



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 228 of 2008

GIBSON KARIITHI KAIRU.....1ST APPELLANT

EXPRESS KENYA LIMITED.....2ND APPELLANT

VERSUS

JOSEPH MUTIO PETER..... RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. Kiarie W. Kiarie (SPM) in Milimani CMCC No. 2950 of 2004 delivered on 7th April, 2008)

J U D G M E N T

1. This appeal arises from a suit which was filed at the Chief Magistrate's Court at Nairobi by Joseph Mutio Peter hereinafter referred to as the respondent. He had sued Gibson Kariithi Kairu and Express Kenya Ltd hereinafter referred to as the 1st and 2nd appellants. The respondent claimed general and special damages suffered by him as a result of injuries sustained by him in a road traffic accident in which he was knocked down by the 2nd appellant's motor vehicle registration No. KAL 325C (hereinafter referred to as the said vehicle). The respondent claimed that the accident was caused by the negligence of the 1st appellant or his driver or agent for which negligence the 2nd respondent is vicariously liable.
2. The appellants filed a joint defence in which the 1st appellant denied being the authorized driver of the said vehicle, and the 2nd appellant denied being the registered owner of the said vehicle. The appellants further denied all the particulars of negligence attributed to them, and contended that the accident was caused by the sole negligence of the respondent.
3. During the hearing of the suit, the appellants did not attend Court and hearing of the suit therefore proceeded ex parte. Two witnesses testified in support of the respondent's case. These were: the respondent and P.C. Patrick Njau. Briefly their evidence was as follows:
4. On 1st Feb 2004 at about 6 am the respondent was on his way to work. He was riding a bicycle off the

Outerring Road. A motor vehicle which was overtaking another vehicle veered off the road and hit the respondent. The respondent sustained a fracture on the right leg. He was also injured on the hips and ears. He was taken to Metropolitan Hospital and then to Kenyatta National Hospital where he was admitted for 6 days. The respondent produced the discharge summary from the hospital and an appointment card showing the follow up visits at the hospital.

5. The respondent testified that he paid a sum of Kshs.7,770/= at Kenyatta National Hospital. Later he was referred for a second operation and he went to Kijabe A.I.C. Hospital. He produced receipts totaling Kshs.8,635/=. He was later examined by Dr. Bhanji who prepared a medical report. The respondent produced Dr. Bhanji's report in evidence. The respondent further produced a police abstract report of the accident and a copy of the records from the Registrar of Motor Vehicle confirming the ownership of the said vehicle.

6. P.C Patrick Njau, who is an officer attached to Buruburu Traffic Office produced the O.B. report involving the said vehicle and the respondent. He testified that the driver of the said vehicle who was arrested, was charged and convicted of the offence of dangerous driving.

7. In his judgment, the trial Magistrate found the 1st appellant fully liable for the accident and the 2nd appellant vicariously liable. He awarded the respondent general damages of Kshs.750,000/=, Kshs.400,000/= for reconstructive surgery, 18,000 for physiotherapy, and Kshs.150,000/= for the removal of implants. He further awarded the respondent special damages of Kshs.22,505/=.

8. Being aggrieved by that judgment, the appellants have lodged this appeal raising 6 grounds as follows:

(i) The learned trial Magistrate erred in law and in fact in holding that the defendant was 100% liable in negligence.

(ii) The learned trial Magistrate erred in law and in fact in failing to hold that the plaintiff's negligence substantially contributed to the occurrence of the accident.

(iii) The learned trial Magistrate erred in law and in fact in awarding the sum of Kshs.750,000/= in general damages which figure is so inordinately high and represents an entirely erroneous estimate taking into account the injuries sustained by the plaintiff and existing precedents.

(iv) The learned trial Magistrate erred in law in allowing the production of medical report by a person other than the maker thereof without calling the maker and without any basis being laid for the production thereof.

(v) The learned trial Magistrate erred in law in relying on the said medical report to award the sum of Kshs.400,000/= for reconstructive surgery, Kshs.150,000/= for removal of implants and Kshs.18,000/= for physiotherapy when the said claims were not specifically pleaded and or proved at the trial.

(vi) The learned trial Magistrate erred in law and in fact in reaching a judgment that is wholly against the weight of the evidence.

