REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 106 of 2003

CHARLES MWANIA……..……1ST APPELLANT

BEN ROGERS MWANGANGI……2ND APPELLANT

AND

BATTY HASSAN suing through his grandmother and next friend

SAFINA ALY SINGILA……RESPONDENT

(Being an appeal from the judgment of the Hon. M.N. Gicheru – Principal Magistrate – delivered on the 25th day of September 2003 at the Kitui Principal Magistrate's Court in PMCC No. 190 of 2002).

J U D G M E N T

1. The appellants in this case were the defendants in Kitui PMCC Number 190 of 2002. The plaintiff's claim against them was for compensation in both general and special damages and future medical expenses and/or surgery for skin grafting, costs of the suit and interest thereon. The plaintiff's claim arose out of a road traffic accident which allegedly occurred on 2/12/2001 in which he was injured as he walked along but off the road at Kithomboani in Kitui township.

2. Judgment on liability was entered by consent of the parties against the defendant for the plaintiff at the ratio of 80%:20%. Though the advocates had indicated that they were likely to agree on quantum, they did not do so so evidence was called. **Dr. Simoni Makau** of Machakos General Hospital testified as PW1 and told the court that the plaintiff suffered the following injuries:-

(a) Bruise on the forehead

(b) A wound on the right thumb and left wrist joint

(c) A wound on the second right finger

(d) Fracture of the right tibia and fibula

(e) A wound below the right knee

(f) A wound on the lateral aspect of the right ankle joint

3. Dr. Makau stated that the wounds were cleaned by surgical toilet while the fractures were managed by P.O.P. By the time Dr. Makau saw the plaintiff on the 16/01/2003, the plaintiff had already been seen at Kenyatta National Hospital but was still undergoing physiotherapy and was complaining of traumatic pains at the fracture joints. Dr. Makau opined that the plaintiff would require post-healing treatment by way of kin grafting which would cost about Kshs.120,000/=. On the other hand, Dr. Wambugu for the defendants opined that such post-healing treatment would cost about Kshs.80,000/= but according to Dr. Makau such a cost of Kshs.80,000/= would only be possible if the treatment was given at the Kenyatta National Hospital and that even his cost estimates were those at a Government Hospital or at a cheap private hospital.

4. On quantum, counsel for the plaintiff proposed the following figures:-

(a) General damages – Kshs.800,000/

(b) Costs for future medical expenses and/or surgery – Kshs.120,000/

(c) Less 10% liability - Kshs.920,000/

- Kshs.184,000/

Total proposed - Kshs.736,000/

5. The plaintiff's counsel cited a number of authorities in support of the proposed quantum among them the case of **Francis Barasa Simiyu –vs- Joseph Makhanu – Nrb. HCCC No.2986 of 1986.** In the said case, the plaintiff who suffered the following injuries:-

- Fracture of the right tibia and fibula
- Fracture of left tibia
- Dislocation of left ankle joint;

was awarded general damages in the sum of Kshs.400,000/=. I shall return to this issue later in the judgment because the appellant has contended that it was wrong for the learned trial magistrate to apply this case since the injuries suffered by the plaintiff therein were not comparable with the injuries sustained by the respondent in the instant case.

6. On the other hand, the defendants' counsel proposed that a figure of Kshs.185,000/= was sufficient as general damages for pain suffering and loss of amenities. The defendants relied on the following cases:-

(a) Johnson Kamande Wanyoike –vs- John Magoche Kabumbu – Nrb. HCCC No. 684 of 1988. The plaintiff was awarded Kshs.200,000/= as general damages for pain suffering and loss of amenities for multiple fracture of the right tibia and fibula and of the tibia malleolus and cut wounds over the face.

(b) David Mutei Kimotho –vs- Nelson Boaz Otieno – Nrb HCCC No.345 of 1990. The plaintiff suffered fracture of the tibia and fibula healing with malunion which necessitated corrective surgery. An

award of Kshs.180,000/= was made as general damages for pain suffering and loss of amenities

(c) In the case of **Raphael Mutuku –vs- Samuel Ngare – Nrb HCCC No. 116 of 1990**, the plaintiff had sustained a fracture of the left tibia and fibula to which a plastic was applied for 4 weeks. He was awarded Kshs.185,000/= for pain suffering and loss of amenities.

7. The appellants were aggrieved by the award made and in their Amended Memorandum of Appeal dated 12/10/2005, they raised the following 8 grounds of appeal:-

(i) THAT the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the evidence adduced by the plaintiff on the extent of injuries, loss and damages suffered by the plaintiff in determining and awarding the said damages.

