

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 42 of 1997

FESTO LANGAT.....1ST APPELLANT

KIPKORIR SIGILAI.....2ND APPELLANT

VERSUS

ISMAIL JAMAL ABDULHAI.....RESPONDENT

JUDGMENT

The respondent, Ismail Jamal Abdulahi filed suit in the lower court against the appellants, Festo Langat and Kipkorir Sigilai seeking to be paid damages, both special and general, on account of the injuries that he alleged to have sustained when motor vehicles registration number KWP 571 and motor vehicle registration number KZB 133 Isuzu lorry collided on the 21st of December 1991 along Nakuru-Eldoret road. The respondent pleaded that the appellants were solely responsible for the said accident and therefore they were liable to him in tort. The appellants filed a defence. They denied causing the said accident; instead the appellants blamed the respondent for causing the said accident. The appellants denied that the respondent sustained the injuries that he had particularised in his plaint and put him to strict proof thereof. After hearing the suit, the lower court found in favour of the respondent. It held the appellant solely liable for causing the said accident. It awarded Kshs 200,000/= general damages and Kshs 3,380/= special damages to the plaintiff. It also ordered the appellants to pay the costs of the suit.

The appellants being aggrieved by the said judgment of the lower court have appealed to this court. In their memorandum of appeal, the appellants have faulted the decision of the lower court on basically three grounds; The appellants were aggrieved that the trial magistrate had found in favour of the respondent on pleadings that did not accord with the evidence adduced by the respondent in court. The appellants were further aggrieved that the trial magistrate had found in favour of the respondent against the weight of evidence adduced by the appellants and finally, the appellants were aggrieved that the trial court had made an award in damages that was too excessive in the circumstances putting into consideration the injuries that the appellant had sustained.

I heard the submissions made by Mr Mahida, Learned Counsel for the appellants and the response thereto by Mrs Omwenyo, Learned Counsel for the respondent. As the first appellate court, this court is mandated to re-evaluate and reconsider the evidence adduced by the parties to this appeal before the trial magistrate's court and reach its own independent determination based on the said evidence. In reaching its determination, the appellate court has always to put in mind that it neither saw nor heard the witnesses as they testified. This court cannot therefore be expected to make any comment as to the demeanour of the said witnesses.

In his plaint, the respondent pleaded that the 2nd appellant, who was driving motor vehicle registration number KZB 133, so negligently drove the said motor vehicle that it caused the same to collide with motor vehicle registration number KWP 571 as a result of which the respondent sustained serious injuries. In the particulars of negligence, the respondent pleaded, *inter alia*, that the 2nd appellant had driven motor vehicle registration number KZB 133 without due care and attention and consequently lost control of it causing it to collide with motor vehicle registration number KWP 571.

In his testimony before the trial magistrate, the respondent testified that on the material day, he had stopped motor vehicle registration number KWP (*which he was driving*) completely of the road on the left side as one faces Kisumu at Total Trading Centre. He wanted to take refreshments. As he was about to

alight from the said motor vehicle, he heard people screaming, and when he looked up, he saw motor vehicle KZB 133, Isuzu lorry, being driven towards his direction at a very high speed. The said motor vehicle had apparently lost control. The said motor vehicle crossed from its lane towards the lane where the respondent had parked his motor vehicle and as a consequent of which it collided with the motor vehicle which the respondent had just shortly before parked. The respondent was injured in collision. He lost consciousness and when he came to, he was already admitted in hospital.

When the 2nd appellant testified in support of the defence's case, he basically confirmed the evidence of the respondent. He admitted that as he was driving the said motor vehicle, he lost control of the same and collided with motor vehicle registration number KWP 571 driven by the respondent which had been parked off the road. He admitted that his efforts to control the said motor vehicle or swerve to avoid the said accident were in vain. It is on the basis of this evidence that the trial court found the appellants solely liable for the said accident.

