Gitau v Aikona (Civil Appeal E113 of 2022)
[2024] KEHC 2476 (KLR) (30 January 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E113 OF 2022

RE ABURILI, J

JANUARY 30, 2024

BETWEEN

CRISTOPHER GITAU ..... APPELLANT

AND

KEVIN AIKONA ..... RESPONDENT

(Appeal arising from the judgment and decree of Hon. W.K. Onkunya, SRM in Kisumu CMCC NO. 544 of 2029 delivered on 11/11/2022)

JUDGMENT

1. The appellant herein was sued by the Respondent before the lower court, seeking general damages, special damages, costs of the suit and interest arising from the injuries he sustained in a road traffic accident when the respondent, while riding his motor cycle registration No. KMEK 007R along Obote Road within Kisumu City, the appellant's driver, agent or servant then driving motor vehicle registration No. KCT 540B Mark X knocked the respondent thereby injuring him.
2. The respondent blamed the plaintiff's driver, agent and or servant for the alleged negligent manner in which he drove, managed and controlled the motor vehicle thereby veering off the road and knocking the respondent. The plaintiff/ respondent pleaded the following particulars of negligence against the defendant/ appellant, his agent, servant or driver, vide the plaint dated 11th November, 2019:
    a. driving at an excessive speed in the circumstances
    b. disregarding the safety of the road users
    c. failing to appreciate and or observe the nature and condition of the road at the locus in quo
    d. driving without due care and attention
    e. driving under the influence of intoxicants

f. failing to have a proper look out or any at all

g. failing to appreciate the condition of the motor vehicle immediately before the incident

h. failing to warn, hoot and or do anything to alert the plaintiff of the dangerous situation he had created

i. failing to stop, brake, slow down, swerve and or in any other way control motor vehicle Marx X Registration No. KCT 540 B to avoid it colliding with the plaintiff's motor cycle registration Mark KMEK 007R.

3. As a result of the pleaded accident and alleged negligence of the appellant's driver, agent or servant, the plaintiff/ respondent herein pleaded that he sustained injuries involving:

a. bruises on the right loin and hip

b. cuts and bruises on the right hand and elbow

c. cuts and bruises on the right knee

d. dislocated pelvic spindle at right femur

4. The respondent therefore prayed for general damages for pain, suffering and loss of amenities, special damages of Kshs 5,933.58, costs of the suit and interest at court rates.

5. In his defence, the appellant herein who was the defendant denied all particulars of negligence attributed to him and pleaded contributory negligence against the respondent, contending that it was the respondent to blame for the accident. The respondent filed a reply to the defence joining issues with the appellant and reiterating his pleadings in the plaint and putting the appellant to strict proof thereof.

6. In the judgment as impugned herein, the trial court found the appellant liable at 100% and awarded the respondent general damages of Kshs 500,000 and special damages of Kshs 5283 together with costs and interest.

7. Aggrieved by the said judgment and decree, the appellant filed this appeal setting out the following two main grounds:

1. That the learned magistrate erred in law and in fact by apportioning liability at 100% as against the appellant despite the existence of contrary evidence thereby awarding damages that were inordinately too high

2. That the learned magistrate erred in law and fact by failing to appreciate the testimony of the defence witness, the submissions and authorities therein.

8. The appeal was canvassed by way of written submissions.

The Appellant's submissions

9. On liability, it was submitted relying on the decision by the Court of Appeal in Hussein Omar Farar v Lento Agencies CA 34 of 2005 [2006] eKLR that where the court is unable to determine who is to blame for the accident, then liability should be apportioned equally.

10. It was submitted conceding that although the pleaded accident occurred, the evidence of DW1 laid blame on the respondent rider who was riding from infront of DW1 who wanted to turn off the road

and as he turned and crossed the first lane, and cleared the second lane, the accident occurred. It was submitted that the rider was oncoming from a distance and that his witness was not an investigating officer and only produced a police abstract which does not provide any information as regards whose fault it was for the accident.

11. On quantum of damages payable, it was submitted that the learned trial magistrate awarded damages which were inordinately high and therefore this court is called upon to disturb the same. It was submitted that the respondent suffered soft tissue injuries which had fully healed at the time of the hearing hence an award of Kshs 500,000 was without any basis. That no reasons or basis for awarding those damages were given by the trial court. The appellant's counsel urged this court to reduce the award to Kshs 120,000. He relied on the cases of Hilaya Kenga v Manyema1965] EA 705 and Kemfro Africa Lts T/a Meru Express Services, Gathogo Kanini v AM Lubia & Olive Lubia on the principles upon which the appellate court can disturb quantum of damages and Butt v Khan [1978] e KLR.

12. The appellant's counsel submitted that the P3 showed soft tissue injuries and so was the medical report which also confirmed the soft tissue injuries which had healed. Further, that the respondent in his testimony was clear that he did not suffer any fracture and that neither did he produce any Xray report on the same.

13. On how much damages to award, it was submitted relying on the cases of Kigaragari v Aya (1982-1983) 1KAR,768 where it was stated that damges must be within the limits set out by the decided cases and also within the limits that the Kenyan economy can afford.

14. Further reliance was placed on the case of Wahinya v Lucheveli [2021] e KLR where Kshs 200,000 was awarded as damages for soft tissue injuries taking into account the inflation, and George Kinyanjui T/ A/ Climax Coaches & Another v Hussein Mahad Kuyale 201] eKLR where an award of Kshs 650,000 general damages for soft tissues was reduced to Kshs 109,890 by the High Court.

15. In conclusion, the appellant submitted that the trial court's failure to apportion liability in the ratio of 80:20 in favour of the plaintiff raises substantial concerns regarding the equitable distribution of responsibility for the accident. He submitted that this court should rectify and award Kshs 120,000 general damages less 20% contribution.

The Respondent's Submissions

16. On behalf of the Respondent, his counsel Mr Onsongo submitted reiterating the grounds of appeal, the facts of the case and the duty of the first appellate court as stipulated in section 78 of the Civil Procedure Act as was interpreted in Selle v Associated Motor Boat Company Ltd & others (1968) EA 123 and peters V Sunday Post Limited [1958]EA 424.

17. On liability, it was submitted that the appellant's driver agreed with the pleadings, that he ought to have complied with the traffic rules and regulations and that eh he ought to have given way to the motor cyclist who was on the main road approaching from his front. That since it was the defendant's driver who was branching off the road to enter a feeder road, he should have stopped and waited for the road t clear before branching and that instead, he made a turn before ensuring that it was safe to do so hence he was the sole author of the material accident.

18. Counsel for the respondent reproduced apart of the judgment of the trial court where the latter analysed evidence on liability and made observations on what the appellant's driver who was the 1st defendant had stated and which evidence, according to the appellant's counsel, corroborated the respondent's testimony on what transpired. It was submitted that in view of that, then the trial magistrate did not err in finding the appellant 100% liable.

19. On quantum of damages payable, it was submitted that award of damages is in the discretion of the trial court which discretion has limits set out in precedents that the awards should not be inordinately high and or high as to reflect an erroneous figure. that damages should take into account the prevailing economic environment. Reliance was placed on Kivati v Coastal Bottlers Ltd CA 69 of 1984 and ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Co. Advocates.

20. Cpunsel set out the principles which this court must apply in determining whether to disturb the award made by the trial court, and reiterated part of the judgment by the trial court on what she stated in making an award. He submitted that the trial magistrate relied on the correct principles in awarding damages for the injuries sustained by the respondent hence this court should not interfere with the same. He urged this court to sustain the award made and dismiss the appeal both on liability and on quantum with costs.

Analysis and Determination

21. This being a first appellate court, it has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. This is what section 78 of the Civil Procedure Act espouses. As stated by Mativo J (as he then was in the High Court) in the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022]

> " The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. See Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs {2001} 3 SCC 179.

22. The learned Judge in the above case also stated, and I concur that in the first appeal, parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

23. Revisiting the evidence adduced before the trial court, the respondent testified as PW1 and adopted his witness statement recorded and filed n court and dated 11th November, 2019.He stated that on the 19th April 2019, he was involved in an accident along Jua Kali Street. That the accident occurred when he ha was riding his motor cycle Registration No KMEK 007R from work headed to town after Kicomi along Obote Road . h estated that there is a junction when entering into Jua Kali and that he was going to turn in when a motor vehicle Toyota Marx which was being driven on Obote Road wanted to enter the Jua Kali Road and on the right as one comes from town on the main road. That there were two other motor cyclists in front of the respondent and that to notify the driver, PW1 hooted at the motor vehicle. That the two motor cycles passed well and that when he reached the junction, the motor vehicle did not wait for him to pass so it entered the Jua Kali Road and hit the respondent on the right side which destabilised the respondent as he was in motion so he jumped and rolled on the ground.

24. That as a result of the accident, the respondent suffered injuries on his body, on his right hand up to the fingers. that when he landed, he hit his abdomen where he sustained injuries, injuries to the right thigh and to his right knee. The respondent produced a list of documents filed into court as exhibits and they included the treatment notes, invoices, radiology request report and receipts as well as the P3 form dated 23rd April 2019. He also produced the police Abstract Form and demand letters to the appellant and his insurance company as well as NTSA copy of search and payment receipt. He prayed for damages and costs of the suit.

25. In cross examination, he stated that he was treated and discharged and that he did not suffer any fracture. He also stated that there was nothing to show that he had a dislocation. He denied testifying in a traffic case. He confirmed that he had produced an Xray request form and not report. He stated that he had no evidence that he had gone for further treatment and that he had a driving licence which he showed to the trial court.

26. PW2 PC Mwakwekwe Nyoka produced the Police Abstract dated 17th July 2019 from Kisumu Police Station to show that an accident had been reported there involving the respondent and the appellant's motor vehicle. He stated that no one was charged with a traffic offence following the accident. He stated that he was not the investigating officer.

27. The defendant Christopher Gitau testified as DW1 and adopted his witness statement dated 20th April 2019 and filed in court on 28th September 2020 and was cross examined on the same. He also produced his said statement recorded with the Police at Kisumu Police Station on 20/4/2019 as Defence Exhibit 1. In his witness statement which was recorded only a day after the material accident, on 19th April, 2019, at around 4 pm, he was riding motor vehicle Registration number KCT 540B Toyota Marx from Kisumu toward Jua kali direction, along Obote Road and that when he reached the junction of Cecypo and Obote Road, he stopped and checked before turning to Cecypo Road and that in the process of turning, he heard somebody hooting and all over a sudden, he heard a loud bang on his front side of the motor vehicle and realised that a motor cycle had knocked the motor vehicle, jumped off the motor cycle and fell down. That the rider had no reflector jacket or helmet and was over speeding. Onlookers came and removed the motor cycle and placed it aside then the appellant called his friend who went to the scene and took the rider to hospital. The appellant went and reported the accident to Kisumu Police Station. The police visited the scene and removed both the motor vehicle and the motor cycle to the Police Station for inspection. In cross examination, the appellant stated that it was him who wanted to turn of the road while the rider was on the main road and that it was after he turned that his left-hand side was hit by the rider. He stated that the road was dual and that he turned and crossed the first lane as he cleared the second lane is when the accident occurred. He stated that the rider was riding from the front, from the oncoming traffic and that according to the traffic rules, the oncoming traffic is the one to stop.

28. on being re-examined by his counsel, he stated that the rider was on the extreme left side of the road, on the outside of his lane of the oncoming traffic, not in the middle of the road.

29. The parties then filed submissions and the trial magistrate fin her judgment found the appellant wholly to blame for the accident and awarded the respondent general damages of Kshs 500,000, special damages as proven and costs together with interest hence this appeal.

Determination

30. Having considered the grounds of appeal, the submissions and the evidence adduced by both parties before the trial court both orally and documentary evidence, the issues for determination are whether the trial court erred in finding the appellant wholly liable in negligence for the accident in question

which was not denied and secondly, whether the damages as awarded were grossly or inordinately high as to call for interference by this court.

