IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Muli & Tunoi JJ A)

CIVIL APPEAL NO. 5 OF 1993

BETWEEN

VICTORIA DE MEO.....APPELLANT

AND

1. ABDULLAHI H. KHALIL

2. SALIM AL AMODY.....RESPONDENTS

(Appeal from judgment of the High Court of Kenya at Mombasa (Mr Justice J F Shields) dated 12/9/1990

in

HCCC No 323 of 1987)

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JUDGMENT

This is an appeal from the judgment and orders of the superior court (Shields J) dated the 12th September, 1990 in HCCC Case No 323 of 1987. Briefly, the facts were that Victoria De Meo, the appellant, was injured on 27th March, 1986 when two cars, a *matatu* registration No KWM 372 driven by the 1st respondent and owned by the 2nd respondent was involved in a violent accident with a Suzuki registration No KSE 252 along Mombasa/Malindi Road near Gedi. One passenger in the Suzuki, who is not involved in this appeal, died almost instantaneously and the appellant was seriously injured as a result. The learned trial judge found on evidence that the 1st and 2nd respondents were responsible for the very tragic accident. He awarded the appellant general damages in the sum of Kshs 250,000/- for the injuries she sustained as a result of the accident. He also awarded special damages in the sum of Kshs 60,750/- and 9,604,600 Italian Lira. He mistakenly fixed the date of conversion of the foreign currency to be the date of the accident ie 25th March, 1986, when in fact, it was on the 27th March, 1986. Nothing turns on the apparent mistake but on the principle itself. It is from these awards that the present appeal rests. The appeal is therefore on quantum of general damages and date of conversion of the Italian Lira in respect of the special damages awarded by the superior court in foreign currency.

To be precise the memorandum of appeal couches the grounds of appeal as follows -

"(1) The learned judge erred in law in holding that proper date for conversion of damages in Italian Lira into Kenya Shillings was on 25th March, 1986, (sic) 27th March, 1986 although the expenses for which damages were awarded were incurred long after the said date.

(2) The award of Kshs 250,000/- in respect of general damages was very low and therefore erroneous."

We shall deal with ground one of appeal first. Mr Kasmani for the appellant was quick to submit that the very recent decision in Civil Appeal No 117 of 1992 should apply in respect of ground one (1) of this appeal. This was the appeal arising from the same tragic accident. Mr Kariuki for the respondents could not resist this and quite properly conceded ground one (1) of the appeal. Both counsel who appeared for the parties in Civil Appeal No 117 of 1992 were fully aware of the circumstances surrounding that appeal. In that appeal, *Mollo Edilio v Abdullahi Hemed and another* Civil Appeal No 117 of 1992 (unreported), this bench, following the authority in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 held that -

"Considering the *Miliango's* case and the time factor between the date of accrual of damages, the filing of the suit and the time of obtaining judgment and possible appeal and time for execution; the appropriate date for making payment would be the date toward the end of the road for determining the rate of conversion of foreign currency with the local currency. In our view the appropriate date for conversion is the date of payment."

Ground one (1) of appeal succeeds and the date fixed by the trial judge is set aside and substituted with the date of payment.

Turning now on ground two (2) of appeal, Mr Kasmani attacked the award of general damages (Kshs 250,000/-) as low and therefore erroneous. To use his own words in his submission, he said that the learned trial judge overlooked the second medical report by Dr Hemant Patel which clearly shows that the appellant would suffer permanent incapacity accompanied with pain for the remainder of her life.

For the benefit of Mr Kariuki and many others who will venture to practice in this branch of the law, we would recall the well-settled law that for

this Court to interfere with the quantum of damages awarded by the trial court, the Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount awarded is so inordinately low or high that it must be a wholly erroneous estimate of damages – see *Kemfro Africa Ltd v Lubia and another* [1982-1988] 1 KAR 727. Kneller JA, as he then was, at p 730 said -

"The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. This Court follows the same principles."

