lady."

He said that when he went to the lady on alighting from the vehicle, he noted that she had been hurt. On being cross examined, he said:-

"She (respondent) was seated on the pavement facing the shops and not on the road. I hit her away from the road. I had not seen her when approaching. I braked and the car stopped but it was already in contact with her."

The learned trial magistrate as stated before found the respondent was 20% liable for the accident. The grounds of appeal faulted the finding of that liability and the quantification of the damages by the trial court. On the issue of liability, the respondent said that she was seated on the pavement with her back to the road. Both the respondent and the 2nd appellant confirmed that where the accident occurred was a place which was ascending. The 2nd appellant further stated that where the accident occurred, there was a sharp bend. The 2nd appellant confirmed also that the respondent was seated on the pavement. It therefore follows that, if she was seated on the pavement but despite his brakes the vehicle hit the respondent, the trial court was wrong to have attributed 20% liability on the respondent. I find that the 2nd appellant was

100% liable for the accident. The evidence adduced before the trial court clearly points to the 2nd appellant driving too fast and as a consequence was unable to control the vehicle at a sharp bend as he overtook the parked lorry. On liability, the appellants relied on High Court cases decided in the early 1990. The present accident occurred in the year 2003. The lower court's judgment was delivered in the year 2005. The appellant relied on the following cases:

1. Raphael Mwaniki Kiboi vs. Joseph Njogu Kinyua – Nairobi HCCC No. 3974 of 1988

This case was decided in 1995. The plaintiff in that case sustained multiple cut wounds on the head in the occipital area, cut wounds on both wrists and cut would on the left knee. The court awarded Kshs. 30,000/= in general damages.

2. Lucy Nthambi Mumo Munyoki vs. Joseph Bett Kimtai – Nairobi HCCC No. 2035 of 1993

The plaintiff in this case suffered bruises and was hospitalized for two days. She was awarded Kshs. 40,000/= in general damages. The case was decided in 1994.

3. Esther Wambui Nderitu vs. Francis Githinji & Kagumba Mathenge – Nairobi HCCC No. 2498 of 1988

The plaintiff in this case sustained injuries to her jaw which was broken. She also sustained cuts below her knee. The accident occurred in 1987 and the case was decided in the year 2000. General damages that were awarded to the plaintiff was Kshs. 20,000/=.

4. Ruth Mbithe Mutua vs. Robert Mutiso Ngundo – Nairobi HCC No. 19 of 1987

The plaintiff was awarded general damages of Kshs. 70,000/= for soft tissue injuries which involved bruises on the right shoulder, front of the chest, lower back, pelvic area and lacerations on the right hand. The case was decided in 1993.
The other cases cited by the appellant are not very different from the cases I have reproduced above. The authority relied upon by the respondent represents far more serious injuries than was suffered by the respondent in this case. The principle upon which the appellant court will interfere with the trial court's award of damages was considered in the case **Coast Bus Service Ltd vs. Sisco E. Muranga Ndanyi & 2 others** Civil Appeal Case No. 192 of 1992
Where the Court of Appeal stated thus:-

"Those principles were well stated by Law, J.A. in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982 – 88] 1 KAR 1 at pg 5 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 consider whether to interfere with the award of damages I am drawn to the statement made in the case **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko** [2006] eKLR where the Court of Appeal stated:-

"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964] AC 326 at page 353.
The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

In the case **Donald Mwangi & Waguthu Farmers vs. Alice Wanjiku Waweru [2006] EKLR** the High Court sitting at Nairobi in its appellant jurisdiction declined to interfere with an award of general damages of Kshs. 100,000/= by the lower court. The injuries that were suffered by the claimant in that case were:-

"***Strain of neck; bruises on the palms, contusion of the left leg."***

That case was decided in January 2006. Having considered the injuries suffered by the respondent, I am of the view that there is no basis for interfering with the award of the lower court's judgment. This is the judgment of this court.

1. The judgment in Meru CMCC No. 648 of 2003 dated 19th August 2005 is hereby set aside.

2. Judgment is hereby entered for the respondent against both appellants jointly and severally for Kshs. 160,000/= as general damages and Kshs. 3,100/= in special damages.

3. The respondent shall have interest on Kshs. 3100/= from the date of filing the lower court's suit and interest on the general damages Kshs. 160,000/= from 19th August 2005 until payment in full.

4. The respondent is awarded costs of the lower court case and of this appeal which costs will be paid by both appellants.

Dated, signed and delivered at Meru this 13th day of April 2011.

MARY KASANGO
JUDGE