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THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO.19 OF 2008

QUENTINE WAMBUA ....APPELLANT

VERSUS

NDUNDA WAMBUA KITUU... RESPONDENT

(Being an appeal from the Judgement of Mr. Karani, Resident Magistrate delivered in Machakos CMCC No.161 of 2004 on 16th January, 2008)

JUDGMENT

The respondent on 10th July, 2003 according to the Plaint filed in the Chief Magistrate's court at Machakos, was lawfully travelling in motor vehicle registration number KZZ 924 along Syokimau-Ngei road when the appellant so negligently drove, managed and or controlled motor vehicle registration Number KAH 473 E that he allowed it to collide with KZZ 924 thereby occasioning severe and extensive injuries to the Respondent. The injuries sustained as foresaid were:-

- **Marked tenderness of the anterior chest**
- **Marked tenderness and swelling of the wrist joint**

The respondent then filed the suit, the subject of this appeal claiming both general and special damages on account of the appellant's negligence in causing the accident. He gave the particulars of negligence.

The appellant filed a statement of defence through **Messrs Manthi Masika & Company Advocates** and denied the ownership of the motor vehicle and indeed the occurrence of the alleged accident. He further averred in the alternative that if the accident ever occurred, then the same was wholly or totally occasioned by the negligence of the driver of the motor vehicle the respondent was aboard. He proceeded to give the particulars of negligence on the part of the said driver.

When the case came up for hearing before **Hon. Karani** Resident Magistrate on 3rd October, 2007, parties involved in the suit recorded a consent on liability in terms

"***By consent judgment on liability be entered for the plaintiff as against the defendant at 90:10. Matter to proceed for assessment of damages on 01.11.07.***"

A further consent was recorded on 7th November, 2007 in terms that medical reports by Doctors Kaburu and Wambugu, P3, Police abstract and treatment cards be allowed in evidence without calling the makers. Subsequent thereto parties filed and exchanged respective written submissions on quantum. In a reserved judgment dated and delivered on 16th January, 2008, the learned Magistrate held:-

"Both parties have filed written submissions on quantum. For the above injuries the plaintiff proposes an award in the sum of KShs.200,000/- while the defendant is of the opinion that KShs.80,000/- would be adequate compensation to the plaintiff. Both have cited authorities which I have looked at. I have also looked at the supporting documents on record.

Doing the best I can, I award KShs.150,000/- being general damages for pain and suffering. No special damages have been proved and none are awarded.

The sum of KShs.150,000/- is to be subjected to deduction by 10% being the plaintiff's contribution. This leaves a sum of KShs.135,000/- as the net award. I enter judgment in the said sum in favour of the plaintiff against the defendant. The defendant shall also have costs of this suit and interest. It is so ordered."`

The above decision triggered this appeal. A total of 2 grounds were advanced by the appellants in faulting the learned magistrate's judgment and decree aforesaid. These were:-

1. The learned Resident Magistrate erred in Law and fact by making an award on general damages which was manifestly excessive given injuries sustained by the plaintiff and the relevant case law produced by the Defendant.

2. The learned Resident Magistrate applied wrong principles of Law in assessing general damages hence arriving at a manifestly excessive damages.

Essentially, the appeal is on quantum.

When the appeal came before **Kihara Kariuki J**. for directions on 30th June, 2011, it was agreed between the parties, that the appeal be canvassed by way of written submissions. Subsequently parties filed and exchanged written submissions. However, before **Kihara Kariuki J.** could craft and deliver the judgment, he left the station on transfer. The appeal found its way to me for determination. The appellant and respondent agreed that I proceed with the appeal from where **Kihara Kariuki J.** had left.

The principles upon which an appellate court can interfere with an award of damages are now settled. 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 trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and consequently arrived at a figure which was either inordinately high or low. See **Generally, But vs. Khan (1981) KLR 356, Robert Muoki Kitavi vs. Coastal Bottlers Ltd. (1982-88) I KAR 891** and **Kemfro Africa Limited t/a Meru Express Services & Another vs. A. M. Lubia & Another (1982) I KAR 727**. Above all, it must be appreciated that in assessing damages, the court is undertaking a discretionary exercise. The damages awardable should to some extent, ameliorate the pain and distress suffered by the plaintiff as a result of the injuries sustained. Such damages should however, not be viewed or construed as a windfall by the plaintiff. Of course in assessing the damages the nature and extent of the injuries sustained must be considered and that comparable injuries should as far as possible be compensated by comparable awards. Such awards must however, be reasonable, appropriate and moderate.

Applying all the foregoing principles to the circumstances of this appeal, I am satisfied that the trial court did not err at all in awarding the respondent KShs.150,000/- as general damages for pain, suffering and loss of amenities. Considering the soft tissue nature of the injuries sustained and their after effects on the respondent, that award was well or richly deserved.

In making the award, the trial court resorted to the relevant authorities cited before it by both the appellant and the respondent. It was persuaded to go along with the authorities cited by the respondent. It duly justified why it had to rely on the said authority. Considering the inflationary trends and the slide of the Kenyan Shilling, since the authorities cited before it were delivered, I do not think that the appellant is justified in faulting the learned Magistrate. Everything considered, I do think that, the award was commensurate with and or proportionate to the injuries sustained by the respondent. The award was not inordinately high or low as to invite the intervention of this court. To my mind, the trial court exercised its discretion in the assessment of damages judiciously and fairly. It did not misapprehend the evidence in some material aspect and as such, arrived at a figure that is unjustifiable in the circumstances. The court had the correct principles in mind when it awarded the damages sought to be impugned by the appellants. I do not agree with the appellant's submission that the trial magistrate consiered the respondent's injuries stated in his submissions while writing his judgment and ignored injuries, as stated in the pleadings and medical reports. What it all came down to was that those were soft tissue injuries. The award was within the acceptable range for those kind of injuries.

The upshot therefore is that, that award was wholly erroneous and must be set aside.

The end game is that, the appeal lacks merit. Accordingly, it is dismissed with costs to the respondent.

Dated, signed and **delivered** at **Machakos**, this 15th day of November**, 2011**.

ASIKE-MAKHANDIA
JUDGE