



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil

Appeal 22 of 2002

1. C. MARIGI WAICHINGA

2. F. N. KARIITHI

3. JAMES WAIGWA GACHIE.....
..... APPELLANTS

VERSUS

1. FAITH WANGUI MITHAMO

2. MARY NYAKINI WANDERI

3. NANCY NYATHAMA KIHARA

4. NANCY KABIA KIHARA

5. LYDIA WANGUI KOGI

6. NYOKABI GICHURU
... RESPONDENTS

J U D G M E N T

The appellants were initially sued by the Respondents in this court in which they claimed damages both general and special, for pain, suffering and loss of amenities suffered by them following a road traffic accident on 5th January, 1991 along Sagana-Makuyu road. On the 13th November, 1995 the case was however transferred from this court to the Principal Magistrate's Court at Nyeri where it was heard and determined. Having heard the testimony of the plaintiffs' as well as the defence, the learned magistrate, **Kaburu Bauni** as he then was, found for the plaintiff on both liability and damages. On liability he apportioned the defendants' contribution to the accident at 50%. On damages the learned magistrate took the view that the injuries to all the plaintiffs were not very much dissimilar and awarded the 1st, 2nd and

5th plaintiffs Ksh.300,000/= each whereas the 3rd and 4th plaintiffs were each awarded Ksh.250,000/=. Having taken into account the contributory negligence attributed to the Respondents as aforesaid the damages awarded translated into Kshs.150,000/= for the 1st, 2nd and 5th plaintiffs respectively and Kshs.125,000/= each for 3rd and 4th plaintiffs. The learned magistrate also awarded costs to the plaintiffs.

The defendants were aggrieved by the findings of the learned magistrate on both liability, contribution and quantum of damages hence preferred this appeal.

In the memorandum of appeal drawn and filed on behalf of the appellants by **Messrs Gachiri Kariuki & Co. Advocates**, the appellants fault the judgment of the learned magistrate on seven (7) grounds to wit that:

- 1. The learned magistrate erred in law and fact in finding the Defendants 50% liable or at all when there was no evidence to support this finding.**
- 2. The learned magistrate erred in law and fact in failing to appreciate each plaintiff's case individually on liability.**
- 3. The learned magistrate erred in law and fact in holding that the plaintiff's had proved a case of negligence against the Defendants.**
- 4. The learned magistrate erred in law and fact in awarding damages corporately without appreciating the fine distinction in the injuries suffered by every individual plaintiff.**
- 5. The learned magistrate erred in law and fact in failing to distinguish the issue of liability between the 1st, 2nd and 3rd Defendants on one hand as against the 3rd party on the other hand.**
- 6. The learned magistrate erred in law and fact in awarding damages of Kshs.300,000/= for 1st, 2nd and 5th plaintiffs and Kshs.250,000/= for 3rd and 4th plaintiffs which damages were so inordinately high as to represent a fair and reasonable award in the circumstances of the case.**
- 7. The learned magistrate erred in law and fact in failing to appreciate and analyse the injuries suffered by each individual respondent thereby failing to take into account relevant issue and as a result arriving at the wrong decision.**

The respondents' case in summary was that on the material day they had hired motor vehicle registration number KWY 396 Nissan matatu which was jointly owned by the 1st and 2nd appellants and was being driven by the 3rd appellant with their express authority, consent and or as their driver and or agent. They had similarly hired another motor vehicle registration number KUD 154 Nissan matatu as well. The purpose of hiring the two motor vehicles was ferry the respondents from Gatondo village in Nyeri District to Nairobi to collect and accompany a body of a relative who had passed on in Nairobi. It was their evidence that as they proceeded with their journey to Nairobi the drivers of the two motor vehicles were racing against each other on the highway trying to out do each other. At a place called '*kwa Muthike*' the driver of motor vehicle KUD 154 lost control and collided with an on-coming motor vehicle as he attempted to overtake a lorry which had stalled on the highway. The second motor vehicle (KWY 396) in which the majority of the respondents were and which was following closely behind hit motor vehicle KUD 154 from the rear and the respondents were seriously injured. Following the accident the respondents were rushed to Karatina District hospital and were treated. Later they were attended to by **Dr. Gakuru Kigotho** of Karatina medical centre who prepared their various medical reports that were tendered in evidence. Similarly following the accident the driver of motor vehicle KWY 396, the third appellant was arrested, charged and convicted for the traffic offence of failing to keep sufficient Distance and was fined 300/= by SRM's Court Thika in traffic case number 56 of 1991. A police Abstract was tendered in evidence in verification of this fact. It should be noted that the appellant took out third party proceedings in respect of the driver of motor vehicle registration number KUD 834 but it is not clear from the record the fate of those proceedings. It is not clear whether the third party proceedings were served

and whether the third party entered appearance or not.

In support of the appeal, **Mr. Ombongi** counsel for the appellant submitted that the learned magistrate erred in apportioning liability – upon 1st and 2nd defendants jointly and against the 3rd defendant individually at 50% each. Counsel submitted that as three motor vehicles were involved in the accident, liability should have been apportioned equally among the owners and drivers of the said three motor vehicles. With regard to General Damages counsel submitted that the general damages awarded were excessive. That the magistrate failed to distinguish or give reasons for the awards. That the injuries were not similar. Finally counsel submitted that the basis of the award of general damages, was not disclosed. On that basis he urged me to allow the appeal with costs.

Mr. Muthigani, learned counsel for the respondents opposed the appeal. Counsel submitted that on liability, the law is that where it is not clear from the evidence distinguishing between two parties as to blame worthiness or otherwise the court ought to apportion liability on an equal basis between the two drivers. The magistrate did so in the circumstances of this case. The driver and or owner of the lorry referred to as a third driver was not enjoined in the proceedings. The third proceedings were only taken out in respect of motor vehicle KUD 837 who was blamed for the accident to extent of 50%.

On quantum, counsel submitted that the magistrate found that the injuries sustained by the plaintiffs were not too much dissimilar and hence he awarded Kshs.300,000/- in respect of the 1st, 2nd and 5th plaintiffs and in respect of 3rd and 4th plaintiffs Kshs.250,000/=. Counsel submitted that the appellate court can only disturb an award of damages where they are inordinately high or low as to represent an entirely wrong estimate. Further the appellant should also demonstrate that the court in awarding the damages misapprehended evidence in some material aspects. Finally counsel submitted that the awards were made in the year 2002. Therefore any advantage that the respondents may have had with the damages awarded have been watered down through vagaries of inflation. Counsel in conclusion sought for the dismissal of the appeal with costs.

It has been said that an appeal to the first appellate court is by way of a retrial and the first appellate court is not bound to follow the trial court's findings of fact if it appears either that it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. See **Selle and Another v/s Associated motor Boat Company Limited & Another (1968) E.A. 123**. But in exercising that jurisdiction the appellate court must bear in mind the caution to be found in **Peters v/s The Sunday Post Limited (1958) E.A. 424** to the effect that:

“..... Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; If there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.....”

In considering this appeal I will bear the foregoing in mind. On the question of liability it is apparent that the appellants are only complaining about the apportionment. If I understood their submissions correctly, they are saying that yes we were to blame for the accident. However we were not solely to blame. There was motor vehicle KUD 854 which also bore blame for the accident. There was also the stationary lorry which too ought to have been blamed for the accident. Accordingly as all three motor vehicles were to blame for the accident and since it was difficult to apportion the extend to which each motor vehicle was to blame for the accident, the magistrate ought to have apportioned liability equally among the three motor vehicles That may well be true. However from the record, the Respondents only sued the appellants. The appellants in response attempted to take out 3rd party proceedings as against the owner and or driver of motor vehicle KUD 834. No such attempts were made in respect of the owner and or driver of the lorry. Further I note that though 3rd party proceedings were taken out in respect of the owner of KUD 834, it is not clear from the record whether they were ever prosecuted as no appearance was entered on their behalf. There is also no evidence of service on record nor were any third party directions given. Accordingly I can only assume that they were never served. That being the case they

were not parties to suit and accordingly the learned magistrate could not have held them liable for the accident to the extent of 50%. Further as the owner and or driver of the lorry was not enjoined in the proceedings, he cannot be held liable for the accident contributory or otherwise. In those circumstances the submission by learned counsel that the apportionment of liability should have a $\frac{1}{3}$ in respect of each vehicle involved cannot be sustained. Indeed the appellant should be grateful that the learned magistrate apportioned liability at 50% and left the other 50% to be born by the owners of motor vehicles who were not parties to the suit. Having not enjoined the owners/drivers of the other motor vehicles in the suit the possibility that they could solely have carried the entire burden on liability cannot be gainsaid. In those circumstances the appeal on liability and in particular on the question of apportionment of liability is unmerited and is accordingly dismissed.

