



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**CIVIL APPEAL NO. 110 OF 2015**

**BIGOT FLOWERS LTD.....APPELLANT**

**-VS-**

**CLEMENTINA KHASUDI MUYANO.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable P. Gesora (CM)*

*delivered on the 27<sup>th</sup> October, 2015 in Naivasha CMCC No 549'A' of 2012)*

**JUDGMENT**

1. The Plaintiff, Clementina, was at the material time, an employee of the Defendant. On 30<sup>th</sup> August, 2007 she was disembarking from the Defendant's truck when the ladder broke and she fell down, sustaining injuries.

2. Clementina filed a suit for damages. She and two other witnesses testified on her behalf. There were no defence witnesses. Testifying as (PW2), she said that she was treated at Naivasha District Hospital and later at Ndonyo Health Care. She produced treatment notes and treatment card from the medical facilities.

3. Dr. Omuyoma (PW1) examined Clementina on 23<sup>rd</sup> August 2013, six (6) years after the accident. He also perused the treatment notes and found that she had sustained:

- Sprain of the left leg and left ankle joint.

- Blunt injury to lower back.

He produced his medical report dated 23<sup>rd</sup> August, 2013.

4. The injuries were confirmed by Dorcas Osoro PW3, a Clinical Officer attached to Naivasha District Hospital. She produced P. Exhibit 7, a letter authored by the Medical Superintendent, Naivasha, which recommended that Clementina should only do light duties.

5. During the trial, the parties entered a consent judgment on liability with the Defendant being liable at 80% and the Plaintiff being liable at 20%. At the close of the hearing, judgment was entered as follows:-

General damages Kshs 600,000.00

Less Contribution 20% Kshs 120,000.00

**Kshs 480,000.00**

Add Special damages Kshs 5,000.00

**Total Kshs 485,000.00**

Costs and Interest were also awarded.

6. The Appellant’s appeal is that the trial court’s assessment of damages was manifestly excessive and that the Trial Magistrate failed to apply the applicable principles and comparable awards for awarding damages.

7. In the trial court, the only decision referred to in the judgment was that submitted by the Plaintiff, namely, **Kakamega HCCA 140 of 2010 Ben Menges v Edith Makungu Lande [2013] eKLR** where Kshs 900,000/= was awarded. The Defendant in the lower court did not submit any authorities on the awardable damages.

8. In their submissions on appeal, the Appellants argue that the treatment notes from Naivasha Hospital provide the most relevant evidence of the injuries of the Plaintiff as the medical report was done years later. I would agree with the appellant on that point. A medical report written up and based on an examination done several years after the accident cannot bear the same relevance or weigh as treatment notes made contemporaneous with the infliction of injuries.

9. In this case the treatment notes (**P. Exhibit 5** dated 30<sup>th</sup> August, 2007) show the injuries to have been:

*“Knee and Ankle joint pain.*

*Lower Back pain*

.....

*Left knee strain and Soft Tissue Injuries*

*Left ankle joint injury (Soft Tissue Injuries).”*

For these she was treated with injectable and oral analgesics and physiotherapy.

10. Dr. Omuyoma’s medical report of 23<sup>rd</sup> August, 2013, suggests that osteoarthritis developed on the left knee and that the blunt injury to lumbar-sacral region of the back developed into lumbago with sciatica. In cross-examination he said that he relied wholly on the treatment notes. He admitted that there was no suggestion in the treatment notes that the Plaintiff had sciatica or lumbago, and that it was his examination of the Plaintiff that led him to those conclusions. He did not explain how he arrived at those conclusions.

11. There is no evidence, in my view, to show that Dr. Omuyoma’s conclusions on arthritis, sciatica and lumbago can be attributed wholly and directly from the fall the Plaintiff sustained in the accident, unless one discounts and excludes normal aging and bodily wear, and any intervening events or injuries to the Plaintiff between the material date and her examination six years later.

12. I am persuaded that the injuries noted in the treatment notes are the injuries the Plaintiff suffered and I so find.

13. The Appellant cited the cases of **Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR** and **Kreative Roses Limited v Olpher Kerubo Osumo [2014] eKLR**. In both cases soft tissue injuries were sustained. In **Sokoro’s** case, Kshs 30,000/= general damages were awarded, and in **Kreative Roses**, the High Court declined to interfere with an award of Kshs 50,000/= for soft tissue injuries.

14. In **Ben Menge’s** case relied on by the Trial Court the injuries sustained were far more serious and substantive. Kshs 900,000/= was awarded there, and in the present case the trial magistrate awarded Kshs 600,000/=. I think the injuries in that case cannot be said to be comparable to those in the present case.

15. Whilst it is possible that lumbago sciatica and osteoarthritis may be somehow connected to the injuries suffered by the Plaintiff in the accident, I am not persuaded that they necessarily flow out of the accident. The accident may have played a role in enhancing conditions that existed or would have naturally arisen, but this is now in the realm of speculation.

**Disposition**

16. All in all I would set aside the lower court’s judgment and award a global sum of Kshs 120,000/= (less contribution of 20%) for general damages with interest at court rates from the date of the award in the lower court. The total award shall thus be:

General damages Kshs 120,000.00

Less Contribution 20% Kshs 24,000.00

Kshs 96,000.00

Add Special damages Kshs 5,000.00

**Total Kshs 101,000.00**

17. Given that the Appellant did not avail any authorities in the lower court to assist it in the quantum award, each party shall bear its own costs of the appeal.

**Administrative directions**

18. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

19. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

20. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 26<sup>th</sup> Day of October, 2020.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Geno for the Appellant
2. Amboko for the Respondent
3. Court Clerk - Quinter Ogutu