REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 43 of 2008

(Appeal from the judgment of the Chief Magistrate dated the 18th day of March, 2008 in NaKuru Chief Magistrate's Court Civil Case No. 1859 of 2006 – E. TANUI, RM)

GIDEON CHIBIRA MMBONO……APPELLANT
VERSUS
ROSELINE CHEBET WILSON……..…..RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Resident Magistrate delivered on 18th March 2008 in Nakuru CMCC No. 1859 of 2006 in which she found the Appellant 100% liable and awarded the Respondent Shs. 210,000/= general damages and Kshs.2100/= special damages. This appeal is against both that finding on liability and the award of damages.

Mr. Mahida for the Appellant argued the appeal under two heads, liability and quantum. On liability he submitted that the learned trial magistrate erred in rejecting the defence evidence that the

Respondent and her friend were hugging each other in the middle of the road and when the Appellant's driver, in an effort to avoid hitting them, swerved to the right the Respondent and her friend ran there and when he swerved to the left, they also went to that side thus giving him no chance of avoiding to hit them. In the circumstances, he submitted that the court should at least have found that the Respondent contributed to the cause of the accident.

On quantum, he submitted that the award was inordinately high. He said the plaintiff in the case of **Stephen Ngunza Mbandi Vs Dismas Kiathine & Others, Nairobi HCCC No. 138 of 1987** which the trial court relied on suffered more serious injuries than those suffered by the Respondent in this case.

Opposing the appeal, Mr. Gai for the Respondent dismissed it as a frivolous appeal. He said the Appellant's driver having admitted that he hit the Respondent and her friend on the pavement, the trial court was right in holding the Appellant 100% liable. On quantum, he submitted that none of the principles for disturbing the trial court's award has been given. He said the authority the trial court relied upon was cited by both sides and urged me to dismiss this appeal with costs.

I have considered these rival submissions and carefully read the record of appeal. That the Appellant's driver was driving at a speed of 50 KPH cannot be true. At that speed he could have stopped before hitting the Respondent and her friend. The scene of accident being near the Nakuru Law Courts, I am familiar with it. If DW1 was driving from Cocoa Savannnah Club towards the DC's Office, he was supposed to stop before crossing Moi Road. Had he done that he could not have gained speed by the time he got to the scene a few metres away. In the circumstances I find that DW1 drove at excessive speed and did not stop at Moi Road.

This finding notwithstanding, I reject the Respondent and her friend's claim that they were on the pavement before the accident vehicle approached. Even if DW1 was in high speed, in the absence of any cause whatsoever, I cannot understand how he would have gone out of the road to hit them on the pavement. I accept DW1's evidence that the Respondent and her friend were hugging each other on the road. When he approached in high speed, he confused them and they ran to the right and then to the left. In an effort to avoid them, DW1 swerved and hit the Respondent and her friend on the pavement. That the appellants' driver was acquitted in the traffic case does not absolve him of liability. An acquittal or conviction for a traffic offence does not preclude a finding of contributory negligence—**Chemwolo & Another Vs Kubende, [1986] KLR 492** and **Robinson Vs Oluoch, [1971] EA 376.** In the circumstances of this case I find that the Respondent was 25% to blame for the accident.

It is trite law as the Court of Appeal stated in **Butt Vs Khan [1982-88] KAR 1** that:-

"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 arrived at a figure which was either inordinately high or low."

In **Kemfro Africa Ltd & Another Vs Lubia & Another (No.2) [1987] KLR 30** at page 35 the Court of Appeal reiterated these principles in the following words:-

"The Principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant 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. See *Ilanga vs Manyoka [1961] EA 705, 709, 713, (CA-T) Lukenya Ranching* and *Farming Co-operative Society Ltd V Kavoloto [1979] EA 414, 418, 419 (CA-K).* This Court follows the same principles."

Applying these principles to this case, has cause been show for disturbing the trial court's award? I do not think so.

It common ground that the Respondent suffered a fracture of the right humerus and soft tissue injuries. Though I agree with Mr. Mahida that the Respondent in the case of **Stephen Ngunza Mbandi Vs Dismas Kiathine & Others, Nairobi HCCC No. 138 of 1987** relied upon by the trial court suffered slightly more serious injuries than those suffered by the Respondent in this matter, that was a 1999 decision in which Kshs.200,000/= was awarded. Given the inflation since then, I find the award of Kshs.210,000/= in

this case quite reasonable. Consequently I dismiss the appeal against quantum. The Appellant shall therefore pay to the Respondent 75% of Kshs.212,100/- which works to Kshs.159,075/-.

In the result, save for the apportionment of liability at 25/75% against the Appellant, I dismiss this appeal. Given that the Appellant has only partly succeeded in this appeal, I order that each party bears its own costs of this appeal.

DATED and DELIVERED at Nakuru this 2nd day of July, 2010.

D. K. MARAGA
JUDGE.