31. On liability, the burden of proof always lies on the person who alleges even if the adverse party does not adduce any evidence to controvert the evidence of the claimant. That burden does not shift except in specific statutory cases specifically provided. This is what section 107 of the Evidence Act stipulates. According to Halsbury's Laws of England 4th Ed at Para 662 (page 476):

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."

32. The question is whether the evidence established that the appellant was 100% liable for the accident. In other words, the Respondent must adduce sufficient evidence to establish that the appellant was wholly to blame for the accident.

33. The law relating to negligent conduct is based on the simple but broad premise of reasonable conduct. Thus, the law demands that a person, who is capable of taking care of himself and appreciating his own interests and the dangers thereto, that he takes the same reasonable precautions for his own interests as well as others.

34. In this case, the appellant urges this court to find that the respondent contributed to the occurrence of the accident in the ratio of 20%. The respondent does not admit having contributed to the accident and urges this court to uphold the findings by the trial magistrate.

35. The evidence by the respondent and which was corroborative of what the appellant stated on oath was that both were going in the opposite direction and that they both wanted to turn into Jua Kali road. according to the respondent, he hooted to alert the appellant that he wanted to enter the junction as there were two other motor cycle riders ahead of the respondent. Clearly, the rider saw that the motorist wanted to turn into jua Kali road, where the rider also wanted to turn to.

36. If there were two other riders ahead of the respondent and he had already seen that the appellant wanted to turn into the same junction where the rider wanted to go, nothing stopped the rider respondent from slowing down or even stopping and letting the appellant turn into the junction before the rider could proceed. One of the requirements while using a road which is used by other road users is being conscious of one's safety and the safety of others.

37. From the testimony of the respondent, he went into the junction because the motor cyclists ahead of him had passed well without any incident. The appellant on the other hand states that he heard the hooting before being hit by the motorcyclist who then jumped off the motor cycle and fell on the side. This was when the appellant was turning into the junction.

38. In my view, the rider should have slowed down and waited until the motorist turned into the junction before entering the same junction, since he had seen the motorist was intending to enter the junction. There was no need to compete for the junction. Hooting is not the same as giving way, slowing down or alerting the oncoming vehicle of the intention to enter the junction. The respondent does not say that he put on the indicator showing his intention or warning the oncoming traffic of his intention to enter the junction. Since he admits that two motor cycle riders were ahead of him, there is high possibility that those may have obstructed the view of the oncoming motor vehicle driver appellant

herein, from seeing the respondent, assuming that the respondent had indicated that he was turning into the junction.

39. On the other hand, the appellant was entering the junction and it is clear from the evidence of the respondent that there were other road users including two motor cyclists ahead of him who passed the appellant. Although the appellant claims that he stopped, it is clear that the accident occurred when both vehicles were in motion meaning, each one of them proceeded to join the junction without giving way to the other. The appellant equally, does not say that he put on the indicator to warn the oncoming traffic that he was to turn or enter into the junction. No sketch plan was produced for the court to appreciate exactly the point of impact. It is the word of the appellant against the respondent and vice versa.

40. In the circumstances of this case, I am satisfied that both parties contributed to the occurrence of the accident. As to what proportions, I would have assessed an equal contribution between the respondent and the appellant but because the appellant asked for 20% against the respondent, I find no reason to assess a higher contribution. I find that the respondent contributed 20% while the appellant contributed 80% to the occurrence of the accident.

41. I therefore set aside the finding of the trial magistrate on liability and substitute it with the finding that the appellant was to blame at 80% while the respondent contributed 20% to the occurrence of the material accident.

42. On the issue of quantum of damages awarded to the respondent and whether this court should interfere with the same, the law on circumstances under which an appellate court would interfere with an award of damages is settled. An appellate court will not interfere with an award of general damages by a trial court unless it finds that the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage. The Court of Appeal of Nigeria discussed these principles in the case of Dumez (Nig) Ltd V. Ogboli {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G).

