REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 900 of 2003

DONALD MWANGI & WAGUTHU FARMERS LTD…….…… PLAINTIFFS

VERSUS

VIRGINIA WAITHIRA MUNGAI……..... RESPONDENT

J U D G M E N T

On 9/12/03 the appellants moved to this Court, by way of an appeal against the Judgment of the Resident Magistrate, at Kiambu, in Civil Case No. 95 of 2000, dated 12/11/2003, on the following grounds of appeal:

1. That Learned Magistrate erred in law in failing to consider the appellant's submissions;

2. The Learned Magistrate erred in law in failing to analyse the two medical reports before him;

3. The lower court erred in law in awarding an exorbitantly high award – not withstanding that the Plaintiff had completely recovered from the injuries.

4. The lower court erred in law in awarding KShs.100,000/- as general damages for pain and suffering and loss of amenities when no evidence of pain, suffering, and loss of amenities was produced before him;

5. The trial magistrate erred in law in awarding KShs.100,000/- for each of the Plaintiffs in SPMCC 94/00, 95/00, 96/00 and 97/00 when no two Plaintiffs had sustained similar injuries.

6. The trial Magistrate erred in law and in fact in refusing to be guided by recent court awards thus arriving at unconscionably high awards.

7. The trial magistrate failed to exercise his discretion judicially thus arriving at an unfair and wrong decision.

8. The trial magistrate demonstrated a bias against the Defendant/Appellants, thus ignoring the evidence before him.

9. The trial magistrate's findings were against the weight of the evidence.

Wherefore the appellants pray that the appeal be allowed with costs, the judgment of the lower court be set aside, and the case be retried before a different court.

I have carefully gone through the pleadings and the written submissions by the two learned counsels – Ms Ndungu, for the appellants, and Mr. Mumo, for the Respondent – in light of the nine (9) grounds of appeal.

My considered opinion is that although there are nine (9) grounds of appeal, the gist in all those grounds is the assessment of general damages. Indeed, apart from the contention in the appellant's submission that the giving of 28 days right of appeal to the appellant, as opposed to 30 days,as per Section 79G of the Civil Procedure Act, Cap. 21, Laws of Kenya, violated the appellant's constitutional right, there is no other issue raised by the grounds of appeal. And while on this, it is my humble opinion that I need not spend any time on the rather misplaced constitutional point as I do not see its relevance to the gist of the appeal, nor any prejudice occasioned by the lessened right of appeal from 30 to 28 days. Such an issue may, and will be, considered in an appropriate case, not this one.

Turning to each of the grounds of appeal, as framed and submitted upon by the appellant's learned counsel, ground No. 1 is not borne out by the record. For example, learned counsel submitted that the trial magistrate did not consider at all, the appellant's submissions, and in support of that, the appellant's counsel contended that the Judgment does not mention such submissions; nor the authorities cited. My humble view, based on the record of the lower court, is that the above contention is not quite correct, nor wholly truthful. The Learned Magistrate mentions the authority of **NBI. HCCC NO. 3838 OF 1990 – CONSTANCO M. THIONGO & ANOTHER VS. THE ATTORNEY GENERAL**.

I agree that the Trial Magistrate was economical with his words in his judgment, and that the same does not analyse the authorities cited to him. Indeed, the judgment is very brief. However, brevity does not necessarily mean that the submissions were not considered or taken into account.

I have closely read the two authorities alleged to have been overlooked or un-analysed by the lower court. The position seems to me to be that in the two cases the award for general damages averaged K.Shs.60,000/- and the period of hospitalization and the injuries in those cases differed substantially from the present case. For instance, in the **ROSEMARY WANGARI VS. PETER KAGIRI K. KARANJA HCCC NO. 4337/1998,** the injuries were mainly contusion to the right leg, strain on the neck, and the outpatient attendance to hospital only 1 ½ months. The award – for general damages for soft tissue injuries was K.Shs.60,000/-.

In the case before me, the medical reports show that the Respondent was incapacitated – hospitalized – for 4 weeks; the pain was nagging, even three years after the injuries. Two points must be noted, and stressed here. In the present case, whereas the quontum of general damages was K.Shs.100,000/- by consent of the parties, liability had been apportioned at 80% to 20%, for the appellant and against the Respondent, respectively. Effectively therefore, the award for general damages for the Respondent is only K.Shs.80,000/- given the above apportionment of liability.

In my view, to term such an award exorbitantly high, when the comparables cited were so different on the degree of injuries, not to mention the passage of time since those judgments were handed down, and the changes in the cost of living index since then, is a misuse of those words.

Besides, the Respondent's counsel had also cited equally relevant authorities, such as **NBI HCCC NO. 3887 of 1989 – BENSON NELSON MUSALILI VS. ATENUS KIPTEGEN & ANOTHER, decided in 1993; and NBI HCCC NO. 4303 OF 1987 – NANCY NYAMBURA IRUNGU & 3 OTHERS VS. MICHAEL NJOROGE** both of which involved soft tissue injuries and where, for general damages, K.Shs.150,000/- had been awarded.

Accordingly, I find no reason, good or otherwise, to interfere with the Trial Magistrate's award for the general damages in the case before me. I hasten to add that it is trite law that no two cases are exactly identical, and as was held in the Court of Appeal decision in **GAKERE V. NGIGI, Civil Appeal No. 36**

of 1980 [1981] KLR 309 at 317; "the appellant has to show that the lower court acted on any wrong principle, that the trial magistrate (or Judge) misapprehended the relevant facts ,or that the award was so high as to be entirely erroneous."

The appellant has not shown any ground that would invite this court to interfere or reduce the award by the Learned Trial Magistrate.

I believe that grounds of appeal Nos. 4; 6; 7; are subsumed in the findings; conclusions, and holding above. However, ground of appeal No. 4 alleges that there was no evidence of pain; suffering and or loss of amenities, upon which the lower court could found the award of general damages.

I have difficulty in accepting this line of challenge and the submissions by Learned Counsel for the appellant because such submissions are an affront to the medical reports on the injuries sustained by the Respondent.

The Report by Dr. J.N. Muiru states, categorically, that the Respondent was given tetanus vaccine; that nine months after the accident, the Respondent still complained of pain of the right leg; that the Respondent experienced pain and suffering from the injuries sustained; she was incapacitated for a duration of 4 weeks; and that the pain was nagging but should subside with time.

More than three years later, the second Doctor, Dr. Ikonya J.M, on 8/12/2001, stated in his medical Report, that the Respondent still complained of painful neck; headache and backache; and had painful neck on movement. Dr. Ikonya confirmed, and concurred, with the earlier medical Report, by Dr. Muiru, in all aspects.

On the basis of the above Medical Reports, I find ground of appeal No. 4 not only lacking in truthfulness, but also hollow of substance and hypocritical. I dismiss the same as lacking in substance.

I have decided to deal with ground No. 5 when dealing with the respective appeal files relevant to each particular appellant in Civil Appeal Nos. 901/03; 902/03; and 903/03.

I consider it prudent to observe, with respect to ground of appeal No. 3, that recovery from the injuries, by the Respondent, does not in any way mean that the Respondent's pain, suffering and loss of amenities she experienced are obterated and forgotten. And that is what the general damages were awarded for.

I have already held that the damages are in no way exorbitant,under the circumstances.

Ground of Appeal No. 8 seems to me like a shot in the dark. I have gone through the entire record in the lower court's file, and read, and re-read the submissions by learned counsel for the appellants and confess my inability to discern any element of bias by the lower court against the appellants. This is because BLACK'S LAW DICTIONARY, Eighth edition, 2004, defines actual bias as "**prejudice that a judge, juror, witness or other person has against some person or relevant subject."**

Then the same Dictionary defines Judicial bias, to mean:

"**a Judge's [or Magistrate's] bias towards one or more of the parties to a case over which the Judge [or Magistrate] presides."**

There is neither evidence, nor submission by the learned counsel for the appellant, to suggest, much less support an allegation of bias in the case before me.

All in all, and for the above reasons, the appeal herein is dismissed with costs to the Respondent, and against the appellants.

DATED and delivered in Nairobi this 18th Day of January, 2006.

O.K. MUTUNGI

JUDGE