REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 113 OF 2013

JOHN KAMORE ……...1ST APPELLANT

BENARD NJUGUNA MWANGI……...……..2ND APPELLANT

VERSUS

SIMON IRUNGU NGUGI……..…....……RESPONDENT

JUDGMENT

This is a judgment on an appeal against the decision of the learned magistrate in the principal magistrates' court at Murang'a in which he awarded the respondent Kshs. 500, 000/= as damages for injuries sustained as a result of a road traffic accident involving the 1st appellant's motor vehicle registration number **KAG 828 R** (herein "the motor vehicle").

The genesis of the plaintiff's claim in the magistrate's court was that on or about 9th August, 2009, the respondent was an authorised passenger in the 1st appellant's motor vehicle when the 2nd appellant drove and/or managed it so negligently and carelessly that he caused an accident. As a result of this accident, the respondent sustained injuries which he particularised in his plaint dated 4th November, 2009 as blunt injury to the head, fracture to the cervical spine and blunt injury to the left lower limb with reduced muscle power.

In their joint defence filed in court on 12th November, 2009, the defendants denied all the allegations in the plaintiff's plaint including ownership of the motor vehicle. They also denied that the said motor vehicle was involved in any accident or that the respondent suffered any injuries, damages or loss due to the accident aforesaid. They asked the court to dismiss the plaintiff's suit with costs.

When it came up to the hearing of the suit, it would appear that no witnesses were called by either side; the parties agreed that the respondents would be held 85% liable for the accident and therefore there was no need to call any evidence to prove liability. The parties also agreed that the their respective doctor's medical reports on the extent of injuries sustained by the respondent, the abstract from the police, the respondent's treatment notes and the receipts of any expenses incurred by the plaintiff be admitted in evidence without calling the makers of these documents. The suit in the magistrate's court was ultimately determined on the basis of these evidence and the submissions made by both counsel for the appellants and the respondent.

In his judgment, the learned magistrate correctly noted that the only issue he was confronted with in determining the case before him was that of quantum of damages payable. In this regard, he considered the submissions by both counsel for the appellants and the respondent and came to the conclusion that;

> ***"…the decided cases availed by the plaintiff consists (sic) of much more serious injuries and involved more elaborate and complex treatment. The plaintiff had to be hospitalised for almost one year. Permanent incapacity was put at 75%. The proposed award is too much.***
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> ***The plaintiff in this case was admitted for only 10 days. He healed well and residual disability is not as big. But the authorities cited by the defence are also not very illuminating. In Bayusuf's case, the respondent had no fracture yet, 200,000/- was awarded. In this suit, the plaintiff has a fracture and the defence want him awarded 180,000/=. In the Rispa's case, this court is unable to appreciate it very well. The two minor respondents were both awarded 180,000/=. They did not have similar injuries. The injuries of one were classified as hard (sic) and for the other maim. Yet both were put together and awarded 180,000/=. The usual trend is to appreciate the injuries of each and award an appropriate award."***

It is apparent therefore that the learned magistrate found the respective counsel's submissions on quantification of general damages payable and the decisions cited in support of their respective positions to be of little help. He discounted them as extremes.

In arriving at the figure of Kshs. 500,000/= which he awarded the respondent as general damages subject to apportionment on liability, the learned magistrate held, correctly in my view, that the respondent is only entitled to what is fair, just and reasonable and that whenever assessments such as this are necessary, they must be done with moderation; they should neither be seen to be enriching the plaintiff or punishing the defendant. In the learned magistrate's view, which view is consistent with the law, a plaintiff in a claim such as the claim before him is only entitled to what is fair, just and reasonable.

The appellants were not satisfied with the learned magistrate's decision and amongst the grounds they raised in their memorandum of appeal, the learned magistrate has been faulted for awarding damages which in the appellants' view were manifestly high and disproportionate to the injuries sustained by the respondent and in any event not commensurate with the available medical evidence; the learned magistrate is also said to have not only disregarded the appellants' submissions on quantum of damages payable but also failed to consider the decisions of cases cited by the appellant in support of those submissions. Finally, the learned magistrate is said to have erred in law for overlooking the applicable principles in assessment of damages.