The appellant suffered head injury – concussion, abrasions face and both legs, haemarthrosis right knee (blood in the joint), dislocation right hip and back injury. According to Mr Hemant R Patel MB, BS, FRCS (ED), who examined her nearly three years and a half after the accident formed the opinion that -

"She has fully recovered from head injury, abrasions and dislocation of right hip. Her present symptoms of right pains are mild and are due to soft tissue injuries. The back pains are due to exacerbation of her spinal arthosis following this trauma. This condition was dormant till this injury at time of accident. She has to take care of back and take drugs."

In summing up of the appellant's condition in his judgment, the learned trial judge said in part -

"She was treated by Dr Hemant Patel and flew back to Italy in 1986 on the 9th of April. She had to be

upgraded to 1st class as she could not be accommodated in economy class. She has had ill health and physical discomforts since the accident. She was away from work for six months, and as is apparent, she is not the same person as she was before the accident and even now

walks with something akin to a limp. I am conscious that I should not give excessive large sums of damages" (underlining is ours).

With greatest respect the learned trial judge's summing up of the condition of the appellant at the time of the trial, in his view, may be correct, but certainly at variance with the extent of the appellant's injuries and condition at the time when Mr Hemant Patel examined her on 19th October, 1989. He does not appear to have had regard to the medical opinion which was expert evidence and which quite clearly established the appellant's condition at that time. It was a misdirection on his part to conclude that he was "conscious that he should not give excessive large sums of damages". He should also have been conscious that he should not give inordinately low damages.

Mr Hemant R Patel, MB, BS, FRC (ED) examined the appellant again on 9th August, 1990. She has had a further operation in Italy to remove torn medial cartilage in the right knee at the time of the accident. On the whole the appellant had remarkable progressive recovery from the injuries she sustained from the accident. However, Mr Hemant Patel had the following opinion as at 9th August, 1990 -

"In my opinion, she will be left with recurrent pain and stiffness of right knee and back off and on as permanent incapacity."

This expert evidence by a prominent medical practitioner, like Mr Hemant Patel, was completely overlooked by the learned trial judge. We were amazed that even Mr Kariuki for the respondent did not know the existence of this vital and descriptive evidence of the extent of the appellant's injuries and the likely extent of her condition for the rest of her life. This was a fatal misdirection which constituted an omission of a relevant factor which the learned trial judge failed to take into account when assessing the damages. It was a violent misdirection which violated one of the criteria enunciated in the *Kemfro* case (*supra*). We are fully justified in disturbing the award of damages under the head of general damages.

The appellant recovered remarkably from the injuries she suffered from the tragic accident which also caused the death of her sister. She will, however, live with recurrent pain and stiffness of the right knee and back, off and on, as permanent incapacity.

Mr Kariuki supported the award of Kshs 250,000/- basing his argument

on the decision in *Anderson Kililo v Mbuni Transport Co* CA No 133 of 1991 (unreported). The injuries in that appeal were very much less severe than the injuries suffered by the appellant. The facts were quite distinguishable and cannot be properly equated with the facts in the present appeal. Taking into account all the facts surrounding this appeal and the inflation trends, it is clear that the award of Kshs 250,000/- as general damages was so inordinately low as to amount to an erroneous award. To that extent, we agree with Mr Kasmani. The learned trial judge failed to take into account the final medical report which indicated clearly that the appellant will live with recurrent pain and stiffness of the knee and back for the rest of her life.

We have considered comparable awards in almost similar cases but each case must be considered on its own merit. In this case, we consider that the award of Kshs 350,000/- would adequately compensate the appellant for her injuries.

Accordingly, ground two of the appeal succeeds as well. In the result, we allow the appeal, set aside the judgment and orders of the superior court and substitute therefor an award of Kshs 350,000/- general damages. The appellant will have the costs of the appeal.

Dated and Delivered at Mombasa this 25th day of January 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR