REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 94 of 2004

JOHN MUTISYA NGILE …….....…….....……...APPELANT

VERSUS

NTHAMBI PAUL MUTISYA (A minor suing through

her father and next friend, PAUL MBITHI …….....RESPONDENT

(From the judgment and decree of W.M. Muiruri, C.M. in Machakos CMCC No. 895 of 2002).

JUDGEMENT

The respondent herein has a judgment of the lower court of Kshs. 430,000 for pain and suffering and loss of amenities.

The appellant appeals mainly because he believes that the award is much too excessive. There are other complaints but he is mainly concerned with excessiveness of the award.

First the appellant says that judgement was not lawfully delivered because it was not read in the open court. Secondly he complains that the judgement which was supposed to be delivered on 1.9.2004 was adjourned to 29.9.2004 and yet it was delivered on 8.9.2004 in the absence of the appellant/defendant.

I have examined the records. On 21.7.2004 in the presence of both counsel for plaintiff and defendant, the court fixed the date of judgment as 1.9.2004. Nothing is recorded for/on 1.9.2004. The next entry appears on 8.9.2004 when the judgment was read. The appellant claims that on 1.9.2004 the parties were informed that Judgment would be delivered on 29.9.04. This information is also not on the record.

The appellant did not seek any remedy in case this court confirmed that the judgement delivery was irregular, which indeed formed the No.1 to 4 grounds of appeal. In their written submissions Mr. Kamau & Company advocates for the appellants stressed the irregularities in the process of delivering judgement but appeared to shift attention to the excessive award. Their message, as this court picked it, is that their main complaint was on quantum.

I have carefully considered the mode of delivering the subject judgement and I have no hesitation in declaring that the record does not confirm the regularity of judgement delivery. With the same breath however, I do hold that the irregularity if any, did not got to the root or substance of the judgment itself. This follows the fact that a consent judgment had been filed on the issue of liability and all that remained to be announced was the quantum which the court pronounced as Kshs.430,000/= and which forms the major complaint in this appeal.

It is with relief that this court notes that this appeal was filed in good time and is properly before the court. Accordingly little harm arose from the hazy and inconclusive date and delivery of the judgement.

In their final submission, Kamau & Company prayed that this appeal be allowed, lower court judgement be set a side as it is manifestly excessive, and the court awards an amount of Kshs. 70,000/= to 100,000/= for general damages for pain and suffering and loss of amenities. That is the issue this court now turns to consider.

The medical evidence which influenced the trial court came from two doctors – Dr. Wambugu P.M. and Dr. Osumba J.O. In his Medico-legal report dated 3.4.03 Dr. Wambugu established the following as the injuries suffered by the claimant as a result of the relevant motor accident-

1. Traumatic extraction of upper left incisor tooth.

2. Blunt abdominal trauma associated with trauma to the liver and gall bladder.

3. Laceration wound (on) perinea region.

4. Bruises (on) lower limbs.

In his final opinion and prognosis Doctor Wambugu stated the claimant:-

"**Nthambi's injuries are consistent with those due to severe blunt trauma as may have occurred during the said accident. She suffered multiple soft tissue as well as dental and visceral injuries. These were appropriately managed and adequate recovery has occurred. The loss of the permanent upper left incisor tooth requires to be replaced with denture. This will cost about Kshs. 8,000/=. The abdominal scar is prominent and of cosmetic significance. She is predisposed to intestinal obstruction at least once in her life time as a complication of the exploratory laparatomy done. I do not hesitate to award her 8% as the degree of partial permanent incapacitation."**

Several issues can be noted from the doctors report as to the nature of the injuries suffered by the claimant – They include –

a) Loss of a tooth (incisor).

b) Soft tissue and visceral injuries.

The doctor declared that the injuries were well taken care of and recovery was adequate. Replacement of denture would be necessary but it would need Kshs. 8,000/=. The doctor was clear however that the patient will expect an intestinal obstruction for which he assessed it as a permanent incapacity which, with the dental injury would be assessed at 8% permanent incapacity. The scars on the patient's abdomen, to the doctor, were only of cosmetic concern. The court understood this to mean that they were merely ugly.

Dr. Osumba almost a year later gave his report. It confirmed what Dr. Wambugu had said but he went further and estimated what the intestinal obstruction would cost to put right in the year 2004 May, i.e. Kshs. 80,000/=.

The injuries above were termed minor soft – tissue injuries which according to the appellant, should have attracted only about Kshs. 70,000/= to 100,000/= general damages. Would that be the correct legal position?

I am aware that this being a first appeal, this court has a duty to re-evaluate the evidence, assess it and make its own conclusions, keeping in mind the fact that it has neither seen nor heard the witnesses (see Selle vs Associated Motor Boat Company Ltd [1968] E.A. 123, 126). That is why I have tried to record the medical evidence in detail to give the perspective upon which the alleged excessiveness of the award

should be considered.

I am also aware that in assessment of damages, the general method of approach is that comparable injuries should as far as possible, be compensated by comparable awards with a view to maintaining a similar level of awards in similar cases. Such an approach in my view makes sense, in that it continues to hold and maintain such system of making awards credible and systematic. It also sets down standards not only of awards but also of the approach to such awards, thus eventually maintaining certainty in our law.