43. Thus, an award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. The Court of Appeal in Kivati v Coastal Bottlers Ltd Civil Appeal No. 69 of 1984 stated that:

> " The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

44. In Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates the Court of Appeal, Kisumu, CA No 84 of 2009 stated as follows:

> " We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

45. According to the appellant, the award of Kshs 500,000 general damages for pain, suffering and loss of amenities was inordinately high because the respondent suffered soft tissue injuries which could not attract such a higher award of damages.

46. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that:

> " comparable injuries should attract comparable awards."

47. The injuries suffered by the respondent were pleaded as above reproduced. the respondent testified and produced the P3 form dated 23/4/2019, Hospital invoice and Xray request form.

48. The medical report by Dr James Obondi Otieno dated 31/10/2020 was never produced as an exhibit. In his adopted witness statement and testimony in court, the respondent never stated what injuries he sustained. He only stated in cross examination that he was treated and discharged and that he never sustained any fracture.

49. I have considered the Appellant's submissions on the quantum of damages, the authorities cited by Counsel in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

50. From the evidence adduced by the respondent as per the P3 form, it is clear that he suffered soft tissue injuries with no resulting disability and had healed from the injuries he sustained at the time of testifying. The dislocation pleaded was never proved. The Xray request form was issued but no report was produced to show the results of the Xray of the right pelvis. The P3 form does not reveal any such dislocation but tenderness which is not the same as dislocation.

51. The P3 form was filled five days after the accident. It shows that the injuries sustained were bruises on the right loin, right hand bruised, right elbow bruised, tender hip, right knee bruised. there was no single cut or laceration identified by the medical officer.

52. in addition, PEX4 is a copy of treatment note dated 19/4/2019 which reveals pain in the right hip and limb bruises following road traffic accident. That is when the respondent was referred for Xray of the right pelvis but there are no results upon which any conclusion of dislocation can be made.

53. In the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> '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 was either inordinately high or low." (Emphasis added).

54. I have re-evaluated the evidence on record and found that the learned trial magistrate referred to the relevant evidence on record. That said, it is for this court to determine whether the award was consistent with comparable awards made. Upon studying the cited authorities relied upon by the Appellant, I note that the injuries therein were more severe in nature than in the current case. I am therefore not persuaded by the authorities cited by the appellant.

55. The Court of Appeal in Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5 held that:

> " 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 was either inordinately high or low"

56. In Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR the court stated that:

> " It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ..."

57. Further, the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanour of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See the case of Simon Tavera v Mercy Mutitu Njeru [2014] eKLR).

58. Considering comparable awards previously made and relying on the following cases:

    a. Fred Barasa Matayo v Channan Agricultural Contractors [2013] eKLR: The court reviewed downwards an award of Kshs.250,000/= to Kshs.150,000/= to moderate soft tissue injuries that were expected to heal in eight months' time

    b. Dickson Ndungu v Theresia Otieno & 4 Others [2014] eKLR The court reviewed the award of Kshs.250,000/- to Kshs.127,500/= for soft tissue injuries which produced no complains.

    c. Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR: The award of Kshs.700,000/= was reduced to Kshs.150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

59. Taking into account the above decisions where the injuries sustained by the claimants was comparable to those sustained by the respondent herein, being minor soft tissue injuries, I find that the award of Kshs 500,000 general damages for pain and suffering following the accident where the respondent sustained soft tissue injuries that healed with no resultant disabilities to be inordinately high and calls for interference by this court. I find the injuries to compare well with the three cases I have cited above. Taking into account inflation and time lapse since the cases cited hereinabove were decided, I find an award of Kshs 200,000 general damages for pain and suffering to be sufficient compensation.

60. In the end, I set aside the trial Magistrate's award of Kshs 500,000 and substitute with an award of Kshs 200,000 less 20% contribution, leaving a sum of Kshs 160,000 plus special damages of Kshs 5,933.58,which were not challenged hence I shall not interfere.

61. The general damages will earn interest at court rates from the date of judgment in the lower court until payment in full while the specials will earn interest from date of filing suit in the lower court until payment in full. Costs as awarded in the lower court will, as usual, be subjected to 20% contribution.

62. The parties shall each bear their own costs as the reduction of general damages is substantial.

63. This file is closed and returned to the lower court

64. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE