



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 390 OF 2015**

**WADIA CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MAKARI ABRAHAM MAFURA.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 23<sup>rd</sup> July, 2015 by Hon. R Ngetich (Chief Magistrate) Milimani Commercial Courts in CMCC No. 3779 of 2013).**

**JUDGMENT**

1. By the consent of the parties, judgment on liability was entered at 70% against the Appellant and 30% against the Respondent. Special damages were agreed at Ksh. 2,000/=. The medical reports by Dr. A. O. Wandugu and Dr. W. M. Wokabi and a notification of injury form filled by the employer were produced as evidence without the calling of the makers. The parties then filed written submissions.

2. Dr. Wandugu's medical report reflected the following blunt injuries:

**“- Forehead**

**- Chest**

**- 6 teeth as evidenced by looseness**

**- Back**

**- Waist**

**- Both hands**

**- Both legs**

**2. Blood loss.”**

The prognosis was as follows:

**“1. The injuries have resulted in chronic disabling pains in the affected areas, a source of chronic ill-health which might need medication on and off.**

**2. The injuries have resulted in scars which are rather uncosmetic in the affected areas.**

**3. The injuries have resulted in chronic headaches disabling him from concentrating in his daily socio economic activities.**

**4. The injuries by their effects in the chest render him vulnerable to recurrent respiratory tract infections.**

**5. The injuries by the effects in the back have resulted in permanent restriction of bending movements**

**6. The injuries by their effects in connective tissues have resulted in permanent weakness of both hands.**

**7. The injuries by their effects in connective tissues have resulted in permanent weakness of both legs.**

**8. By affecting his eating habits negatively, the results of the injuries render him vulnerable to malnutrition.”**

3. The trial magistrate observed that the medical report by Dr. W. M. Wokabi was not in the file. General damages were assessed at Ksh.750,000/= on a 100% basis. This came to Ksh.526,400/= upon adding the Ksh. 2,000/= special damages and deduction of 30% contribution.

4. The Appellant was aggrieved by the said judgment and appealed on grounds that can be summarized as follows:

(a) That the second medical report was not taken into account.

(b) That the Appellants submissions particularly on comparable authorities were not considered.

(c) That the assessment of general damages was excessive unreasonable and manifestly unfair.

5. The appeal was canvassed by way of written submissions which I have considered.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

7. I have carefully perused the record of appeal. Although the recorded consent refers to a medical report by Dr. W.M Wokabi, no such medical report is on the record of appeal and there’s no supplementary record of appeal. I have also carefully perused the original lower court file. There is no such report therein. The observation by the trial magistrate that there was no such report on the record is therefore correct.

8. Under Order 42 rule 27 of the Civil Procedure Rules, the Appellant had the liberty to apply for the production of Dr. W M Wokabi’s report as additional evidence. This was however not done.

9. In the circumstances of this case this court can only consider the medical evidence on record as per the report by Dr. A. O. Wandugu. From the said report it is noted that there is mention of chronic disability pains, chronic headaches, uncosmetic scars, vulnerability to recurrent respiratory tract infections, permanent restriction of bending movements, permanent weakness of both hands and both legs and negatively affected eating habits. These are aggravated circumstances.

10. I have considered comparable authorities cited the same range from 100,000/= to 1,000,000/=. I find the award of general damages herein to be within the range of similar awards.

11. I am guided by the case of **Kemfro Africa Ltd (Supra)**, where the Court of Appeal observed:-

**“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”**

12. In the upshot, I find no merits in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of March, 2019**

**B. THURANIRA JADEN**

**JUDGE**