



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei- J

CIVIL APPEAL CASE NO. 67 OF 2015

MUTINDA MICHAEL.....APPELLANT

VERSUS

MM (a minor suing through her mother And next of friend

WKM alias WK.....1ST RESPONDENT

JOHN KIMANTHI MUSYOKA.....2ND RESPONDENT

(Being an Appeal from the judgment of Hon. M. O. Opanga (S.R.M.)

in Kithimani Senior Principal Magistrate SRMCC. No. 6 of 2014

delivered on the 19/03/2015)

JUDGEMENT

1. The instance appeal arises from the judgement of Hon. M. O. Opanga SRM in **Kithimani SRMCC NO. 6 of 2014** dated 19/03/2015 wherein liability against the appellant was pegged at 100% and that general damages of Kshs. 300,000/= plus special damages of Kshs. 17,860/= were awarded to the Respondent.

2. The Appellant being aggrieved by the said judgment lodged this appeal. Vide a Memorandum of Appeal dated 17/05/2015 the Appellant raised the following grounds of appeal:

(a) That the learned trial magistrate erred in fact and law and misdirected herself in finding that the 1st Respondent is entitled to general damages of Kshs.300,000/= which amount is excessive.

(b) That the learned trial magistrate erred in law and fact by misdirected herself in failing to consider the submissions by the Appellant together with the authorities relied on by the Appellant.

(c) That the learned magistrate erred in law and fact in arriving at her said decision.

3. From the above ground it is clear that the Appellant is only challenging the quantum of damages awarded to the Respondent. Liability not being disputed, I find that the issues for determination are:

(i) Whether the award of damages by the trial court should be interfered with.

(ii) Whether the Appellant's submissions were considered by the trial court.

4. This being the first appellate court, my duty is to re-evaluate and analyze the evidence presented before the trial court and come up with my own conclusion but taking note of the fact that I did not see or hear the witnesses testify.

5. Parties in the trial court had agreed to have **PMCC No. 160 of 2013** as a test suit wherein liability against the Appellant was agreed by consent at 100% which was to be shouldered equally between the Appellant and another. It was the evidence of the Respondent that the minor sustained burn injuries on the chest and left hand and who was admitted in hospital for one week. Dr. Kimuyu later carried out examinations and which are captured in a medical report. According to the said medical report the minor suffered burn wounds on the chest both anterior and posterior. It was noted that the patient still complained of pain on the affected areas and had difficulty in lifting the left upper limb. It was the opinion of the doctor that the patient needed counselling as she grew up and further there would be need for physiotherapy of the left upper limb. It was also the doctors' view that the scars on the patient will psychologically affect him as he grows up.

6. There was no evidence tendered on the part of the Appellant.

7. Parties herein agreed to file written submissions. However it is only submissions by the Respondent's counsel that are on record. Learned counsel submitted that the award of the trial court should be upheld. Reliance was placed in the case of **Eldoret Steel Mills Ltd –vs- Gilbert Nganyi Nehemia [2005] eKLR** where a Plaintiff who sustained burns on head, ears, left hand and wrist was awarded Kshs.250, 000/=.

8. I have considered the appeal as well as the submissions. I have noted the evidence of the Respondent tendered before the trial. As regards the first issue, it is not in dispute that the Respondent sustained burns on the left posterior and anterior chest wall as well as some soft tissue injuries. The doctor noted some limited movement of the left upper limb and that the scars would be permanent thereby requiring the patient to undergo both physiotherapy and psychosocial support as he grows up. Learned counsel for the Respondent before the trial court had sought for a sum of Kshs.400,000/= and placed reliance in the case of **Eldoret Steel Mills Ltd –vs- Gilbert Nganyi Nehema [2005]eKLR** where a sum of Kshs. 250,000/= was awarded to a plaintiff who sustained burns on head, ear, left hand and wrist. The Appellant's counsel had proposed the sum of Kshs. 40,000/= - 50,000/= as general damages and placed reliance on several cases namely **Africa Highlands produce co. Ltd –vs- Francis Mososi Kericho CA 22 of 2003** where the sum of kshs. 40,000/= was awarded for soft tissue injuries which had healed. **Savani Estate –vs- Gilbert Muhunzi Makotsi Eldoret HCA. 76/2012** where a sum of 130,000/= was reduced to Kshs. 70,000/= on appeal.

The judgement of the learned trial magistrate reveals that she considered all the submissions placed before her and came up with the sum of Kshs.300,000/=.

9. Assessment of quantum of damages is always left to the discretion of the trial court and therefore the Appellate court only comes in to interfere with it if certain parameters were not met by the trial court. The principles have been laid in the case of **Butt –vs- Khan [1978] eKLR** where the court of Appeal held as follows:-

“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 is either inordinately high or low.”

I have looked at the evidence presented on behalf of the Respondent including the medical report by Dr. Kimuyu. It is clear that the Respondent sustained burns on the chest as well as other soft tissue injuries. According to the said doctor the Respondent still needed to use analgesics on and off and that the left upper limb had restricted movement requiring physiotherapy. The doctor also opined that the Respondent needed counselling owing to the scars which would affect him psychologically as she grew up. The said injuries appear to me to be similar to those of the Plaintiff in the case cited by the Respondent's counsel namely **Eldoret Steel Mills Ltd –vs- Gilbert Nganyi Nehema [2005] eKLR** where a sum of Kshs. 250,000/= was awarded in respect of burns on the head, ears left hand and wrist. The Respondents injuries were compounded by the fact that he was still a minor and was to grow with the said scars on his body thereby leaving a psychological effect on him. The decision in the said case was made quite some time ago and hence the effects of inflation on the economy cannot be gainsaid. I am satisfied that the trial court considered all these salient facts and came up with the award which in my view is neither high nor low and which represented a reasonable estimate of the damages. Therefore I see no reason to disturb the same. On special damages, I note that the Appellant has not challenged the same and hence the same shall remain undisturbed.

10. As regards the second issue and from the above observations it is plainly correct that the judgement of the learned trial magistrate duly considered the submissions of the Appellant's advocates. She considered all the authorities cited and found the one cited by the Respondent's Counsel to be relevant in the circumstances of the Respondent's case. I have also found that the said authority is relevant herein. Consequently, the Appellants claim that their submissions were not considered by the trial court is not merited.

11. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

Judge