**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

# CIVIL APPEAL NO. 32 OF 2017

**JOSPEH GICHUHI THOMAS.....APPELLANT**

**VERSUS**

**K G** *(Minor suing through his*

*mother and next friend S N N)*.....**RESPONDENT**

**JUDGMENT**

1. K G ("Respondent") is a minor. On 27/05/2009, through his next friend and mother, S N N, the Respondent launched a civil claim against the Appellant herein at Thika Chief Magistrate's Court. The suit came to be known as ***Thika CMCC No. 426 of 2009***.

2. The Appellant, Joseph Gichuhi Thomas, filed a Statement of Defence and the suit proceeded to hearing. Before the hearing, however, the parties recorded a consent on liability on 03/07/2012. The recorded consent was to apportion liability in the ratio of 70%:30% in favour of the Plaintiff and against the Defendant. The matter was then set for assessment of damages.

3. During the hearing, only one witness testified: the mother of the Respondent. It turned out – both in the Lower Court and here – the only contentious issue was the quantum of damages. The Respondent's mother produced as exhibits two medical reports – one by Dr. George Karanja and another by Dr. Yusuf Kodwavwala. She also produces various receipts to prove special damages. The latter are not in contention on this appeal.

4. At the conclusion of the case, the parties filed their written submissions and the Learned Trial Magistrate rendered his decision dated 08/01/2013. The Learned Magistrate general damages for pain, suffering and loss of amenities in the sum of Kshs. 1,800,000/- and special damages of Kshs. 3,500/-. The Learned Magistrate, then, adjusted the figure for the 30% apportionment of liability conceded by the Respondent. After this adjustment, the total amount awarded to the Respondent came to Kshs. 1,262,450/-.

5. The Appellant is aggrieved by the quantum of damages awarded by the Learned Magistrate and has preferred the present appeal. The Appellant filed three grounds of appeal:

> i. That the Learned Magistrate erred in law and fact in making an award on the aspect of general damages in the sum of Kshs. 1,800,000/- thereby making an award that was outrightly (sic) excessive in in view of the injuries pleaded by the Respondent in the Plaint.
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> ii. The Learned Magistrate erred in law and fact in failing to take into consideration the medical reports and the Appellants submissions on general damages.
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> iii. The Learned Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.

6. It became clear in the parties' written submissions before this Court that these three grounds of appeal actually amount to one: grievance over the assessment of damages which the Appellant feels was excessive. He further believes it was excessive because the Learned Trial Magistrate did not pay attention to the medical report by the Appellant.

7. The Appeal was opposed. The Respondent's counsel filed written submission defending the Learned Trial Magistrate's assessment of quantum.

8. I have read and considered the respective arguments in the parties' written submissions.

9. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

10. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in **Watt – vs- Thomas (1), [1947] A.C. 484:***
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> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

11. With this in mind I will now consider the issues raised in the present appeal.

12. Broken down, the Appellant has two mini-complaints which adds together to the third complaint that the general damages were excessive. The mini-complaints are:

> i. First, that the Learned Magistrate did not take into consideration the medical report by the Appellant. In particular, the Appellant complains that the Learned Magistrate failed to take into consideration the part of the medical report tendered by the Appellant that showed that the minor was recuperating and was improving. This, the Appellant argues, led to an award of excessive damages.
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> ii. Second, that the Learned Magistrate took into consideration that the Respondent was in special school yet no evidence was produced to this effect. This, in their estimation, led to an award of high damages.

13. Let us briefly interrogate the first claim. The Respondent particularized his injuries in the Plaint as follows:

> a) Head injury;
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> b) Multiple cuts and bruises on head, face, chest and lower limbs.

14. The Plaint, then, particularizes the present conditions thus:

> a) "Weakness conditions of the right side of the body – both upper and lower limbs;
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> b) Loss of memory – cannot remember happenings of recent or past events (sic);
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> c) Harshness to other children with tendency to fight or beat them;
>
> d) Running away from home and towards the river and very often attempting to drown in the river;
>
> e) At school reported to be a slow learner. He has problems with attention whose span is too low;

f) He cries a lot when interacting with other pupils and is socially maladjusted;

g) Scars in face and lower limbs;

h) Weakness of right hand with inability to write with it;

i) Poor speech – he starts well then becomes incoherent and un-cordinated."

15. Among the documents received into evidence without objection from the Appellant was a medical report done by Dr. George Karanja. The Report says that the doctor relied on the Discharge summary from Thika District Hospital; CT Scan of the brain and X-ray films; special educational assessment and resource service form; and a letter from [particulars withheld] Primary School. The doctor concludes that the minor suffered the following injuries from the road traffic accident:

a) Loss of consciousness for two weeks secondary to head injury;

b) Cut wounds on the scalp;

c) Multiple lacerations on lower limbs;

d) Laceration wounds on the trunk; and

e) Hemi paresis of right side.

16. Dr. Karanja reported that the minor has weakness of right upper and lower limbs such that he cannot hold an object tightly and cannot use the right hand to write. He also found that the minor had low mental status such that he has to attend special school. The doctor's conclusion were as follows:

> *He sustained maim injury. The trauma was very significant causing head injury with right hemi paresis. The injuries caused him to have mental retardation which has force[d] him to be admitted in a special school, which is trying to rehabilitate him. The hemi paresis might improve in due course although might take long. The accident affected his quality of life and future prospects of employment. In my opinion, the degree of permanent disability is 45%.*

17. With the acquiescence of the Appellant, the Respondent's mother also produced the medical report done by the Appellant's doctor, Dr. Yusuf Kodwavwala. This is what Dr. Kodwavwala concluded:

> *The main injury of K was trauma to his brain which has left him with great learning disability and behavioural problems. The weakness of the right side of his body as a result of the head injury has mostly recovered and he is likely to gain full strength. I saw the report from K's teacher at [particulars withheld] Primary School dated 21st February, 2011. It does not make optimistic reading. Though there may be some improvement in Kelvin's mental ability and educational attainments, I cannot base his permanent compensation on that tenuous basis. It is only fair to give this unfortunate lad the benefit of doubt. I therefore agree with the 45% permanent disability assessed by my colleague, Dr. George Karanja.*

18. In his judgment, the Learned Trial Magistrate described the injuries suffered by the Respondent and then said this:

> *According to Dr. Karanja who examined the boy, he made (sic) opinion that the incapacity was 45%....The further report by Dr. Yussuf (Kodwavwala) is also produced as Exhibit 5….I have carefully considered [the evidence]. I do note that the Plaintiff's evidence is not rebutted by the defence*.

19. Looking at the two medical reports, it is if fairly obvious that they do not diverge at all. Indeed, Dr. Kodwavwala is quite explicit that he agrees with the findings by Dr. Karanja. It is, therefore, perplexing for the Appellant to be stating on appeal that the Learned Magistrate ignored Dr. Kodwavwala's report. That report is quite explicit that the degree of permanent disability is 45% -- the same as Dr. Karanja. Further, that report does not, contrary to what the Appellant submits on appeal, say that the Respondent will improve. This is what the Appellant's own expert said: "Though there may be some improvement in K's mental ability and educational attainments, I cannot base his permanent compensation on that tenuous basis. It is only fair to give this unfortunate lad the benefit of doubt. I therefore agree with the 45% permanent disability assessed by my colleague, Dr. George Karanja."

20. That conclusion does not require any parsing. It is right there: the Appellant's doctor agrees that the head injury would have the permanent disability to the same degree as the Respondent's doctor.

21. As to the second complaint that there was no evidence that the Respondent has been forced to attend a Special Needs School, one needs to only point out to the report by the Appellant's own doctor as the first piece of evidence. If that is not enough, one could refer to the Letter from [particulars withheld] Primary School which was produced as Exhibit XX and was not challenged by the Appellant. If one, wanted even further evidence, one can refer to the uncontroverted oral testimony by the Respondent's mother.

22. Still, I am required to come up with my own independent assessment whether the damages awarded were excessive. In doing so, it is important to remember my remit as a first appellate Court: the principles that govern an appellate Court in considering a request to review an award of general damages are the following:

*An Appellate Court will not disturb an award of damages unless 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 as either inordinately high or low*.

These are, of course, the celebrated words of the appropriately named Law J.A. in the case of ***Butt v Khan (1977) KAR 1***.

23. It is important to recall that I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:

i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

24. In the present case, I have looked at the comparable cases cited before the Learned Magistrate. The Appellant suggested that an amount of Kshs. 700,000/- would be sufficient to compensate the Respondent. Counsel for the Appellant relied primarily on ***MR (Minor) v Patrick Magama & Another (Mombasa HCCC No. 491 of 1992)***. In that case, the Plaintiff was a minor of 8 years who was knocked down by a motor vehicle resulting in a fracture of the skull, as well as lacerations on the limbs. She was in a coma for four days after the accident. The Court awarded her general damages of Kshs. 500,000/-. Two things are clear from this case. First, it is quite dated – having been decided 15 years ago. Second, the injuries in that case are much milder than the present one. Here, the minor was in a coma for a month. Also, here the injuries have resulted in permanent mental incapacity to the degree of 45%. There was no mental incapacity in the cited case. The same thing applies to the other cases cited by the Appellant. I have read them: they all share the two deficiencies pointed out above in their capacity as comparators.

25. The cases cited by the Respondent were more comparable. For example, in ***Patrick Mutie Kamay v Judy Wambui Kibara (Civil Appeal No. 254 of 1996)***, the Plaintiff was left with 60% mental disability following an accident that resulted in a brain injury. He was awarded Kshs. 1.5 Million as general damages. Considering that the decision was made 12 years ago and adjusting for the milder permanent mental disability in this case (45% as opposed to 60%), it is my considered opinion that the award of Kshs. 1,800,000/- in the present case is not excessive as to invite the interference of an appellate Court.

26. **Consequently, for the reasons stated above, this appeal is without merit. It is dismissed with costs**.

27. Orders accordingly.

**Dated and delivered at Kiambu this 7th day of June, 2018.**

**.....**

**JOEL NGUGI**

**JUDGE**