REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 18 OF 2008

JAMES MWANIKI... APPELLANT

VERSUS

MARGARET MBUGUA...RESPONDENT.

J U D G M EN T.

1. By a decree in CMCC No. 307 of 2002, judgment was entered in favour of the respondent in the sum of Ksh. 879,510/=. The appellant was found liable one hundred percent and general damages was assessed as Ksh. 800,000/= and special damages Ksh. 79,510/=. Being aggrieved by that judgment, the appellant has appealed and in the memorandum of appeal, he has raised the following grounds:-

1. THAT, the trial magistrate erred in law and fact in finding the defendant 100% liable in spite of the evidence on record and the submissions on liability tendered by the defendant.

2. THAT, the learned trial magistrate erred in law and fact in disregarding the submissions and authorities in support of the defendant's case without any reasonable cause.

3. THAT, the learned trial magistrate erred in law and fact in awarding the plaintiff damages which were excessive in view of the injuries sustained by the plaintiff.

4. THAT, the learned trial magistrate erred in law and fact in evaluating of the evidence on record regarding the injuries suffered by the plaintiff.

2. In further submissions, in support of the above grounds, counsel for the appellant submitted that; although the appellant in his defence did not call any witness, the learned trial magistrate should have taken into consideration that there was a third party motor vehicle which was involved in the collision. The appellant had issued a third party notice against **Edwin Wainaina & Another** who did not enter appearance which failure in itself was tantamount to an admission of liability. On the issue of quantum, counsel submitted that the respondent sustained only a fracture of the right femur. Going by the doctor's evidence, the respondent's degree of disability was assessed as 20%. According to the appellant the award of Ksh. 800,000/= was excessive in view of the awards for similar injuries in **Nakuru HCC 136 of 2003 JANE WANGUI KAMAU & 2 OTHERS VS. ALICE ATANDI MUGAMANGI & ANOTHER** where Kimaru – J awarded a sum of Ksh. 350,000/=.

Counsel also cited the case of **Yunis Malik vs. Eliud Muriithi & Another [2005] Eklr** and urged the court to set aside the award for general damages and substitute it with an appropriate award commensurate with the injuries suffered by the respondent.

3. This appeal was opposed. Mr. Onyancha, learned counsel for the respondent submitted that the respondent established her case on a balance of probabilities. The appellant opted not to adduce any evidence on how the accident occurred. The appellant was the driver and the owner of the motor vehicle that was involved in the accident. The defendant only relied on the medical legal report by **Dr. Gaya** which although produced in support of the defence case was in support of the respondent's case. The appellant did not plead contributory negligence thus there was no basis for the trial court to apportion liability. The trial court believed the evidence by the plaintiff that the appellant was negligent and caused the accident thus the appellant was found 100% liable.

4. Regarding the 3rd party notice, counsel submitted that it was issued in the vacuum because contributory negligence by a third party was not pleaded in the defence. There was no basis for the trial Magistrate to apportion liability against a 3rd party. On the issue of quantum, the trial court considered the severe injuries suffered by the respondent coupled with a finding of a permanent disability of 20%. The lower right limb of the respondent was shortened by 6 cm and the respondent was limping and would continue to so limp for the rest of her life. Mr. Onyancha submitted that the two decisions from Nakuru High Court are distinguishable because there was no shortening of the claimant's limb. Moreover, the kinds of occupation, profession or age of the claimant were not disclosed in those cases, whereas in this case the respondent is a teacher by profession which involves rigorous movement which is now affected by the shortened leg. Further the inflation on the award should be taken into account as this appeal has been pending for the last 3 years. He urged the court to dismiss the appeal.

5. This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its own independent decision on whether or not to interfere with the decision. In so doing the court must bear in mind that it never heard or saw the witness testify and give due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions by the court of appeal and one such leading authority is the case of **PETER VS. SUNDY (1958) E.A. page 429** as follows:-

"***It is a strong thing for an appellate court to defer from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

6. Further the principles governing the considerations to bring to bear by the 1st appellate court have similarly been elaborated in several decisions by the Court of Appeal. One such leading authority is the case of **KIRUGA VS. KIRUGA & ANOTHER [1988] KLR page 348** where the Court of Appeal held;-

"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

7. Another consideration to take into account is that the assessment of general damages is a discretion that is exercised by the trial court. The appellate court cannot substitute a figure awarded simply because it would have awarded a different figure if it had tried the matter in the 1st instance. This court can only interfere with the award of damages if the trial court applied the wrong principles or it misapprehended the evidence. I have considered the medical evidence by **Dr. Njenga** and also the defence evidence which was by the medical report produced by consent by **Dr. Gaya**. The respondent was travelling in a motor vehicle belonging to the appellant on 14th August, 1999. The motor vehicle was involved in an accident which the respondent attributed to the negligence of the appellant. The appellant on his part did not adduce any evidence and there was no defence of contributory negligence. Thus I agree with counsel for the respondent that the trial court could not have apportioned liability to the 3rd party out of the blues.

8. Back to the issue of quantum, it is evident that the respondent was hospitalized for 11 days. She was operated on the right thigh bone and there was internal fixation with a K-nail. One of the wounds was complicated by infections and it took 3 months to heal. The respondent used walking clutches as the fracture took long to heal. According to **Dr. Gaya**, the respondent suffered loss of bone leading to right lower limb shortening and the respondent was walking with a limping gait. He opined that the respondent was unable to effectively use the limb and may in future develop Osteoarthritis of the knee and hip joints as

a result of shortening/limping gait. He assessed the degree of permanent disability at 20%.

9. I have considered the decisions that guided the trial magistrate, they were determined several years ago, while this decision was delivered 3 years ago. Besides every case has it own peculiarities. Although the injuries may be classified, there are differences regarding the degree of injury and disabilities experienced by different claimants as no case is similar to another in all aspects. Taking the totality of the evidence before the trial court, and also considering the monetary inflation, I am not satisfied the learned trial magistrate took into account irrelevant factors or misapprehended any evidence. For those reasons I find no merit in this appeal which is dismissed with costs to the respondent.

Judgment read and signed on 6th day of May, 2011.

M. KOOME.

JUDGE.