IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 7 OF 2010

FAST CHOICE COMPANY LTD.....1ST APPELLANT
MORRIS KINYANJUI MWANGI.....2ND APPELLANT

VERSUS

JOSEPH WANYIRI MWANGI.....RESPONDENT

JUDGMENT

This appeal arises from the decision of S. M. S. Soita, Principal Magistrate, Molo Court, dated 26/1/2010, in PMCC 159 of 2008. The Respondent Joseph Wanyiri Mwangi (the then Plaintiff), filed the suit against the Appellants, **Fast Choice Company Ltd** and **Morris Kinyanjui Mwangi**, (who were defendants), seeking damages for injuries that he sustained on 9/6/2008 when the 1st Appellant's motor vehicle KAX 628P, which was driven by the 2nd Appellant, collided with motor vehicle KYF 462, in which the Respondent was traveling. A 3rd party, Nyahururu High School was joined to the suit as a 3rd party, being the owner of motor vehicle KYF 462. The issue of liability was settled in PMCC No. 156 of 2008 at 100% as against the defendants and what was before the trial court was the assessment of damages. An award of Kshs.450,000 was made in general damages.

The appellants were aggrieved by the award and preferred this appeal based to the following grounds;

(1) That the award was manifestly excessive;
(2) That the trial court erred in applying the wrong principles in awarding the damages;
(3) That the trial court disregarded the medical reports.

As the first appellate court, this court has a duty to evaluate the evidence afresh and arrive at its own findings and conclusions.

Ms Chepkurui, counsel for the Appellant submitted that some of the injuries pleaded were not proved from the medical reports as read with the medical chit issued when the Respondent was just examined at Molo Hospital. She further urged that the only injuries pleaded and proved were to the forehead, wrists, arm, knee and loose incisor tooth. She further stated that the court placed a lot of weight on Dr. Wabore's report and ignored Dr. Mahida's report and initial treatment chit; that the court therefore applied the wrong principles in the assessment of damages. She made a submission of Kshs.90,000 as a reasonable award in general damages.

The appeal was opposed and Ms. Gatei, counsel for the Respondent submitted that Dr. Wabore's report is more accurate as it was filled only 3 days after the accident while Dr. Mahida's report was made one year later. Counsel denied that the award was inordinately high as alleged. Reliance was made on the case of **Isaac Keter Vs Dismas Wabwire Masinde Eldoret Hcc No. 129 of 2002**, which applied the decision of

Kemfo Africa Ltd Vs M. Lubia & Another, Nairobi C.A. No. 21 of 1984.

At paragraph 6 of the Plaint, the Plaintiff set out the injuries that were sustained by the Respondent;

(1) Soft tissue injuries of the forehead causing epistaxis;

(2) Broken left incisor jaw;

(3) Loose incisor teeth upper jaw;

(4) Soft tissue injury gum upper jaw of the right wrist and soft tissue injuries of the same writs joint;

(5) Soft tissue injuries left thigh;

(6) Soft tissue injuries to the chest;

(7) Soft tissue injury to the chest.

On 10/11/2009, the parties recorded a consent whereby all documents were admitted in evidence. These were the P3 form, treatment chit, Dr. Wabore"s medical report and Dr. Mahida's report. In the medical chit issued to the Respondent at Molo, the only injuries noted were painful knee, loose upper tooth, headaches, bruises on right hand. Three days later, the Respondent was seen by Dr. Wabore who filled the P3 form and prepared the report dated the same day. He classified the injury as maim basically because of the broken right incisor tooth which was also loose, and was likely to fall out and leave an unsightly gap. He went on to assess that the Respondent suffered 6 weeks total temporary incapacity, 8 weeks of partial temporary incapacity. He assessed him to have suffered 25% permanent incapacity. He found the rest of the injuries to be soft tissue which could cause the Respondent a lot of discomfort.

