REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 623 of 2005

STYROPLAST LIMITED……..…….……..1ST APPELLANT

STEPHEN MURIGI NJUGUNA…….……2ND APPELLANT

VERSUS

ROB GALGALO BAGAJA…… RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed by Rob Galgalo Bagaja hereinafter referred to as the respondent, in the Magistrate's Court at Nairobi. The respondent had sued Styroplast Limited and Stephen Murigi Njuguna, hereinafter referred to as the 1st and 2nd appellants, seeking general and special damages for personal injuries suffered by him in an accident involving the 1st respondent's motor vehicle registration No. KAD 337X. The respondent contended that the accident was caused solely by the gross negligence of the 2nd appellant, for whose negligence the 1st respondent is vicariously liable.

2. The appellants filed a joint defence in which they denied the respondent's claim and all allegations of negligence. In the alternative the appellants averred that the accident was not caused by the negligence of the 2nd appellant, but was caused solely by the negligence of the respondent. The appellants further denied that the respondent suffered any injuries, loss or damage. Further, the appellants maintained that the accident was inevitable notwithstanding the exercise of reasonable care and skill on the part of the driver of the appellant's vehicle. Finally the appellants stated that the respondent with full knowledge of the risk of injury or damage to himself, voluntarily consented to accept such risk and therefore waived any claims in respect of any injury.

3. On the 17th May, 2005, judgment on liability was recorded by consent of the parties in the ratio of 60:40% in favour of the respondent as against the appellants. The matter was adjourned to 31st May, 2005, to record further consent on quantum. On that day however, no consent was recorded but a date was fixed for submissions.

4. Thereafter submissions were filed, and the trial Magistrate delivered her judgment assessing quantum based on the written submissions. In her judgment the trial Magistrate noted that the respondent suffered soft tissue injuries over the right foot. She assessed damages at Kshs.100,000/=, and entered judgment in favour of the respondent at the sum of Kshs.61,860/= together with costs and interest, having taken into account the element of contribution.

5. Being aggrieved by that judgment the appellant has lodged this appeal raising four grounds as follows:

(i) The learned Magistrate erred in assessing general damages in the sum of Kshs.100,000/= for the

injuries suffered by the plaintiff/respondent.

(ii) The said assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.

(iii) The said assessment and award is out of keeping with other Kenyan awards for comparable injuries.

(iv) There was no good or proper basis for the said assessment of damages.

6. It is evident from the above grounds of appeal that the appeal is only against the assessment of quantum by the trial Magistrate. In *Kemfro Africa Ltd. t/a Meru Express Services (1976) & Another vs. Lubia & Another No. 2 (1988) KLR 30***,** the principles upon which the quantum of damages awarded by a trial Judge can be disturbed by an appellate Court were held to be as follows:

"*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*."

7. From the written submissions filed by the parties, it is evident that the parties agreed to rely on the medical report prepared by Dr. G.K. Mwaura and Dr. Modi. The two reports were availed to the Court. It is clear from both reports that the respondent suffered soft tissue injuries on the right foot, from which he had fully recovered as at the time of examination by Dr. Modi. The trial Magistrate assessed the quantum of damages for the respondent's injuries at Kshs.100,000/=.

8. In their written submissions, the respondent's advocate urged the Court to award a sum of Kshs.120,000/= relying on ***HC****CC 2707 of 1990 Dennys Mabwaka Khabusi vs. Mawingo Bus Services Ltd & Another*, in which Mbogholi, J. awarded a sum of Kshs.120,000/= to a plaintiff who suffered, cut wounds on the right arm, cut wounds on the face, cut wounds on the chest and cut wounds on the tendon and right leg which injuries resulted in scars on the face and right leg, and some disability on the right foot. It is evident that the injuries suffered by the plaintiff in the cited case were not comparable with the injuries suffered by the respondent herein which as described in paragraph 7 of the plaint was only "swollen painful tender right foot."

9. In the submissions filed in the lower Court, the appellant's counsel urged the Court to award a sum of Kshs.30,000/- relying on the case of *Raphael Mwaniki Kibui vs. Joseph Njogu Kibui, Nrb HCCC No. 3974 of 1988*. In that case, the plaintiff who sustained multiple cut wounds on the head, cut wounds on both wrists and cut wounds on the left knee which healed leaving faint scars on both knees was awarded a sum of Kshs.30,000/=.

10. The respondent's soft tissue injuries were not serious. In awarding the sum of Kshs.100,000/=, the trial Magistrate did not refer to any comparable award. The trial Magistrate appears to have been influenced by the case which was cited to her by the respondent's counsel. However, as aforestated the injuries in that case were not comparable with the present case. I find that the trial Magistrate erred in assessing the damages as the award was not consistent with an accurate estimate of the injuries suffered by the respondent as to merit the award of Kshs.100,000/=. I find that the award of Kshs.100,000/= was so inordinately high as to warrant the intervention of this Court. Had the trial Magistrate properly addressed her mind she would have been guided by the authority which was cited by the appellant's counsel. I find that taking into account the element of inflation and the fact that the respondent's injuries did not include any cuts or leave any scars, a sum of Kshs.40,000/= would have been appropriate compensation for the injuries suffered by the respondent.

11. Accordingly, I allow the appeal, set aside the award and judgment of the lower Court, and substitute thereof judgment for the respondent in the sum of Kshs.40,000/= less contribution. I award the respondent interest and costs of the lower Court but order each party to bear their own costs in this appeal.

Those shall be orders of this Court.

Dated and delivered this 31st day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mwaniki for the Applicant

Thimba for the respondent