



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Appeal 73 of 2006**

**PAMELA KILELO MAGHANGA.....APPELLANT**

**VERSUS**

**D.I.M (Minor suing through L.W.M as the next friend)...RESPONDENT**

*(Being an appeal from the judgment and order of Honourable, T.W.C. Wamae, (Mrs), Senior Resident Magistrate, in CMCC No.13670 of 2004 at Nairobi delivered on 31<sup>st</sup> January, 2006)*

**J U D G M E N T**

1. This is an appeal arising from a suit which was filed by D. I. M a minor suing through his next friend, L.W.M (hereinafter referred to as the respondent). Judgment on liability was agreed upon by the parties in the ratio of 80-20% in favour of the respondent as against Pamela Kilelo Maghanga who was the defendant, (hereinafter referred to as the appellant). Following written submissions filed by the parties, the trial magistrate assessed general damages at Kshs.400,000/= and gave judgment in favour of the respondent.

2. The appellant being aggrieved by this assessment, has lodged an amended memorandum of appeal raising five grounds as follows:

- (i) That the learned magistrate erred in fact and in law in her assessment of general damages which were inordinately high having regard to the medical evidence.
- (ii) That the learned magistrate erred in fact and in law in finding failing to find that the appellant was incapacitated from the injury sustained.
- (iii) That the learned magistrate erred in fact and in law in assessing the damages in the face of the evidence adduced and the authorities cited.
- (iv) That the learned magistrate erred in fact and in law in failing to consider the age of the plaintiff and the nature of injuries sustained by the plaintiff in assessing general damages.
- (v) That the learned magistrate erred in law and in fact in failing to consider the defendant's submission and

failing to give any reason in her judgment in arriving at the award of damages.

3. Counsel for the appellant has submitted that the trial magistrate did not consider or refer to the submissions which were made before her by the appellant's counsel. In particular, *Nakuru High Court Civil Case No.725 of 1995 Phillip Kirorei vs Hassan Noor Abile* was referred to, and it was contended that the award by the trial magistrate was inordinately high as he did not take into account awards for comparable injuries. Referring to *High Court Civil Appeal No.126 of 2006 Meru Kithoka Youth Polytechnic vs Lucy Kithira Riungu*, counsel for the appellant submitted that an appeal court can reverse the assessment of damages by a trial court if it is excessive, and if the trial court failed to take into consideration matters it ought to have considered and as a result arrive at a wrong decision. It was submitted that taking into account the age of the respondent at the time of the accident and the nature of injuries sustained, the amount of Kshs.400,000/= awarded was excessive and ought to be substituted by an award of Kshs.120,000/=. The case of *Stephen Kariuki Kaburo and another vs Deniwa Builders and another Nairobi High Court Civil Case No.1551 of 2002*, was relied upon as providing appropriate comparison.

4. For the respondent *Aky Industries Ltd vs Amani [1990] KLR 309*, was cited for the proposition that assessment of damages is a matter of judicial discretion. The case of *Iddi Ayub Shaban vs City Council of Nairobi & another Civil Appeal No.52 of 1984*, was cited for the principle that an appellate court cannot interfere in the assessment of damages unless it is shown that the sum awarded is demonstrably wrong or that the award was based on wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred. Also referred to was *Savco Stores Ltd vs David Mwangi Kimotho Machakos Court Civil Appeal No.12 of 2005*. It was maintained that the trial magistrate had taken into account the submissions made before her by the parties' counsel, and the medical report, and arrived at a fair decision in assessing damages. It was contended that the damages awarded were not so inordinately high as to necessitate any interference.

5. The injuries suffered by the minor respondent were confirmed by the medical reports of Dr. Were and Dr. Kodwavalla both of which were admitted in evidence by consent. The two medical reports showed that the minor respondent suffered compound fracture of the left tibia, multiple lacerations and deep cut wounds on various parts of the body, including a deep cut wound on the right forehead. His injuries had healed leaving residual scars and a defective gait.

6. The judgment of the trial magistrate though short, took into account the injuries suffered by the minor respondent. The trial magistrate also took into account the case of *Phillip Kirorei vs Hassan Noor Abile* (supra) which was cited to her, and which she found relevant. The trial magistrate assessed general damages in respect of the minor respondent's injuries at Kshs.400,000/= having taken into account the element of inflation.

7. I have considered the case of *Phillip Kirorei vs Hassan Noor Abile* (supra) and I am satisfied that the injuries were comparable with those suffered by the minor respondent. I find that although the award made by the trial magistrate was on the higher side, it was not so excessive, nor was it based on wrong principles so as to justify the intervention of this court. The trial magistrate properly exercised her discretion in assessing damages and I have no reason to fault her. Accordingly, I find no merit in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 6<sup>th</sup> day of May, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant absent

Mwaniki for the respondent

Eric - Court clerk