On quantum of damages, it has been stated repeatedly by the court of appeal that an appellate court will only disturb an award of damages when the trial court has taken into account a factor it ought not to have or failed to take into account something it ought to have or if the award is so high or low that it amounts to an erroneous estimate. See for instance **Kitavi v/s Coastal Bottlers Limited, (1985) KLR 470**. In the circumstances of this case, the learned magistrate found that:

“.....The injuries to all of them are not very much dissimilar”

However he then proceeded to award the 1st, 2nd and 5th plaintiffs Kshs.300,000/= each and the 3rd and 4th plaintiffs each Kshs.250,000/=. In my view this was erroneous. If the injuries sustained by both plaintiffs were not very much dissimilar, they should have attracted similar awards. What was the rationale of having other plaintiffs get Kshs.300,000/= whereas others got Kshs.250,000/= ? The learned magistrate did not proffer any reason for the different treatment of the Respondents. In the circumstances it would appear that the magistrate must have taken into account factors he ought not to have. The injuries sustained by the plaintiffs were soft tissue injuries. Some of the plaintiffs sustained such injuries to the head (skull) and eyes and others sustained them on the other parts of the body. Injuries resultant from motor vehicle accidents and indeed other accidents are rarely similar. They all depend on the impact, where the injured was sitting at the time of the accident and his/her body make up. The injuries sustained herein were however all classified as soft tissue injuries. I have looked at the medical reports of each respondent tendered in evidence and although the injuries sustained by the respondents varied in seriousness from one respondent to the other, they were nonetheless soft tissue injuries and were not very much dissimilar as correctly held by the learned magistrate. It would appear that the learned magistrate having considered that the injuries sustained were soft tissue injuries approached the award of damages globally. I do not see anything wrong with that; after all they were all soft tissue injuries.

Having perused the medical reports and respective counsels' submissions on quantum and the authorities cited I am afraid that I have come to the conclusion that the awards were so high as to amount to an erroneous estimate. The injuries in the authorities cited by the Respondent's counsel in support of his submissions on quantum were extremely severe involving fractures, loss of consciousness, loss of teeth etc. On the other hand, the injuries sustained in the authorities cited by the appellants in support of their case were less severe. Indeed they were extremely minor soft tissue injuries. A round about this period the award of damages for soft tissue injuries ranged from Kshs.100,000/= to about Kshs.200,000/=. If my reading of the authorities cited by both counsel is anything to go by. Doing the best I can in the circumstances I would set aside the awards of damages to each Respondent granted by the magistrate substitute therefor with an award Kshs.200,000/= as general damages to each and every respondent respectively. In so doing, I have been guided by the following authorities which I consider appropriate and relevant in the circumstances of this case:-

(1) John Njuguna Mungai v/s Posiden Invest Co. Ltd – H.C.C.C. No. 4801 of 1989 Nbi (unreported)

(2) Nancy Nyambura Irungu & Another v/s Michael Njoroge H.C.C.C. No. 4303 of 1989 (unreported)

(3) Martin Adungosi v/s Ibrahim Muhawa Abdalla Msa H.C.C.C No. 681 of 1987 (unreported).

These authorities are all from the High Court and therefore of persuasive authority only. In arriving at these awards I have factored in incidents of inflation since the decisions were made.

In the result and as the defendants were held to be liable to the extent of 50%, each respondent in the end is entitled to Kshs.100,000/= to be born by the Defendants jointly and severally. The same to attract interest from the date of judgment in the subordinate court. The appellants did not ask for costs both in their memorandum of appeal and in their submissions before me and though they have partially succeeded in the appeal, I will make no order as to costs in this appeal.

Dated and delivered at Nyeri this 15th October 2007

M S. A. MAKHANDIA

JUDGE