9. Following an agreement by the parties, written submissions were filed by the parties' counsel and the Court is invited to determine the appeal based on those submissions.

10. For the appellants it was submitted that the trial Magistrate erred in awarding the sum of Kshs.750,000/= as general damages. It was contended that the amount was so inordinately high as to be an entirely erroneous estimate, taking into account the injuries sustained by the respondent. Relying on **G.G. Saint vs. Kenn Hogan [1953] 1 E.A.C.A. 85**, it was submitted that assessment of damages for personal injuries should accord with the general run of assessment made over a substantial time in comparable cases.

11. The Court was referred to **Ezra Ondari Okemwa vs. John Gecheha Gachungu, HCCC No. 69 of 2001**, where a sum of Kshs.350,000/= was awarded as general damages for injuries which included, multiple facial lacerations, fractures to both femur, fracture to the right hip joint, fracture to the humerus and radius nerve palsy on the left arm; and **Jairus Mwanza Kyove vs. James Karanja Nguthi HCCC No. 24 of 2000**, in which a sum of Kshs.300,000/= was awarded as general damages for injuries which included, fracture to the left femur, blunt injuries to the left waist and left thigh, and deep cut from the left knee to the hip.

12. It was further submitted that the trial Magistrate erred in allowing the production of the medical report by a person other than the maker without any basis being laid. It was submitted that Dr. Bhanji was not called to give evidence or produce medical report. Therefore the trial Magistrate was wrong in accepting his opinion. In support of that contention, the case of **David Musyimi Ndeti t/a Oasis Mineral Water Company & Another vs. Safepack Limited [2005] e.K.L.R.** was cited. Referring to the case of **Parvin Singh Dhalay vs. Republic, Nairobi Criminal Appeal No. 10 of 1997**, it was submitted that the trial Magistrate relied on the medical report without assigning any reasons as to why to believe the medical report.

13. It was submitted that the award of Kshs.400,000/= for reconstructive surgery, Kshs.150,000/= for removal of implants and Kshs.18,000/= for physiotherapy were claims which were neither pleaded nor proved during the trial, and should not have been awarded. The case of **Zacharia Waweru Thumbi vs. Samuel Thuku [2006] e KLR** was cited for the proposition that awarding damages for future medical expenses was irregular.

14. The Court was therefore urged to allow the appeal, review the evidence and re-assess the general damages awarded, and set aside the award in respect of future medical expenses, reconstructive surgery and removal of implants.

15. For the respondent, it was submitted that the injuries suffered by the respondent, were serious as was revealed by the evidence adduced by the respondent. It was submitted that the cases of **Ezra Ondari vs. John Gecheha Gachungu** (supra) and **Jairus Mwanza vs. James Karanja** (supra) were old cases and therefore not appropriate as a guide in assessment of quantum. It was submitted that the case of **Robert Kamaru Muchina vs. Esther Mwangi Munyiri HCCC No. 594 of 1998** which was cited to the trial Magistrate and where the plaintiff was awarded Kshs.750,000/= as general damages, provided an appropriate guide.

16. The Court was referred to **Butler vs. Butler KLR [1984] 225**, where it was held that in awarding damages, a Court should consider the general picture, and all the prevailing circumstances and effect of the injuries on the claimant including a fall in the value of money. And further, that the assessment of damages is more like an exercise of discretion by the trial Judge, and an appellate Court should therefore be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would. **Kemfro Africa Ltd t/a Meru Express Services & Another vs. A.M. Lubia & another KLR [1982 – 1988], 727** was also cited. It was

argued that the appellants had not shown anything to bring themselves within the realm of the principles set out in these cases.

17. With regard to admission of the report of Dr. Bhanji, it was submitted that a notice to admit documents was served on the appellant's counsel, and that no notice of non admission of documents having been filed pursuant to Order XII Rule 2, the appellants were deemed to have admitted the documents and it was thus not necessary to call the maker. With regard to the costs for reconstructive surgery, removal of implants and physiotherapy, it was submitted that the respondent did amend the pleadings and pleaded a sum of Kshs.568,000/= as future medical expenses. It was submitted that the amount was proved through the production of medical reports. **Civil Appeal No. 21 of 2002 Bakhrania & Another vs. Kagau** was cited, where the Court of Appeal declined to interfere with an award for future medical care contending that the assessment of quantum of damages was an exercise of discretion and that it was not shown that the trial Judge had acted on a wrong principle.

18. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions made by both counsel. With regard to liability, the respondent testified that the 2nd appellant's said vehicle veered off the road and knocked him whilst he was riding his bicycle on the side of the road. Evidence was also adduced to show that the 1st appellant, who was driving the 2nd appellant's motor vehicle at the material time, was tried and convicted of the offence of dangerous driving. Although the appellants alleged that the respondent was negligent, they did not call any evidence to substantiate their allegations. Thus the evidence before the trial Magistrate was sufficient to prove on a balance of probability that the accident was caused by the negligence of the 1st appellant for which 2nd respondent was vicariously liable. Appropriate evidence in regard to ownership of the motor vehicle was also available. I therefore uphold the finding of the trial Magistrate on the issue of liability.

19. The appeal is essentially against both liability and quantum. In considering the issue of award of damages, I am guided by **Butler vs. Butler** (supra) and **Kemfro Africa Limited t/a Meru Express Services vs. A.M. Lubia and Another** (Supra), which lay the principles that an appellate Court should be hesitant to interfere with an assessment of damages by a trial Court, unless it is established that the assessment is either based on wrong principles or is so excessive or so little as to be a wholly erroneous estimate.

20. In this case, the respondent in paragraph 4 of the amended pleadings claimed to have suffered the following injuries:

(i) a compound fracture right tibia and fibula leading to:

(a) a shortening of right leg by 3.5 cm

(b) a deformity at the fracture site of the right
lower leg

(c) a varus angulation of 20% at the fracture site
due to mal union of the fracture

(d) muscle wasting on the right leg

(ii) Lacerations over the pina of the right ear

(iii) Soft tissue injuries to the right chest

21. In his evidence the respondent produced receipts for treatment from Kenyatta National Hospital, the treatment note from Machakos General Hospital, X-ray reports, and discharge summary from Kenyatta National Hospital. All these confirmed that the respondent was injured and treated at the hospitals. For the extent of his injuries, the respondent relied on the report prepared by Dr. Bhanji. Although the appellants challenged the admission of this report, it is clear from the record of appeal that a notice to admit the medical report by Dr. N.H. Bhanji was served on the appellants' counsel by the respondent's counsel, under Order XII Rule 2 of the Civil Procedure Rules. The appellants having failed to serve a notice of non admission, it was deemed to have admitted the documents and therefore the production of documents without calling the maker was in order.

22. The report of Dr. Bhanji confirmed that the respondent suffered serious injuries which resulted in the shortening of his right leg by 3.5 cm. Dr. Bhanji recommended constructive surgery so as to restore the leg length, and a further surgery to remove metal implants. That meant that if the corrective surgery was undertaken, the respondent's permanent injury would be minimized. In awarding the sum of Kshs.750,000/=, the trial Magistrate did not take this fact into account. In the circumstances, the sum of Kshs.750,000/= awarded was inordinately high as it did not take into account that the permanent incapacity would be eliminated by the corrective surgery. Awarding the sum of Kshs.400,000/= for corrective surgery had the effect of double compensation to the respondent.

23. Accordingly, I find it justified to interfere with the award by reducing the general damages of Kshs.750,000/=. I set aside the award and substitute thereof an award of Kshs.400,000/= as general damages for pain and suffering. With regard to the award for reconstructive surgery, physiotherapy and removal of implants, these were in accordance with the doctor's recommendations and were also pleaded in the amended plaint. Appropriate evidence was also adduced in respect of the special damages. I find no justification to interfere with these awards and would therefore dismiss the appeal in that regard.

24. The upshot of the above is that I allow the appeal only to the limited extent of setting aside the award of general damages made by the trial Magistrate of Kshs.750,000/= and substitute thereof an award of Kshs.400,000/=. I award the respondent half the costs of this appeal.

Orders accordingly.

Dated and delivered this 18th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kairaria for the appellant

Mwangi for the respondent

Eric, court clerk