



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 468 OF 2017

AFRICA SPIRITS LIMITED.....APPELLANT

VERSUS

STEPHEN GACHUKI NJUGUNA.....RESPONDENT

(Being an appeal from the judgement of Hon D. W. Mburu P.M delivered on 4/8/2017 at the Chief Magistrates Court at Nairobi in CMCC No. 6089 of 2015)

JUDGEMENT

1. This appeal arises from the judgement of Hon D. W. Mburu P.M in Nairobi CMCC No. 6089 of 2015 in which the learned trial magistrate awarded the respondent a sum of Ksh. 1,000,000 as general damages and Ksh 3,000 as special damages arising from a fire that occurred on 3/12/2013, in which the respondent was injured while engaged in his work at the appellant's premises.
2. The appellant was aggrieved by the said judgement and filed this appeal raising the following grounds in the memorandum of appeal;
 - a) **That the learned trial magistrate failed to consider the whole case as argued on behalf of the defendant thus did not apply its discretion properly.**
 - b) **That in awarding the damages, the learned magistrate failed to take into account the fact that the appellant had paid for all accrued medical expenses.**
 - c) **That the trial magistrate erred in law and in fact in awarding the plaintiff a sum of Ksh. 803,000 general damages which award is inordinately excessive considering the fact that the plaintiff had totally healed and does not require any future medical expenses.**
 - d) **That the trial magistrate erred in law and fact in failing to consider that the injuries sustained by the plaintiff were second degree burns which had totally healed.**
3. On 15/7/2020 this court directed that the appeal be disposed of by way of written submission which the parties have already filed.
4. The appellants in their submissions argued that the respondent called Dr. G. K. Mwaura who examined him on 15/9/2015 and confirmed that he had sustained deep burns on the forehead, upper and lower limb, trunk and abdomen. Upon cross examination he indicated that the respondent had sustained second degree burns and that the said burns had healed.
5. The respondent also testified to the fact that the appellant cleared his hospital bill at mater hospital and that the trial magistrate failed to take this into consideration when awarding damages.
6. It is the appellant's submissions that the injuries sustained can be adequately compensated by an award of Ksh. 300,000 as general damages for pain and suffering. In support the appellant cited the cases *inter alia*;

i. **West Kenya Sugar Co. Ltd v Zebedayo Kivati Salamba Civil Appeal No. 26 of 2011** at the High Court of Kenya at Kakamega where the respondent suffered 2nd degree burns and the appellate court awarded the respondent a sum of Ksh. 60,000 as damages for pain and suffering.

ii. **Smokies Bar & Restaurant & Rajan Karim v Reuben Kieti Civil Appeal No. 18 of 2013** in the high court at Nairobi where the respondent suffered extensive burn wounds on the right leg between the knee and ankle joint, extensive burns on the whole face with loss of skin coloring, deep and extensive burn wound on the entire right hand from elbow to the fingers and palm and deep extensive burn wound on the entire left hand from the elbow to the fingers and palm. The trial court awarded the respondent general damages of Ksh 250,000 which was upheld by the appellate court.

iii. **Gertude Akungo (a minor suing through her next friend carolyne Atieno) & 2 Others v James Mwangi Muturi T/A Total Westend Services Station & Another Civil Suit No. 161 of 1998** in the High Court at Nakuru where the plaintiff sustained burns on the face, left arm and on the right thigh and the court awarded Ksh 402,44.90.

7. The respondents on the other hand argued in their submissions that it is not disputed that the appellant catered for the respondent's medical expenses however based on the principles for assessment of damages in personal injury cases the court is not bound to take it into consideration such expenses.

8. It is the respondent's contention that the trial magistrate award was appropriate based on the injuries of the respondent and in support he cited the following cases inter alia;

i. **Charles Kimani Nganga v. Kenya Power & Lighting Company Ltd (2006) eKLR** where the plaintiff was awarded Kshs. 2,500,000 for similar injuries in the year 2006.

ii. **Agnes Wanjiku Ndegwa v. Kenya Power & lighting Company [2014] eKLR** where the Plaintiff suffered severe burns on the body among other injuries and was awarded Ksh. 1,300,000.

9. This being a first appeal, the court is bound analyze and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses when they testified. See **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123 and KIRUGA V KIRUGA & ANOTHER [1988] KLR 348.**

10. This Appeal is only on quantum of damages, liability having been agreed in the ratio of 80:20 in favour of the Respondent.

11. The appellate court's power to interfere with an award of damages by a trial court is restricted and not discretionary. In the case of **Butt =vs= Khan (1978) eKLR** the Court of Appeal held inter alia:

“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.”

12. At trial only two witnesses testified. **PW1 Dr G. K. Mwaura** told the court that on 15/9/2015 he examined the respondent. He had sustained deep burns involving the forehead, upper and lower limb, trunk and abdomen. He also suffered pain swelling and loss of body fluids. During cross examination he indicated that the respondent burns were 2nd degree burns.

13. In his judgment, Hon. D. W. Mburu, learned Principal Magistrate took into account all the authorities relied upon by the parties. The learned Principal Magistrate expressly stated that the injuries suffered by the 1st plaintiff in the case of **Gertude Akungo (a minor suing through her next friend Carolyne Atieno) and 2 others =vs= James Mwangi Muturi T/A Total West End Service Station and another (2005) e KLR** were almost identical to those obtaining in the injuries suffered by the respondent in this appeal and proceeded to award a sum of ksh.700,000/= as general damages.

14. I have re-evaluated the manner the learned Principal Magistrate arrived at the award made in this case. It is clear that in the case cited hereinabove that the injuries suffered included burns on the face, left arm and on the left thigh.

15. It is also noted that the award of ksh.700,000/= was made in 2005, twelve years had lapsed in that case from the date of judgment. The learned Principal Magistrate took into account the passage of time and the inflationary

trends and proceeded to award ksh.1,000,000/=.

16. It is not in dispute that the respondent suffered 30% deep burns on his face, limbs, trunk and abdomen. With respect I am convinced that the learned Principal Magistrate applied the correct principles in assessing damages in this appeal. He took into account the nature of injuries and past awards for similar injuries. He also took into account the inflationary trends before determining the appropriate award.

17. In the end, I find this appeal to be without merit. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent