



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 542 OF 2017

NIRMA CONSTRUCTION CO.LIMITED.....APPELLANT

VERSUS

HARRONY OUMUKHOBERO OKUTOYI.....RESPONDENT

(Being an appeal from judgment of Senior Principal Magistrate Hon. Edna Nyaloti at Milimani commercial court delivered on 13th September 2017 in Civil Case no. 2046 of 2015.)

JUDGMENT

1. The respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 4th February, 2015 and sought for reliefs against the appellant in the nature of general and special damages plus costs of the suit and interest thereon as a result of injuries sustained by the respondent arising from an alleged injury that occurred on the appellant's site.
2. The appellant filed a defence dated 15th July 2015 denying the claim in the plaint and called for strict proof. It particularly denied that the said injury was as a result of its failure to provide a safe system of work to the respondent and put the respondent to strict proof. After the full hearing judgment was delivered in favour of the respondent.
3. Being aggrieved, the appellant preferred this appeal and put forward the following grounds of appeal:
 - a. **That the learned Magistrate erred and misdirected herself on the issue of general damages.**
 - b. **That the amount for general damages awarded to the respondent is manifestly excessive in light of the injury sustained and the medical report prepared by Mr.R.B Barad dated 15th February 2016.**
 - c. **That the appellant shall file a supplementary Memorandum of Appeal upon receipt of Court proceedings.**
4. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. The appellant vide its submissions dated 28th September 2021 argues that the award of Kshs.1 million was extremely excessive and not in tandem with the principal of damages for comparable injuries should be uniform.
5. On this argument counsel relied on the case of *Daniel Gacheru v Paul Kigima Karimi Nairobi HCCC No.250 of 1990* where the plaintiff suffered depression fracture on the frontal area of the skull above the right eye. Bruises on the right hand, right knee and left knee. General damages was assessed at Kshs.300,000/=.
6. The appellant submitted that the court applied the wrong principles in awarding a sum of Kshs.1 million as general damages while taking note of the inflationary trends in the country and noting that the accident happened in 2014 a sum of Kshs.400,000/= would have sufficed in the circumstances.
7. In retort, the respondent submitted that liability was settled by consent at 85:15 in plaintiff's favour and that there were two medical reports by Dr. Barad and Dr. Wokabi were produced by consent.
8. He referred to the two medical reports in which stated that the injuries sustained by the respondent were with severe head subdural haematoma, fractures of the right temporal bone and right zygomatic bone. He further submitted that the respondent risked development of

epilepsy and that Dr. Wokabi put incapacity at 20% of which Dr. Barad confirmed the injuries and also saw possibility of epileptic disorder.

9. The respondent submitted that the appellant had proposed Kshs.60,000/= and cited old authorities that were not relevant as they were related to soft tissue injuries which are not related to head injuries. The respondent further submitted that inflation was not factored in the appellant's submissions.

10. The respondent contends that it cited cases on head injuries which were recent and the awards ranged from Kshs.600,000/= to Kshs.1,700,000/= of which the trial court considered the cited cases and awarded Kshs.1,000,000/=.

11. The respondent submitted that the award was not excessive as the trial court did not error in its method of approach. On this the respondent relied on the case of ***Agnes Kamene Mulyali v Harvest Limited (2017) eKLR***.

12. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion.

13. I have considered the contending submissions and authorities cited on appeal. I have likewise re evaluated the material placed before the trial court. I find the issue falling for determination is whether the award of damages was excessive as claimed

14. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established.

15. A perusal of the impugned judgment shows that the parties had Agreed on liability in the ratio of 85:15 in favour of the respondent.

16. That there were two medical records. The injuries suffered by the respondent are as stated in Dr. Wokabi's medical report are that he suffered fractures of the right temporal bone and right zygomatic bone. The same doctor put incapacity at 20% which was confirmed by a second doctor Dr. Barad who also saw a possibility of epileptic disorder. It is clear from the above that there was a second opinion that was sought so as to satisfy both parties.

17. On the same the respondent in the trial court had proposed the sum of Kshs.2,000,000/= which the trial magistrate felt was inordinately high while the appellant had proposed Kshs 60,000/= which the trial magistrate felt was inordinately low

18. In the case of **ROBERT GITAU KANYIRI – VS- CHARLES R KAHIGA & 2 OTHERS; NAKURU HCCC NO. 22 of 2009**, the Plaintiff sustained fracture of the right radius, fracture of the femur, and head injury. Kshs. 1,000,000 was awarded.

19. After due consideration of all the material before this court alongside the authorities, I do find that the award for damages for Kshs.1,000,000/= to be reasonable considering the fact that years that have lapsed since the cited authorities of the appellant were made and the present value of the shilling and the factoring in the liability ratio of 85:15, I find the award of Kshs.1,000,000 to be reasonable.

20. I have also considered the fact that this is an old man who by then was 50 years and had already started developing complications of the head, this means that he might not work again and will end up depending on others.

21. With respect, it is clear that the learned Magistrate did not breach any principles in assessing damages and I am satisfied the award is reasonable.

22. In the end this appeal is found to be without merit. The same is dismissed with costs being awarded to the respondent.

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

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent