



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.34 OF 2013

JAMES FINLAY (K) LIMITEDAPPELLANT

- V E R S U S -

PAULINE NSOTO MWITAGINIRESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. I. SHIMENGA (P.M) in Kericho PMCC.No.339 of 2003

delivered on 10/10/2013)

JUDGMENT

1. The Respondent **PAULINE NGOTO MWITAGINI** filed PMCC. No.339 against the Appellant **JAMES FINLAY (K) LTD** seeking Special Damages and General Damages for injuries sustained on 20/7/2002 while the Respondent was in the cause of employment with the Appellant.
2. The Respondent testified that while working at Cheptebes Tea Estate, she slipped into a hole and her leg got stuck in the hole and she sustained Potts fracture of the left ankle and sprain of the left ankle joint.
3. The Appellant denied the Respondent’s claim in their Defence dated 14/2/2003 and called two witnesses during the hearing of the case who said the respondent was beaten by her husband.
4. The Trial Court found the Appellant liable and apportioned liability at 60:40 in favour of the Respondent against the Defendant.
5. The Trial Court assessed quantum of damages as follows: -

General Damages	-	100,000/=
Less 40%	-	40,000/=
		60,000/=
Special Damages	-	<u>3,000/=</u>
Total	-	63,000/=
		=====

6. The Appellant has appealed to this Court against both the finding on liability and General Damages on the following grounds: -

- (i) THAT the finding on liability was not founded on evidence.*
- (ii) THAT the Court based it’s finding on irrelevant matters.*
- (iii) THAT the Respondent did not prove her case on a balance of probabilities.*
- (iv) THAT the respondent sustained the injuries as a result of domestic violence and the appellant should not be blamed.*

(v) THAT the award of damages was inordinately high and manifestly excessive for the alleged injuries sustained by the Respondent.

(vi) THAT on those grounds, the Court erred in law and facts on both the finding on liability and the quantum of damages awarded.

7. The parties were directed to file written submissions in this Appeal. The Appellant stated in the written submissions dated 28/10/2020 that the consultant surgeon who testified as PW.1 said the Respondent sustained injuries on the right ankle but the Respondent said it was her left leg that was injured.

8. PW.3 a Clinical Officer at Kericho district Hospital said he examined the Respondent on 24/3/2003 and requested for an X-Ray film and it diagnosed the Respondent with arthritis.

9. The Appellant further submitted that the two witnesses who testified for the Appellant said the Respondent told them she had been assaulted by her husband and she did not work on 20/7/2002 and she was not paid.

10. The Appellant also submitted that the award of Kshs.100,000/= was too high taking into consideration that PW.3 examined the Respondent on 24/3/2003 and said she was suffering from arthritis. The Appellant relied on the case of **SOKOWO SAW MILLS LIMITED -VS- GRACE NDUTA NDUNGU {2006} eKLR** where the Court said Kshs.80,000/= as General Damages was inordinately high for soft tissue injuries that had fully healed.

11. The Respondent opposed the Appeal and submitted in writing that the Respondent testified that she was injured on 20/7/2002 while working as a tea plucker at Cheptebes Tea Estate when she slid into a hole and her left leg got stuck and she was taken to the Appellant's Dispensary known as Cheptebes where she was treated and the treatment note was retained.

12. The Respondent was examined by PW.3 on 24/3/2003 and he said she had arthritis and in Cross-Examination, the witness confirmed trauma can cause arthritis

13. The Respondent's Counsel submitted that DW.1 admitted the Respondent was treated at the Appellant's Clinic but there was alteration on the date and the witness failed to explain the alterations were made.

14. The Respondent's Counsel also submitted that the Respondent proved her case on a balance of probabilities and further that the award was reasonable and guided by the following authorities:-

(i) BIGOT FLOWERS LTD -VS- CLEMENTINA KHASUDI MUYANO NAIVASHA HCCA.110 OF 2015.

(ii) LEAH NYAGUTHI KAMUNY -VS- KENYA BROADCASTING CORPORATION NAIROBI HCC. NO.112 B OF 1993.

15. The first duty of the 1st Appellate Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own conclusion.

16. The issues for determination in this Appeal are as follows: -

(i) Whether the Respondent proved her case to the required standard.

(ii) Whether the award of damages was inordinately high.

17. On the issue of liability, the Respondent testified that she slipped into a hole and sustained injuries. The Appellant's Counsel did not Cross-Examine her on the alleged domestic violence that the Appellant said was responsible for the injuries the Respondent sustained. I find the Defence evidence an afterthought.

18. I also find that DW.1 admitted that there were alterations in their records. DW.1 confirmed that he treated the Respondent at their Clinic and that she had injuries on the left ankle.

19. In the circumstances, the Trial Court was right in apportioning liability at 60:40 in favour of the Respondent against the Appellant.

20. I find that the Respondent established her case on a balance of probabilities.

21. On the issue of quantum of damages, I find that the Respondent proposed Kshs.450,000/= while the Appellant proposed Kshs.30,000/=

22. The sum of kshs.100,000/= awarded is not inordinately high or excessive as alleged by the appellant.

23. I find that the Appeal lacks in merit and I accordingly dismiss it with costs to the Respondent.

24. The findings on liability and quantum are accordingly upheld.

Delivered, signed and dated at Kericho this 29th day of January, 2021.

A. N. ONGERI

JUDGE