In their submissions in support of the grounds of appeal, the appellants argued that in awarding the sum he awarded, the learned magistrate was influenced more by the particulars of injuries as pleaded in the plaintiff's plaint than by medical evidence admitted as a proof of those injuries.

The appellants' counsel stretched this argument even further and added that the learned magistrate ignored the appellant's submissions on the number of injuries sustained. According to counsel there is nothing in the learned magistrate's judgment to indicate that he took note of the appellant's submission that the respondent sustained one injury. In view of these lapses, so argued the appellants, the learned magistrate's assessment of the extent of the injuries was erroneous.

My understanding of the learned magistrate's judgment does not seem to support the appellant's arguments; the third paragraph of the first page of the learned magistrate's judgment which the appellants seem to be referring to in their submissions is simply stating the plaintiff's case and is not a finding on which the learned magistrate based his decision. Indeed the first two pages and part of the third page of the learned magistrate's judgment are devoted to a statement of the respective parties' cases; the learned magistrate does not appear to have made any conclusive remarks in those parts of his judgment until after he had analysed the parties' positions.

On the number of the injuries sustained, the learned magistrate was quite categorical on the number of injuries he was dealing with in assessment of the damages. While making reference to the decisions in the cases cited by the appellants in support of what they deemed as a fair compensation, the learned magistrate stated at page 3 of his judgment that, "In this suit, the plaintiff has a fracture…" This statement appeals to me to be illustrative of the fact that the learned magistrate was clear in his mind of the extent of injuries that he was dealing with.

The appellants' argument that the learned magistrate was influenced by the particulars of injuries as particularised in the plaint rather than by the medical evidence or that he was mistaken as to the number or the extent of the injuries sustained by the respondent is apparently contrary to what is clearly expressed in the judgment itself.

The final question for determination in this appeal is whether, as argued by the appellants, the amount awarded as general damages was inordinately high or excessive compared to the injuries sustained by the respondent. In considering this question, it must be noted at the outset that some of the arguments postulated by the appellant particularly as far as the extent of the injuries sustained by the respondent is concerned have been found wanting as they appear to be contrary to what is clearly apparent from the record; there is no basis for the argument that the learned magistrate misdirected himself on the number of injuries or their extent thereof while making the award that he made.

Going back to the evidence at the trial, the P3 form and the medical report by Dr Kanyi were in agreement that the respondent sustained a blunt injury to the posterior part of neck which resulted to a fracture of the cervical spine. The net effect thereof was, as I understand the report, a weakness or partial paralysis of the respondent's left lower limb which in turn has left the respondent walking abnormally. I note that this evidence was not contested by the appellants but their only qualm with the learned magistrates judgment is that this type of injury cannot attract the sum of **Kshs. 500,000/=** as compensatory damages.

Counsel for the appellants has argued, and I agree with her, that assessment of damages is a matter of discretion which, as always, must be exercised judiciously and not whimsically. In assessment of damages exercise of this discretion will be subject to such factors as doctrine of precedent and *stare decisis* according to which the court is enjoined to consider previous court decisions were assessment of near similar injuries was in issue; and even where similar cases have been decided the court will also consider the incidence of inflation taking into account the time span between the time those decisions were made and the decision at hand. Ultimately, the objective of assessment of damages is to put the victim in a position that is as nearly as possible to the position he was in before the occurrence of the events that may have led to his injuries. Damages are not meant to enrich the plaintiff unjustly and except for punitive damages, they are not meant to punish the tortfeasor or the defendant. Considering all these factors it is up to the court to ensure that what is awarded is modest, reasonable, just and fair.

It is clear from the record that after due regard to the decisions cited by the parties, the learned magistrate was alive to all these factors in determination of the respondent's compensation. This is what he said in concluding his judgment;

> ***"Having observed this, this court is alive to the relevant factors considered in making awards. Normally courts consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual incapacity if any, the inconvenience or deprivation encountered by the plaintiff, inflationary trends, cost of living and lapse of time from the time of any availed decided authorities.***
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> ***The plaintiff is only entitled to what is fair, just and reasonable. Money cannot renew a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the plaintiff. It is not also the aim to punish the defendant."***

Having noted these fundamental principles in assessment of damages it is difficult to accept the appellants' counsel's argument that the learned magistrate erred in law for disregarding the established

principles governing exercise of discretion in assessing damages due to the respondent.

If the learned magistrate exercised his discretion within the legal ramifications would this court have any reason to interfere with that discretion? This question arose in **Nairobi High Court Civil Appeal Case No. 759 of 2006, Shreej Enterprises (K) Ltd versus Peter Ndirangu Kariuki** where the decisions in the cases of **Shaban versus City Council of Nairobi (1985) KLR 716** and that of **Civil Appeal No. 40 of 1977, Butt versus Khan** were cited with approval for the proposition that an appellate court will not disturb damages awarded unless it is inordinately high or low as to present an entirely erroneous estimate based on a wrong principal or a misapprehension of evidence; the judge must have proceeded on the wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which is either inordinately high or low.

As far as I can see there is nothing on record to suggest that the learned magistrate proceeded on the wrong principles or that he misapprehended the evidence in some material respect in arriving at the award he made.

Counsel for the appellant argued that having rejected the decisions cited by the parties in support of their respective positions, he ought to have cited the decision which he relied upon to come up with the figure of Kshs. 500,000/=. My understanding of the learned magistrate's position is that in none of the cases cited by the parties were there injuries comparable to those in the case before him. Those cases were only useful as to help the learned magistrate arrive at a middle ground between the two extreme positions. In cases of personal injuries, there is hardly one particular case that will be said to be on all fours with another; even where injuries may appear to be the same, they may vary in as many aspects as the circumstances under which they occurred. No one particular person will suffer exactly the same injuries as another and I suppose this is where discretion in assessment of damages comes in to play. In my humble view, it would be asking too much of a magistrate to demand that he cites a particular decision where someone who suffered injuries similar those that respondent sustained was awarded the same amount he awarded in the case before him.

Considering the evidence on record and the decisions that have been cited by the appellants I would arrive at more or less the same figure which the learned magistrate arrived at. Take, for instance, the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Others versus Augustine Munyao, Nairobi Civil Appeal No. 203 of 2001** which was cited I the case of **Shreej Enterprises (K) Ltd & Another versus Kariuki (supra);** in this case the plaintiff sustained fractures of the left forearm bones(radius and ulna) and cuts and lacerations. There were negative residual effects. An award of **Kshs. 300,000/=** general damages was upheld by the court of appeal. If this was made 11 years later when the case in issue was decided the amount would have been much more than that. In any event the injuries sustained in that case appear to me to be less severe than those the respondent sustained in the case between him and the appellants. I consider a cervical fracture which affects a lower limb to be a more serious injury than fractures of radius, ulna cuts and lacerations combined.

Again in the case of **Shreej Enterprises (K) Ltd & Another versus Kariuki (supra)** the plaintiff was awarded Kshs**. 300,000/=** for a fracture of the right radius and ulna, a fracture of the right scapula/shoulder blade and soft tissue injury to the right leg and scalp. This decision was made three years prior to the decision the subject of the appeal herein and none of the injuries appear to have been sustained on a more sensitive area as the cervical spine. Yet in **Mombasa High Court Civil Case No. 898 of 1991, Bessie Nazi Mjuta versus Samji H. Nagan & Another** which was also cited in **Shreej Enterprises (K) Ltd & Another versus Kariuki (supra)** the court awarded **Kshs. 430,000/=** for a comminute fracture of right radius and ulna and multiple lacerations. This award was made 15 years before the award in issue was made.

Considering the decisions in these case I do not think the award of Kshs. 500,000/= subject to apportionment on liability was excessive, inordinately high or unreasonable in the circumstances; it represents a fair compensation for the injuries sustained by the respondent. I would uphold the award and dismiss this appeal with costs to the respondent.

Dated, signed and delivered in open court this 9TH day of May, 2014

Ngaah Jairus

JUDGE