Furthermore, I am conscious of the fact that in making compensational awards, in physical injury cases, the court does not nor cannot thereby renew the physical frame of the claimant who had been injured! All that the judges or courts try to do is to award sums which must be regarded as giving reasonable, but moderate compensation. The plaintiff cannot possibly be fully compensated for all the loss and detriment he/she has suffered. The court cannot give him/her enough to maintain him/her for life. All that the courts do is to give what it considers fair compensation. It was therefore stated by Lord Denning in Lim Poh Choo vs Health Authority [1978] 1 All ER, 332 at 341 thus

" … **I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service for the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation".**

Finally in this case before me this court is on appeal being asked to reduce the award of damages made by the lower court. It is now settled that an appellate court may only interfere with the award when-

" … **it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

Per Law, J.A. in **Butt** vrs **Khan,** C.A. No. 40 of 1977 and followed frequently by the Court of Appeal in subsequent cases e.g. **Shabani** vs **City Council of Nairobi & Another** C.A. No. 52 of 1984, **Mariga** vs **Musila,** C.A. No. 66 of 1982 and 88 of 1983.

Can it be said then that the award in this case calls for interference by this court? We will now within the principles above discussed, find out how the trial court arrived at the figure of Kshs. 430,000/=, the subject of complaint in this appeal.

Kamau & Company advocates argued that the legal authorities of **Japheth Nduma Murage vs David Kamande Ndunge & Central Drugs Store** (Nairobi HCCC No. 101 of 1996) and **John Moochi** vs **Mabati Rolling Mills Ltd**, MSA (Mombasa HCCC No. 229 of 1998), which are the cases the trial court relied on are misleading and distinguishable. The counsel argued that in each of the above two cases the injuries are more serious than in our case. They pointed out that in first of the above cases, the plaintiff had a serious injury to the chest and raptured viscus in the abdomen. That in the second case the plaintiff had a fracture of the pelvis, a rapture of the bladder and burns on the left arm. Accordingly, Kamau & Company argued, the two cases could not be grouped in the same class with this case before the court because the injuries here they argued, are not as serious.

On the other hand the respondent argued that the cases that the appellant was asking the court to rely on, did not reflect the seriousness of the plaintiff's injuries. For example the case of **Ruth Mbithi Mutua** vs **Robert Mutiso Ngundo-**Nairobi HCCC NO. 1977 of 1987 in which the plaintiff had multiple bruises on right shoulder, chest, lower back, pelvis and lacerations on the hand the court had awarded Kshs. 70,000/=. The second was **Peter Kimanthi Kimani** vs **Paul Kamau Mwaniki & Another** –Nairobi HCCC No. 2919 of 1988 in which the plaintiff's injuries were bruises on the head, neck, dorsal spine and

left leg and in which the court awarded Kshs.60,000/=.

I have carefully considered all these arguments and the facts relating to the issues. In my opinion, the only serious injury incurred by the plaintiff in the case before the court is the abdominal injury. This is said to have created a potential likelihood of adhehisive intestinal obstruction sometime in life. Otherwise all injuries, except the removal of the incisor tooth, were soft tissue and fully recovered, scars apart. The incisor would be taken care of by denture costing Kshs. 8000/= while the intestinal obstruction if it occurs, would costs Kshs. 80,000/= to adjust. Had the plaintiff in this case sought compensation for the lost tooth he might have been awarded, say Kshs. 60,000/=, by the authority of **George Mugambi Githinji** vs **F.K. Gatheka & Another** (Nairobi HCCC No.4038 of 1993).

Taking into account the above injuries suffered by the plaintiff which included-

a) Loss of an incisor tooth,

b) Abdominal injury likely to cause an obstruction sometimes in life.

c) Laceration wound on the perinea region and

d) Some bruises on the lower limbs, a reasonable court would give, say from Kshs. 120,000/= to Kshs. 210,000/= with an average at about Kshs. 180,000/=.

It is my view therefore that the cases taken into account and relied on by the trial court were of a higher and more serious class, which accordingly led him to arrive at a far higher award than he should have. As earlier stated the approach should be that similar or closely similar injuries should attract similar awards. Secondly, too high awards should be avoided for reasons earlier discussed which may lead spiral higher insurance premiums, higher taxes and higher costs of maintaining the health and social systems in society. And finally the award of Kshs. 340,000/= is so inordinately high that it cannot represent a fair or correct estimate. The trial magistrate in my view proceeded on wrong principles in failing to keep to similar cases, in failing to take into account the ill effects of very high awards, and in thinking that the court can really fully compensate a party who has been injured in a road accident by awarding high award.

For the above reasons, this court is of the view that this is a suitable case to interfere with the award made by the lower court and does so by setting aside the award of Kshs. 340,000/= and replacing it with one of Kshs. 200,000/= with costs and interests apportioned in the same ratio. Orders accordingly.

Dated and delivered at Machakos this **3rd** day of November, 2006

D.A.ONYANCHA

JUDGE