



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Appeal 127 of 2009

**MUNZA INVESTMENT COMPANY
LIMITED.....APPELLANT**

VERSUS

MAKAU

MWONEWA.....RESPONDENT

(Being an appeal from the original judgment and decree in Machakos Senior Resident Magistrate's Court

CMCC No. 1228 of 2008 By Hon. Mr. Gacheru Senior Resident Magistrate's Court on 10//7/2009)

JUDGMENT

1. This is an Appeal against the judgment and decree of the Learned Honourable Mr. Gicheru, the Senior Resident Magistrate at the Machakos CMCC No. 1228 of 2008. The judgment is dated 10/07/2009. In it, the Learned Magistrate found the Appellant 100% liable for an accident that occurred on 07/11/2008 involving the Appellant and the Respondent's Motor Vehicle Registration number KAA 415 A along the Machakos-Kathiani Road. The Learned Magistrate then awarded the Respondent a sum of Kshs. 160,000/= as general damages and Kshs. 3,200/= in special damages.

2. The Appellant was aggrieved by the quantum of damages and has appealed to this Court. It does not contest the finding on liability or special damages. The Memorandum of Appeal raises four grounds of appeal:

- a. That the Learned Magistrate erred both in law and facts in awarding Kshs. 160,000/= on general damages as the same is excessively high;
- b. That the Learned Magistrate erred both in law and in facts in failing to take into account the medical documents before him whilst making the award;
- c. That the Learned Magistrate erred both in law and facts in failing to take into account the submissions of both counsels whilst making the award; and
- d. The Learned Magistrate erred both in law and facts in making an award on quantum which was unsupported by authorities.

3. Since the appeal is wholly addressed to quantum of damages, it is imperative that the Court reminds itself of the standard to be applied in reviewing a trial Court's decision on quantum of damages. In the case of *Jabane v Olenya* (1989) KLR 1, the Court of Appeal addressed itself to the question of when an Appellate Court should interfere with an award of damages. It stated:

- a) Each case depends on its own facts;
- b) For the sake of those who have to pay insurance premiums, medical fees or taxes, the awards should not be excessive;
- c) Comparable injuries should attract comparable awards;
- d) Inflation should be taken into account; and
- e) An appellate Court will not disturb an award of damages unless it is 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.

4. Hence, while a Trial Court must, in the first instance, take into consideration the first four factors listed above, on appeal, the most important question that shapes the Court's apprehension of the appeal before it is whether the quantum awarded by the Trial Court is inordinately high or low; or whether the Trial Court proceeded on wrong principles; or whether the Trial Court considered irrelevant factors or failed to consider materially relevant factors. To do so, I will briefly appraise the evidence tendered before the Trial Court. According to the Respondent, he suffered the following injuries as a result of the accident: "I was injured on both shoulders, neck, both hands and on the right hip joint. I was not injured on the back." Later on he said in testimony: "I have not recovered completely and I continue getting medication."

5. The extent of the injuries was not controverted on cross examination. In fact, the Appellant's advocate offered no questions about them. The doctor, PW 4, on the other hand, testified:

He [the Plaintiff] sustained the following injuries:

- Blunt injury to the neck both sides;
- Blunt injury to the lower back;
- Blunt injury to the right shoulder;
- Blunt injury to both hands and right leg below the knee and right hip joint.

6. And then added: "The patient complained of pain on the right shoulder and on the right leg. He had tenderness of right shoulder. He sustained multiple soft tissue injuries from the said accident."

7. Again, the Appellant did not cross examine the doctor on the extent of the injuries. Based on this evidence, the Learned Trial Magistrate found that the Respondent had proved the injuries outlined in his Plaintiff as:

- a. Blunt injury to the neck;
- b. Blunt injury to the shoulder;
- c. Blunt injury to the right leg;
- d. Blunt injury to the left hand;

e. Blunt injury to the right hip joint.

8. In my view, the Learned Magistrate was entitled to that conclusion based on the evidence received in the case. I therefore easily find ground 2 in the Memorandum of Appeal to be without merit. This means that the only question which I must deal with is whether, based on these injuries, the Trial Court's award of damages was excessive. In considering this question, I must remind myself, that at the end of the day each case is unique and must be decided on its merit even while bearing in mind that it is a transcendental value of the legal system in this kind of cases that awards must be reasonable and comparable (see *Rahima Tayab v Anna Kinara* 1982-88 1 KAR 90 quoting the famous *West H & Son v Shephard* (1964) AC 326).

9. In his judgment, the Learned Magistrate referred to the two authorities cited by the Respondent and the two authorities cited by the Appellant and then made an award of Kshs. 160,000/=. The Respondent cited the case of *George Omenjo Obare & Another v Francisca Tavitha Mbuvi* (Machakos HCCC No. 89/07) and *Francisca Mumbee Kitundu v Kenneth Thuo Njonjo* (Nairobi HCCC No. 328 of 1984). In the former case, the Respondent had been awarded a sum of Kshs. 200,000/= in the Court below for the following injuries:

a. Cut wound on the left ear pinna posteriorly;

b. Cut wound on the right side of the head;

c. Long cut wound on the left cheek;

d. Blunt injury to the chest;

e. Blunt injury to the upper back;

f. Bruises on the knee;

g. Bruises on the upper back;

h. Bruises on the left leg;

i. Blunt injury to the right hip joint;

j. Blunt injury right leg swelling.

10. Justice Lenaola confirmed the award and dismissed an appeal lodged challenging the award as excessive. On the other hand, in the latter case, the Learned Mbogholi Msagha J., assessed damages at Kshs. 140,000/= for injuries which included facial injuries along with cuts and bruises on the shoulder blade and lumbar sacral area. These injuries led to excessive watering of the right eye, heaviness of the right side of the face, difficulties chewing food and inability to open her mouth fully. She also had considerable disfigurement caused by multiple facial scarring and had lost sensation of the forehead. She was awarded Kshs. 140,000/=.

11. The Appellant complains, and rightly so in my view, that the *Francisca Mumbee Kitundu Case* is not a comparable one because the injuries are much more severe. I agree. But, in my view, that does not necessarily change the outcome of the case. This is because, the other authority relied by the Learned Magistrate, to wit, the *George Omenjo Obare Case* is quite comparable to the present one. I readily concede that the two cases cited by the Appellant's counsel in the Court below are equally comparable. They are: *Rosemary Nanjara Baiba v Benson Irungu* (Nairobi HCCC No. 577 of 1991) (where Kshs. 90,000/= was awarded by Aluoch J.) and *George Ngambi Githinji v F.K. Gatheka & Another* (Nairobi HCCC No. 4038 of 1982) (where Kshs. 60,000/= was awarded).

12. In my view, however, both of these cases cited by the Appellant are quite dated and the fact of

inflation alone would explain the increased sum awarded by the Learned Magistrate. If one takes into account inflation and the discretion of the Trial Court to award any sum that it deems fit, the threshold for this Court to interfere with that award either for being too low or too high has simply not been reached in the instant case. In making this finding, I am reminded that the legal standard is not to award an amount that I would have awarded if I were hearing the case in the first instance; the legal standard is only to interfere if the awarded figure is so inordinately low or high as to represent an altogether erroneous estimate. I do not think that threshold has been reached here. Consequently, I decline to disturb the award by the Lower Court, and dismiss this Appeal with costs to the Respondent.

13.Orders accordingly.

DATED and SIGNED this 5TH day of JULY 2012.

**J.M. NGUGI
JUDGE**

DELIVERED and SIGNED in open court at MACHAKOS this 6TH day of JULY, 2012.

**GEORGE DULU
JUDGE**