Having heard the submissions made by the appellant, I find no reason to fault the decision of the trial magistrate holding the appellants liable for the said accident. The fact that the said motor vehicle could have collided with other motor vehicles before finally colliding with the motor vehicle which the respondent had just parked, is no ground for this court to reach a different conclusion from that of the trial magistrate. Upon close perusal of the plaint filed by the respondent, I do hold that the evidence adduced by the respondent was supported by the averments made in the plaint. The respondent pleaded that the motor vehicle driven by the 2nd appellant collided with the motor vehicle which he had just parked as a consequence of which he was injured. That aspect of the respondent's evidence was confirmed by the 2nd appellant's testimony before the trial court. In any event, the High Court heard a case against the appellants herein in Nakuru **HCCC No. 456 of 1992, Mohammed Nuh Hussein –vs- Festo Langat and Kipkorir Sigilai** where it was revealed that, the 2nd appellant had been charged and convicted on his own plea of guilty of the offence of careless driving contrary to Section 49(1) of the Traffic Act in Nakuru **CMCTR.C No. 3 of 1992 Republic –vs- Kipkorir Arap Sigilai**. I therefore do not find any merit with the grounds of appeal by the appellants challenging the trial magistrate's finding against them on liability. Their appeal against liability is therefore dismissed.

*As regard the assessment of damages by the trial magistrate, this court is aware of its duty as regards interfering with the assessment of damages by a trial court. As was held in **Kenya Bus Services & Anor –vs- Frederick Mayende (1991)2 KAR 232** at page 235 by Omolo J.A.,*

“The principles on which an appellate court will interfere with a trial judges assessment of damages are now well settled in Kenya. Kneller JA as he then was put it thus in Robert Msioki Kitavi v. Coastal Bottlers Ltd (1985)1 KAR 891 at B95: “The court of appeal in Kenya, then, should, as its fore runner did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. Singh v Singh and Itanda (1955)22 EACA 125, 129; Butt v. Khan (1977)1 KAR 1. Also see Idi Ayub Omari Shabani (an infant suing by his friend) and Yusufu Juma v. City Council of Nairobi and Daniel Nachela Kahungu (1985)1 KAR 681 where Hancox JA as he then was, stated the test thus (at 683):

“The test as to when an appellate court may interfere with an award of damages stated by Law J. A. in Butt –vs- Khan (1977)1 KAR 1 (a case referred to in another context by the learned judge) as follows:- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent and 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.” This direction has since been followed frequently by this court.”

In this case, the respondent pleaded that he had sustained the following injuries:- Loss of four upper teeth, bruises and cuts to the upper and lower lips and abrasion to the right wrist. The P3 which was

produced as the respondent's exhibit No. 1 disclosed that the respondent had sustained injuries as follows:- swollen upper and lower lips. The respondent's teeth had been knocked off. There were abrasions on his right wrist. The medical opinion written by Dr Siminyu (which was produced as plaintiff's exhibit No. 3) and Dr Malik (*plaintiff's Exhibit No. 4*) confirm the injuries sustained by the respondent, that is, that the respondent had lost his four teeth during the accident and further sustained soft tissue injuries to his mouth and left wrist. Dr Malik was of the opinion that although the loss of teeth is a permanent injury, the same could be replaced by artificial dentures. The other injuries that the respondent had sustained were of a temporary nature and would heal with time. Dr Siminyu assessed the cost of each artificial tooth to be Kshs 2,500/= when she wrote the report.

The respondent was awarded Kshs 200,000/= general damages for pain suffering and loss of amenities by the trial magistrate. The trial magistrate did not consider any decided cases in reaching that assessment of damages. She ignored the case of **Sarah N. Muciri v. John T. Kamau, Nairobi HCCC No. 325 of 1985 (unreported)** which had been placed before her in the submissions made by the appellants. In the said decision, the plaintiff was awarded Kshs 40,000/= for losing her eight teeth. In my opinion, the trial magistrate erred in not considering the said decision, as a consequence of which, she applied the wrong principle in assessing the general damages to be awarded to the respondent. It resulted in the respondent being awarded a sum that was inordinately high considering the injuries that he had sustained.

This court will therefore interfere with the said wrong exercise of discretion by the trial magistrate. The said general damages awarded is consequently set aside and substituted by an award of this court. Having considered the incidences of inflation when the **Sarah N. Muchiri** case (supra) was decided and also putting into consideration the other soft tissue injuries sustained by the respondent, I will award him Kshs 100,000/= general damages. He is awarded Kshs 3,380/= proven special damages. He shall be paid interest on the special damages from the date of filing suit and interest on general damages from the date of judgment of the lower court.

Since the appellants were partially successful on this appeal, they are hereby award half of the costs of appeal. The respondent shall however get costs in the lower court.

DATED at NAKURU this 14th day of July 2005.

L. KIMARU

JUDGE