



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 115 OF 2017

JOSEPH KIMANI GITHAGA.....1ST APPELLANT

BLUE SKY OUTSOURCING LIMITED.....2ND APPELLANT

VERSUS

JOHN MACHARIA MWANGI.....RESPONDENT

(Being an appeal from the judgment and orders Senior Resident Magistrate - Hon. B. Khaemba delivered on the 7th July 2017 in Kikuyu CMCC No. 297 of 2016)

JUDGMENT

1. This Appeal arose from the judgment of the trial Magistrate in Kiambu CMCC No.297 of 2016 delivered on the 7th July 2017.

The appellant was dissatisfied with the Award of General damages awarded in view of injuries he sustained on the 3rd July 2016 following an accident along the Nairobi-Limuru road involving motor vehicle Reg. No. KBH 929U driven by the Appellant (then plaintiff) and the 2nd Appellants vehicle Reg. No KCC 308 V.

2. Upon hearing of the suit, the Respondent was awarded Kshs.950,000/= in general damages for pain and suffering which the Appellants state is inordinately high hence seeks that this court set aside, vary and re-assess appropriate damages.

The matter of liability was resolved by the parties consent when they apportioned liability to 85%: 15% in favour of the Respondent (then plaintiff).

3. *Quantum of damages*

For an appellate court to interfere and vary or set aside a trial court decision on its assessment of damages, it ought to be satisfied that the court misdirected itself in some matter as a result arrived at a wrong decision – **Mbogo –vs- Shah (1968) EALR Page 93** .

4. Further the court will not interfere with discretion of the trial court on an award of damages unless it is satisfied that either that in assessing the damages, it took into account an irrelevant factor or left out a relevant factor, or that the amount awarded is so inordinately low or high or a wholly erroneous estimate of the damages – **Kemfro Africa T/a Meru Express Services and Another –vs- Lubia (1982 -88) KAR 727**.

5. The Respondents injuries are stated in the medical report of Dr. N.H.Bhanji dated 8th August 2016 which the trial magistrate based his assessment of damages.

They are

- **Head injury**(cerebral concussion)
- **Blunt injury to the face**
- **Loosening of frontal teeth, upper jaw**
- **Cut wound behind left ear**

- **Deglowing injury to the right forearm with loss of right thumb**
- **Deep abrasions over the abdomen and anterior chest wall**
- **Soft tissue injury to the back.**
- **Debridement of deglowing injury right forearm done under general anaesthesia**
- **Tenderness of spine on palpation**
- **Spasms of Muscles of back and movements**
- **Extensive hypopigmented scarring over abdomen extending to chest wall.**

6. Future prognosis

- **Head injury may dispose claimant to epileptic fits in future, risk about 5%**
- **May develop post concessional syndrome – lack of concentration, spells dizziness, forgetfulness, insomnia**
- **Loss of right thumb is of permanent nature**
- **Needed constraint physiotherapy, cost in private institution about 2,500/= per session, needing at least 3 sessions in a week.**
- **May have difficulty in driving vehicle due to loss of thumb.**

7. The said injuries were stated in the plaint.

In his judgment the trial magistrate captured the Respondents evidence and analysed the same in the assessment of damages, and arrived at a finding that the Respondent sustained severe injuries and cited the case two cases in support of the award of Kshs.1,200,000/=, and considering the Appellants submissions and decisions cited in support of their proposals of Kshs.500,000/=.

8. In addition, it is on record that the trial court considered the claim for loss of earnings and earning capacity cited authority and parties proposals, and in particular the case **Mumias Sugar Co. Ltd** where the Court of Appeal rendered that

“Loss of earning capacity can be awarded as part of general damages for pain and suffering or as a separate head of damages

That there is no formula for assessing earning capacity. Nevertheless the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of the disability.”

9. The trial court went ahead to state all the factors to be taken and supported the same with authorities.

10. It is to be noted that the appellant did not call any evidence and of necessity leaves the Respondents evidence uncontroverted.

It is the award of Kshs.950,000/= General Damages for pain and suffering that is the subject of this Appeal.

11. I have considered the appellants submissions on the award and cited authorities.

In the analysis of the cited authorities, the trial Magistrate considered the case of **Pelican Engineering Construction Co. –vs- Daniel Ngunjiri Githendu HCCCA No. 338 of 1999** which he is faulted for not considering (Page 6 of judgment).

12. The injuries of the plaintiff therein are not comparable, in fact they are different being amputations to the left thumb, index finger, middle finger and ring finger and an award of Kshs.400,000/= given.

He relied principally on the cases of **Ben Mengesa –vs- Edith Makungu Lande Kakamega Civil Appeal No. 140 of 2010** where in 2013 the court awarded **Kshs.900,000/=** and **Barry Proudfoot –vs- Coast Broadway Co Ltd Nairobi Civil Case No.1265 of 1997** where the injuries were comparable to those sustained by the Respondent.

13. In its totality, I am satisfied that the trial magistrate was properly guided by the principles stated in the **Mbogo –vs- Shah and Kemfro Africa Cases** and **Butt -vs- Khan(Supra)**.

14. The Appellant has failed to satisfy this court in what manner the trial magistrate failed to uphold the doctrine of precedent nor failed to consider the Appellants submissions and the medical report by Dr. Bhanji.

15. The award of damages of Kshs.950,000/= for pain and suffering and loss of amenities in my considered opinion represent a fair reasonable compensation considering the injuries the Respondent sustained.

16. For the foregoing, I find the Appeal hereof devoid of merit. It is dismissed with costs to the Respondent.

Dated and signed at Nakuru this 23rd Day of January 2019.

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J.N. MULWA

JUDGE

Dated, signed and Delivered at Kiambu this 21st Day of February 2019.

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C. MEOLI

JUDGE