(ii) THAT the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the submission of the counsels for both parties herein and in particular the appellants' submissions.

(iii) THAT the learned trial magistrate misdirected himself and erred in law and in fact in not appreciating sufficiently or at all the judicial authorities relied upon by counsels for both parties put in to guide the court in the assessment of damages.

(iv) THAT the learned trial magistrate misdirected herself himself and erred in law and in fact by giving an award of Kshs.800,000/= and Kshs.120,000/= in general damages and costs of future medication which was too high and excessive considering the injuries sustained by the Respondent.

(v) THAT the learned trial magistrate misdirected himself and erred in law and in fact in taxing and assessing the Respondents costs at Kshs.74,953/=.

(vi) THAT the learned trial magistrate misdirected himself and erred in law and in fact in taxing and assessing the Respondent's/plaintiff's costs without jurisdiction.

(vii) THAT the learned trial magistrate misdirected himself and erred in law and in fact in taxing and assessing the Respondents costs without giving the Appellant any opportunity.

(viii) THAT the learned trial magistrate misdirected himself and erred in law and in fact in failing to follow the Chief Justice's circular, principles and law on assessment of costs in the subordinate courts.

8. Mr. Echesa who appeared for the appellants contended that the sum of Kshs.800,000/= by way of general damages for pain suffering and loss of amenities was on the high side taking into account, according to him, the fact that the injuries in instant case and the Simiyu case (above) the two cases are not comparable. Mr. Echesa referred the court to two authorities:-

- ***Stanley Maore –vs- Geoffrey Mwenda – Civil Appeal No.147 of 2002 at Nyeri and***

- ***Morris Mugambi & Another –vs- Isaiah Gitiru Civil Appeal No.138 of 2002 at Nyeri.***

9. In the **Stanley Maore** case the Court of Appeal stated the general position regarding award of damages when at page 9 of the judgment it said:

"Having said so, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again 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 keeping in mind the correct levels of awards in similar cases."

10. On when an appellate court may reduce the award of damages, as this court is being asked to do in the instant case, the Court of Appeal quoted from the judgment of Kneller JA at page 730 in he case of **Kenfro Africa Limited t/a Meru Express Service Gathogo Kanini –vs- A.M. Lubia and Olive Lubia (1982-88) 1 KAR 727** thus:-

"the principles to be observed by an 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 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] EA 705, 709, 713 Lukenya Ranching and Farming Co-operative Society Ltd. –vs- Kaloveko [1970] EA 414, 418, 419. This court follows the same principles."

11. The above are the same principles that this court must apply in determining this appeal. Mr. Mulu for the Respondent urged the court to apply these very principles and to find that the appellant's appeal has no merit. He submitted that though Dr. Wambugu for the appellants seemed to suggest that the Respondent's injuries were not as serious as alleged his (Dr. Wambugu's) report was not produced in evidence.

12. Regarding the case law cited by the appellant, Mr. Mulu submitted that the same were decided more than ten years before the appellant was injured. Mr. Mulu relied on two authorities (a) **John Nyarangi Rasugu –vs- Car & General (Automotive) Ltd and Another – HCCC No.2531 of 1996 – Nairobi** and **Esther Wanjiru Kiarie –vs- Joseph Kiarie Ng'ang'a HCCC No.384 of 2000 at Nakuru.**

13. As the appellate court of first instance, it is my duty to reconsider the evidence on record and evaluate it afresh with a view to reaching my own conclusions in this matter. I have carefully reconsidered the evidence on record and evaluated, it afresh. There is no dispute on liability which was agreed at 80% to 20% in favour of the respondent herein. I have considered the medical evidence and do find that the injuries sustained by the respondent were of a serious nature and with long lasting effects that would mean further treatment, including skin grafting at extra cost. I have considered the law as cited to me by both counsels in this matter. My conclusions are that I do not find anything untoward in the award made by the learned trial magistrate. Infact, contrary to what counsel for the appellants would want the court to believe, the injuries sustained by the appellant herein were not only comparable to those suffered by the plaintiff in the **Francis Barasa Simiyu** case (above) but they were worse in that in the instant case, the respondent requires further treatment involving skin grafting.

14. As regards the appellant's complaint on taxation of costs, I believe that this complaint has no merit because the trial court assessed the costs in accordance with the rules.

15. In the result, I have no option but to dismiss the appellant's appeal with costs to the respondent.

It is so ordered.

Dated and Delivered at Machakos this 14th day of May 2008.

R.N. SITATI

JUDGE

28/04/08

Delivered by Lenaola J

In the presence of

No appearance for Appellant

Mr. Mulu for the Respondent

I. LENAOLA

JUDGE