REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 325 of 2003

(From the original proceedings and judgment of the Senior Resident Magistrate at Milimani Commercial Courts Nairobi in her C.M.C.C. No. 2581 of 2001 delivered on 17/10.2002)

JOSPHAT KYALO NZUMA……...……APPELLANT

VERSUS

VIOLET KANYUA FRANCIS…….……RESPONDENT

JUDGMENT

The facts which gave rise to this appeal briefly may be stated. On or about the 11th March 1999 at about 6.10 p.m the appellant was lawfully crossing Enterprise Road Nairobi near Kuguru Food Complex when the Respondent drove her motor vehicle registration No. KAH 451K so carelessly, recklessly and or negligently that it swerved off its lane and violently hit the appellant who thereby sustained severe injuries to wit compound fractures of the tibia and fibula bones of the right leg. The appellant filed a suit against the respondent in the Chief Magistrate's Court at Nairobi being Civil Suit No. 2581 of 2001.

Liability was admitted and a consent order was recorded in the following terms:-

By consent judgment on liability be entered as follows: Plaintiff to bear 35% and the defendant to bear 65%. This was on 25th June 2002. And on 26th August 2002 a further consent was recorded in the following terms:

By consent written submissions be filed together with medical report on 2nd September 2002. In his submissions counsel for the appellant suggested an award of a figure of Shs. 500,000/= an adequate compensation for the injuries sustained by the appellant while counsel for the respondent suggested a figure of Shs. 100,000 as adequate compensation.

The learned trial magistrate on considering the submissions by both counsel and the authorities cited awarded a figure of Shs. 90,000/= and the judgment is silent on the issue of interest but the learned trial magistrate ordered that costs be in the cause.

The appellant being dissatisfied with the said award filed this appeal. Although the Memorandum of Appeal contained 6 grounds the appellant condensed them into only three under the following heads:

(1) Quantum

(2) Costs

(3) Interest

Mr. Nzamba Kitonga Counsel for the appellant submitted that the appellant having sustained compound fracture of both libia and fibula of the right leg as contained in his medical report an award of Shs. 90,000/= was manifestly low that it amounted to miscarriage of justice. Mr. Kitonga further submitted that in view of the fact that the appellant sustained serious injuries the award by the learned trial magistrate was completely erroneous and this court is entitled to interfere and award a more realistic compensation

The second issue raised in this appeal is the issue of costs. The trial magistrate in her judgment ordered that costs to be in the cause. Mr. Kitonga submitted that this was contrary to the provisions of Section 27 of the Civil Procedure Act which provides that costs shall follow the event unless the court or judge shall for good reason otherwise order. He further submitted that an order that costs be in the cause is normally given during interlocutory proceedings meaning that at the end of the suit the issue of costs will be dealt with but here there was no pending suit since the suit had been concluded. He submitted that this was another misdirection and urged the court to interfere and award costs to the successful litigant. The last issue raised in the appeal was the issue of interest. Mr. Kitonga also submitted that the provisions of Section 26 of the Civil Procedure Act are very clear on this issue of interest. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable.

Mr. Mutie Counsel for the respondent is opposing the appeal submitted that the appeal should be dismissed in that all the issues raised in the appeal were adequately considered by the trial magistrate in her judgment. He submitted that for the court to interfere with the decision of the lower court it must be guided by established principles namely (1) That the trial magistrate acted on wrong principles. (2) The amount awarded is too high or too low to make it an erroneous estimate to which the plaintiff is entitled. (3) The court can only intervene if the award for general damages differed highly with the comparable authorities.

As submitted by Mr. Kitonga Counsel for the appellant this appeal is condensed into three grounds.

