IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI, O'KUBASU, JJ.A.)
CIVIL APPEAL NO. 10 OF 2004

BETWEEN

ZIPHORAH WAMBUI WAMBAIRA AND 17 OTHERS …….….. APPELLANTS

AND

GACHURU KIOGORA ……...…..…….…....…… 1ST RESPONDENT

DAVID MWANIKI KURIA ……...…….…....……. 2ND RESPONDENT

KIONGERA SAW MILLS ……..…….…....…….. 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 4 th July 2002 in H.C.C.C. NO. 2221 OF 1993)
****

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Ang'awa J.) delivered in Nairobi on *4th July 2002* . This appeal is basically on assessment of damages as can be noted from the grounds of appeal which are as follows:-

> ***(1) The learned Trial Judge erred and misdirected herself both in law and fact on the medical evidence tendered in court and thereby arrived at an erroneous estimate of the general damages by awarding inordinately low figures.***
>
> ***(2) The learned trial judge err ed and misdirected herself in law and in fact on the medical evidence tendered by the 13 th plaintiff on the injuries sustained by Muriithi Wang'ondu (deceased) and thereby arrived at an erroneous conclusion in not finding that the documentary evidence tend ered in court matched the pleadings.***
>
> ***(3) The learned trial Judge erred and misdirected herself in law and in fact in setting aside on her own motion a consent entered for special damages between the plaintiff and the 2nd defendant.***

On the *10th December 1992*, a group of villagers from Nyeri District had traveled to a funeral in Laikipia District using a vehicle registration number KVS 093. On their way back to Nyeri this vehicle came upon a tractor that had been parked on that road without any reflectors. As the driver of vehicle reg.

KVS 093 tried to avoid hitting the tractor he swerved to the other lane only to collide with an oncoming vehicle registration number KWZ 646. As a result of this head on collision the passengers in vehicle registration number KVS 093 sustained injuries and were rushed to hospital. It was 18 of these passengers that filed a suit against the respondents herein. The 1st respondent, Gachuru Kiogora, was sued in his capacity as the registered owner of the motor vehicle registration number KVS 093 in which the plaintiffs were passengers. The 2nd respondent, David Mwaniki Kuria, was sued as the registered owner of motor vehicle registration number KWZ 646 which collided head on with vehicle number KVS 093. The 3rd respondent, was sued as the registered owner of the tractor number KAA 530L which had been negligently parked on the road without reflectors.

When the suit came up for hearing in the superior court, each of the 18 plaintiffs testified giving details of how the accident occurred and the injuries sustained by each of them. On the issue of liability the learned Judge in her judgment came to the following conclusion:-

> ***"I find that negligence is attributed to the three defendants. It would have assisted if the defendants had issued a notice under order 1 r. 21 CPR upon each other if they were claiming indemnity from each other. I hereby find the three defendants liable at 100% jointly and severally."***

When the appeal came up for hearing before us, Mr. Machira Ngatia, for the appellants, submitted that the awards in respect of each appellant were too low and asked us to set aside the judgment of the High Court as regards quantum of damages. He pointed out that, as an example, the learned Judge awarded Shs.5,000/- for soft tissue injuries while for fractures she awarded Shs.100,000/-. As regards 17th plaintiff (17th appellant herein), Mr. Ngatia submitted that the claim was dismissed and yet there was a medical report.

It should be pointed out that when this appeal came up for hearing on *11th November, 2004* there was no appearance for the respondents although hearing notices had been served on the respondents' advocates.

As we have already said this appeal is basically on assessment of damages. We are fortified in so saying since the respondents did not appear either by themselves, or by counsel to dispute liability.

This being a first appeal, we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate the evidence and reach our own conclusions – see ***Selle V. Associated Motor Boat Company Ltd*** **(1968) E.A.123** and ***Williamson Diamonds Ltd V. Brown*** ***[1970] E.A. 1***. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P stated in Peters V. Sunday Post Ltd [1958] E.A. 424 at p. 429:-

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact of a Judge who tried the case and who had the advantage of seeing and hearing the witness."***

In this appeal we are being urged to interfere with the awards made by the superior court. In ***Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini V. A.M. Lubia*** **And Olive Lubia [1982 – 1988] 1 KAR 727 at p. 730 Kneller J.A said:-**

> ***"The principles to be observed by an ap pellate 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. See Ilango V. Manyoka [1961] E.A. 705709, 713; Lukenya Ranching And Farming Co -operatives Society Ltd V. Kavoloto [1970] E.A. 414, 418, 419. This Court follows the same principles."***

The above stated principles continue to be applied by this Court. Mr. Ngatia submitted that the awards

made by the learned Judge were too low. He gave examples in which the learned Judge awarded only Shs.5,000/= for soft tissue injuries and Shs.100,000/= for fractures. In his view these figures were so low as to be erroneous. This Court has repeatedly stated that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards. In this appeal, we are being urged to consider the injuries sustained vis-a-vis what the learned Judge awarded and make a finding that the awards were too low to warrant us interferring and award higher amount. Having considered the manner this matter was handled by the learned Judge we would refer to the case of ***Rahima Tayab And Another V. Anna Mary Kinaru*** **(1982-88) 1 KAR 90** in which Potter JA gave the following advice:-

> ***"I would commend to trial judges the following passage from the speech of Lord Morris of Borth - y-Gest in the case of West (H) & Son Ltd v. Shepherd [1964] A.C. 326 at pg. 345:-***
>
> ***"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."***

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Poh Choo v Camden and Islington Ar ea Health Authority [1979] 1 All ER 332 at 339 :

> ***In considering damages in personal injury cases, it is often said: "The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tendentious way of putting t he case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the b ill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay. It is worth recording the wise words of Parke B over a century ago.***
>
> ***"Scarcely any sum could compensate a labouring man for th e loss of a limb, yet you do not in such a case give him enough to maintain him for life…. You are not to consider the value of existence as if you were bargaining with an annuity office…. I advise you to take a reasonable view of the case and give what you consider fair compensation."***

Later in his judgment, at 341, Lord Denning had this to say about extravagant awards:-

> ***"I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service . But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."***

We fully agree with the foregoing as we think it sets out what we consider to be the most practical method of dealing with assessment of damages in personal injury cases.

It is our view that had the learned Judge considered recent decisions relating to soft tissue injuries, we think she would have awarded more than Shs.5,000/= to each appellant who suffered soft tissue injuries.

In a recent decision of this Court in ***Arrow Car Limited v. Elijah Shama lla Bimomo & Others*** **– Civil Appeal No. 344 of 2001** (unreported) in its judgment delivered at Kisumu on 9th July, 2004 this Court stated inter alia:-

> ***"What about the injuries sustained by the respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1 st and 3 rd respondents herein suffered what the doctors described as soft tissue injuries the awards of Shs.350,000/ - for such injuries as made by the superior court are, in our view, inordinately high, as to warrant our interference."***

In the present appeal, we are of the view that an award of Shs.5,000/= for soft tissue injuries was so inordinately low that it must be wholly erroneous estimate. As regards the awards made in respect of fractures we think that the awards of Shs.100,000/= could not be considered as inordinately low and hence we see no reason to interfere.

As regards 17th plaintiff, Moses Muthee Mathenge, his claim was dismissed on the ground that there was no medical report. We have perused the record and found that there was a medical report (at p.161-2 of the record of appeal) in respect of this claimant. In that report the doctor stated that the injuries sustained were "relatively minor". His claim ought not to have been dismissed. In our view he should have been given an award for soft tissue injuries.

In view of the foregoing we allow this appeal and set aside the awards made by the superior court and substitute thereof the following:-

Plaintiff No. 1 awarded Shs. 50,000/=

Plaintiff No. 2 awarded Shs. 50,000/=

Plaintiff No. 3 awarded Shs.100,000/=

Plaintiff No. 4 awarded Shs.100,000/=

Plaintiff No. 5 awarded Shs. 50,000/=

Plaintiff No. 6 suit dismissed for non -attendance

Plaintiff N o. 7 awarded Shs. 100,000/=

Plaintiff No. 8 awarded Shs. 100,000/=

Plaintiff No. 9 awarded Shs. 100,000/=

Plaintiff No.10 awarded Shs. 50,000/=

Plaintiff No.11 awarded Shs. 50,000/=

Plaintiff No.12 awarded Shs. 50,000/=

Plaintiff No.13 awarded Shs. 50, 000/=

Plaintiff No.14 awarded Shs. 50,000/=

Plaintiff No.15 awarded Shs. 50,000/=

Plaintiff No.16 awarded Shs. 50,000/=

Plaintiff No.17 awarded Shs. 50,000/=

Plaintiff No.18 awarded Shs. 50,000/=

As regards special damages, we think that this ought to have been specifically proved and in absence of clear proof we find no basis on which to award special damages.

The final position in this appeal is that the appeal is allowed to the extent stated above. Since the appellant's have partially succeeded in their appeal, we award half the costs of this appeal to the appellants.

Dated and delivered at NAIROBI this 17th day of December, 2004.

R.S.C. OMOLO

……..

JUDGE OF APPEAL

P.K. TUNOI

……

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR