



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 117 OF 2007

ELIAS MAINA KING'ORI.....APPELLANT

VERSUS

JOSEPH KABUTI T/A MAHIGA SERVICE STORESRESPONDENT

(An appeal from the judgment and decree of S.O. Mogute R.M. in Meru

CMCC No. 73 of 2006 delivered on 11/10/2007)

JUDGMENT

The plaintiff who is the appellant in this case sought judgment for special and general damages which he incurred following a road traffic accident. The lower court in his judgment awarded the appellant in general damages Kshs. 200,000/=. The appellant was dissatisfied with that judgment in respect of the general damages and has filed this appeal with the following grounds:-

- 1. The learned trial magistrate erred in law and fact in making the award, which was inordinately low in all circumstances of the case.**
- 2. The learned trial magistrate failed to take into account the degree and extend of injuries in making the award.**
- 3. The learned trial magistrate erred in law and fact in failing to be guided or take due consideration of the authorities cited of similar injuries.**

From those grounds it is clear that the appellant's appeal is restricted to the award of general damages. The question that I need to address my mind to is, under what circumstances can I interfere with the lower court's award of damages? This was well discussed by Knellere, J.A. as he then was, put it thus in **Robert Msioki Kitavi Vrs Coastal Bottlers ltd** (1985) I KAR 891 at 985:

“The Court of Appeal in Kenya, then, should, as its fore-runners did, only disturb an award of damages when the trial judge had taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.”

As I began to consider this appeal, it occurred to me that the appellant failed to attach a very vital document to an appeal. The appellant did not extract the decree of the lower court. That is a vital

document as per Order XLI Rule 8(B) (4) (f) (ii) which is in the following terms:-

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in possession of either party have been served on that party that is to say:-

(a)

(b)

(c)

(d)

(e)

(f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal:

(g)

Provided that:-

(i)

(ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a) (b) and (f)

As it can be seen from that rule, a judge cannot dispense with the production of a decree in an appeal. In the absence of that decree, this appeal is incompetent. Accordingly, for lack of a decree, this appeal is hereby struck out with costs to the respondent.

Dated and delivered at Meru this 8th day of October 2009.

MARY KASANGO

JUDGE