Dr. Mahida examined the Respondent on 16/11/2009, over a year after the accident. His opinion was that the Respondent suffered a minor injury to the forehead, right wrist, left thigh, chest, right upper gum, right hand and left knee. He found the injury to the 2nd incisor doubtful as it looked like the tooth had suffered normal erosion. He also pointed out that Dr. Wabore was not specific as to which tooth was broken and loose. According to Dr. Mahida, Dr. Wabore included in his report injuries which were not noted at the District Hospital soon after the accident. He opined that the Plaintiff suffered partial incapacity of a temporary nature but no permanent injury.

I have considered the medical report and the treatment chit issued to the Respondent soon after the accident. I do note that there are indeed contradictions between the report by Dr. Wabore and the treatment chit. It seems Dr. Wabore noted more injuries on the Respondent than the hospital at Molo did. I do appreciate that Dr. Wabore saw the Respondent 3 days after the accident. It is possible for the injuries to surface later after the accident. The only injury that may be in doubt is the permanent injury to the tooth. It should have been noted at the time the Respondent was first examined at the hospital. In sum, I would find that the Respondent suffered soft tissue injuries but not a maim. There is no evidence that the Respondent was ever hospitalized or attended hospital after the visit soon after the accident. In my view, assessing degree of incapacity at 25% due to one broken or loose tooth is exaggerated.

Having so found, the question is whether the award was excessive. An Appellate court is always slow to interfere with an award of the trial court because it is an exercise of discretion and the principles be observed by the appellate court were set on in **Kemfro Africa Ltd Vs M. Lubia & Another 1982-88**

IKAR 727, where the court said that;

"the principles to be observed by an appellate court in deciding whether the court is justified in disturbing the quantum of damages by a trial Judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the Judge, in assessing thedamages, took into account an irrelevant factor, or left out of account arelevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

The above decision was adopted in **Keter Vs Masinde (2005) Hcc No. 129 of 2002** and that is the law.

In assessing damages, the trial court must ensure that the award is within reasonable limits that the Defendant can afford. This is because the award is not putting back the Plaintiff in his former shoes but giving reasonable compensation for injuries sustained. ***(see Cecelia Mwangi Vs Ruth Mwangi CA No. 251 of 1996)***.

The appellant cited the case of **Boniface Mbuthi Mbaluto Vs John Njau Kimani Hcc No. 533 of 2001**, where the Plaintiff sustained injuries of the right upper incisor, cut wounds on upper and lower lips, soft tissue injuries and bruise on the face, bruises on right knee and left wrist and an award of Shs.80,000 was made. In **Anna Muriuki Vs Ngumbao K. Asaka & Another Hcc No. 341 of 1990 (Mombasa)**, an award of Shs.60,000 was made for fractures to 2nd and 12th left ribs, temporary concussion, bruises on the face, both legs and cut wounds on lower back. The award was made in 1993 about 18 years ago. On the other hand, Ms Gatei relied on the decision in **Tito Sekeni Vs John Wanyili Hcc No. 254 of 1992**, where an award of Kshs.400,000 was made in 1992 for fractures to the clavicle, right scapula cervical spine and two ribs with extensive abrasions and loss of skin. Obviously, the Plaintiff in the above case sustained very serious fractures not comparable with the Respondent's injuries. The above case not compare well with the one before me. After considering the medical reports and the authorities cited, I find that the award was excessive and did not compare well with the injuries sustained by the Respondent at all. Even if the court found that the tooth was fractured, the award was still too high. In making an award, the court is required to make awards that will reasonably compensate the Respondent because he cannot be put back in the shoes he was in before injury.

For all these reasons, the award hereby set aside and is substituted with an award of Kshs.150,000 as general damages. There was no proof of special damages. The appellant will have costs of the appeal. Costs of the Lower Court to Respondent. It is so ordered.

DATED and **DELIVERED** this 18th day of November, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:
No appearance for Appellants
Ms Wanjiru for Respondent
Court Clerk – Kennedy Oguma