The first being the issue of quantum to damages. For this court to interfere with the award of damages awarded by the lower court it must be satisfied that the trial magistrate acted upon a wrong principle of law or the amount awarded as damages is so high or so very small as to make it an entirely erroneous estimate of the damages to which the appellant is entitled. Moreover where an award of general damages differs widely from the awards given in comparable cases it might be right for the appellate court to alter it. In the instant appeal the appellant had sustained a fracture of the libia and fibula. This is not a minor injury by all standards. Counsel for the appellant in his submissions suggested a figure of Shs. 500,000/= for general damages while counsel for the respondent suggested a figure of Shs. 100,000/= Surprisingly even when the respondent was willing to give Shs. 100,000 the trial magistrate reduced it to Shs. 90,000/= and did not give any explanation as to why he did not give even the amount the respondent was willing to give. Having considered the injuries sustained by the appellant and the awards given in comparable injuries in the cited authorities it is my considered opinion that the damages awarded were not consumerate with the injuries sustained by the appellant. It is too law and merits interference. But as was stated by the Court of Appeal in the case of **Cecilia W. Mwangi and Another V. Ruth W. Mwangi CA No. 251 of 1996** (unreported) awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.

The awards must be reasonable and must be assessed with moderation taking into account the injuries suffered by the plaintiff. Lord Morris of Borth-Gest said in the case of **West (H) Son Ltd Vs. Shephard 1964 AC 326 at page 345**

"**But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endevour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."**

I am satisfied that the damages awarded are too low and attract intervention.

The next ground of appeal was failure by the trial magistrate to award costs. The complaint in this ground is that the trial magistrate erred in law in ordering that costs be in the cause. It was contended by Mr. Kitonga that as the appellant was successful at the trial, he should have been awarded costs.

Before considering the merit of this ground it is convenient to refer briefly to the law applicable. Section 27 of the Civil Procedure Act while giving the court a wide discretion as to costs of a suit, contains the following proviso:

"**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."**

In Devian Manji Duttani vs. Haridas Kahda Davida [1949] 16 EACA 36 the Court of Appeal for East Africa held that a successful defendant can only be deprived of his costs when it is shown that his conduct either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been averted. In that case the following passage from the judgment of Lord Atkinson in Donald Compbel V. Pollak [1982] AC 732 at 813 was quoted with approval:

"**It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried the case that discretion is a judicial discretion, and if it be so its exercise must be based on facts …… . if however, there be, in fact, some grounds to support the exercise by the judge of the discretion he purports to exercise the question of sufficiency of those grounds for this purpose is entirely a matter for the judge to decide and the Curt of Appeal would not interfere with his discretion in that instance."**

Thus where a trial court has exercised its discretion in costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its discretion appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the race.

Here the trial magistrate having decided the suit in favour of the Plaintiff/Appellant departed from the rule that costs shall follow the event and did not award costs of the suit to the Appellant.

This was a clear departure from the rule for which no reason was given by the trial magistrate. With due respect, I can find no ground for depriving the successful plaintiff of his costs in this matter and in the absence of good reason he is entitled to them. Ground two accordingly succeeds.

The complaint in ground three is that the learned trial magistrate erred in law in not awarding the appellant interest on the decretal sum. Before I proceed to consider this ground convenient to refer to the applicable law namely the provisions of Section 26 of the Civil Procedure Act Cap. 21 Laws of Kenya

provides:-

"26(i) where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principle sum.

In this suit the appellant's decree was for the payment of money and it follows therefore that she was entitled to interest and usually the interest awardable by the courts is at courts rates from the date of judgment until payment in full. The learned trial magistrate did not give any reason why she deprived the successful litigant of interest. Where the court gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong.

I find no ground for depriving the successful plaintiff of his interest on the amount as general damages and in the absence of good reason he is entitled to it. Ground three accordingly succeeds.

The upshot of all these is that this appeal is allowed and the damages awarded in the sum of Shs. 90,000/= are increased to Shs. 140,000/= reduced by 35% as the defendant's liability was 65%. In the end result there will be judgment for the appellant as follows:

General damages - Shs. 91,000/= nett.

with interest at court rates from 17.2.2002.

I also order that the Respondent do pay to the appellant costs of this appeal as well as costs in the lower court.

Dated and delivered at Nairobi this 22nd day November of 2007.

J. L. A. OSIEMO

JUDGE