REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 41 OF 2020

SAMCO TRADERS LIMITED.....1ST APPELLANT

MATIKO AGOYE AKED.....2ND APPELLANT

VERSUS

ALFRED AYANGA OPAKA.....RESPONDENT

[Being an Appeal from the Judgment and Decree of Hon. Oruo C.N.C, (SRM) given at Maseno on the 29th January 2020 in Maseno PMCCC No. 9 of 2019]

JUDGMENT

The Appellant, **SAMCO TRADERS LTD.** and **MATIKO AGOYE AKED** were the 2nd and 3rd Defendants in the case before the trial court.

1. The parties had agreed on the issue of liability, so that the Appellants herein were held 75% liable, whilst the Respondent, **ALFRED AYANGA OPAKA** was 25% liable.

2. Having received evidence on the issue of the quantum of the damages, the learned trial magistrate awarded to the Respondent herein, the sum of Kshs 1,000,000/=.

3. The Appellants have expressed the view that the trial court had arrived at the wrong conclusion, as the said court had allegedly misdirected itself by treating the evidence and the submissions superficially.

4. The trial court is said to have ignored the applicable principles and the relevant authorities on quantum. Instead, the trial court is perceived to have applied wrong principles when assessing the damages awarded to the Respondent.

5. In any event, the Appellant believes that the damages awarded by the trial court were so inordinately high that it can only be construed as an entirely erroneous estimate of the damages that could have compensated the Respondent.

6. It is common ground that the Respondent sustained the following injuries;

a. Blunt injury to the chest; and

b. Fracture of the left tibia and *proximal ends.*

7. When called upon to determine whether or not the quantum of damages awarded was erroneous, the appellate Court reminds itself that as far as possible, comparable injuries should be compensated by comparable awards.

8. If the Court awarded an inadequate amount, that would be incapable of providing a reasonable compensation to the Plaintiff; and the same would therefore be unjust.

9. On the other hand, if the Court awarded a very high amount, that would have the effect of unjustly enriching the Plaintiff, whilst unduly overburdening the Defendant.

10. It is therefore incumbent upon the Court to always seek to strike the right balance, so that the Plaintiff is appropriately compensated, whilst the Defendant is not unduly burdened.

11. At the trial, the Plaintiff urged the Court to award him Kshs 1,600,000/=. The Plaintiff placed reliance on the case of **ISAAC MWORIA MINABEA Vs DAVID GIKUNDA, HIGH COURT CIVIL APPEAL NO. 67 OF 2016**.

12. In that case the Plaintiff sustained compound fractures of the right tibia fibula, and also a mild head injury.

13. As the learned trial magistrate in this case noted in his judgment, the Claimant in that authority suffered permanent incapacity, which made him incapable of working.

14. Therefore, the Claimant herein suffered comparatively less serious injuries. It would therefore follow, that the Plaintiff in this case ought to be awarded damages which were comparatively less than that awarded in the case of **ISAAC MWORIA MINABEA** (above cited).

15. The second authority cited by the Plaintiff in this case was that of **PW Vs PETER MURIITHI NGARI, HIGH COURT CIVIL APPEAL NO. 54 OF 2013**.

16. In that case the Claimant sustained the following injuries;

> **a. Fracture of the left femur;**
>
> **b. Fracture of the left tibia and fibula *malleoli;***
>
> **c. Blunt injuries to the pelvis, causing *fracture of the pelvis.***

17. As the Court noted, during the appeal;

> **"….. the plaintiff sustained multiple fractures; 20% permanent disability; urine incontinence, and required future operations to remove metals."**

18. The learned Judge set aside the award of Kshs 600,000/= and substituted it with an award of Kshs 1,600,000/=.

19. In my considered opinion, the Claimant in that case suffered more injuries, and which were also more severe than those sustained by the Respondent in this case.

20. Indeed, the Respondent has, in his written submissions acknowledged that his injuries were less severe than those sustained by the Claimant in the case of **P.W. Vs PETER MURIITHI NGARI (2017) eKLR**.

21. Nonetheless, the Respondent submitted that the trial court awarded an appropriate quantum, as the said court gave him a sum which was discounted to the tune of Kshs 600,000/=.

22. In my considered opinion, parties always ought to strive to cite cases which are comparable to their own case. When the Respondent concedes that;

> **"The injuries suffered in the two cited cases were not comparable to the injuries sustained by the Appellant (sic!) as the Appellant's (sic!) injuries were less severe;"**
>
> that is indicative of a choice to try and influence the trial court to give an award which the Claimant was well aware, would be higher than what he was entitled to get.

23. Indeed, it is noteable that whilst the Respondent has now conceded that the authorities he had cited were not comparable to his case, during the trial he had expressly submitted that the injuries he had sustained were;

> **"more or less similar injuries as those sustained by the plaintiff's in the above cited authorities."**

24. Meanwhile, the Appellants had cited the case of **HARUN MUYOMA BOGE Vs DANIEL OTIENO AGULO, HCCA NO. 7 OF 2015**. In that case the Plaintiff had sustained a compound fracture. Majanja J. noted thus, when determining the appeal from the trial court;

> **"…. it is clear that the fracture was serious enough to warrant a period of hospitalization and its effects were permanent."**

25. In those circumstances, the learned Judge enhanced the award of General Damages from Kshs 150,000/=, to Kshs 300,000/=.

26. I note that in that case the Plaintiff had also sustained a chest injury and a small cut to his right hand.

27. There is no doubt that the Plaintiff in that case had sustained injuries which were comparable to those in the case herein. Therefore, the awards should be comparable.

28. When awarding Kshs 1,000,000/= to the Claimant in this case, the learned trial magistrate stated that he had taken into account the factor of inflation.

29. In principle, inflation is a relevant factor when determining the quantum of compensation. However, the court ought to provide some more information to explain how inflation was factored into the particular case.

30. In this case the two authorities which were cited by the Claimant, were determined in 2017, whilst the Claimant's case was determined on 29th January 2020. In the event, the period between the said decisions was not substantial. And whereas there would probably have been an element of inflation between 23rd November 2017 (when **ISAAC MWORIA M'NABEA Vs DAVID GIKUNDA HCCA NO. 67 OF 2016** was determined) and the 29th of January 2020, the learned trial magistrate did not indicate how he determined the relevant factor of inflation.

31. In my considered opinion, the case of **HARUN MUYOMA BOGE Vs DANIEL OTIENO AGULO** (supra) bore more similarities to the case before me. Therefore, in determining the appropriate quantum, the said case would be my first point of reference.

32. I then take into account the fact that that case was determined on 13th April 2015, which is more than six (6) years ago.

33. I take judicial notice of the fact that over the last six years, the purchasing power of the Kenya Shilling has been reduced. In the circumstances, a Claimant who would have been appropriately compensated with Kshs 300,000/= in 2015, would need to be awarded a higher award today, so as to be duly compensated.

34. In the event, I find that whereas the sum of Kshs 1,000,000/=was inordinately high, the proposed sum of Kshs 350,000/= was inadequate. Accordingly, I now allow the appeal, set aside the award of Kshs 1,000,000/= and substitute it with the sum of Kshs 600,000/=.

35. The costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2021

FRED A. OCHIENG

JUDGE