



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 81 OF 2016

ALPHA KNIT COMPANY LIMITED.....APPELLANT

-VERSUS-

DANIEL KARURI GITHINJI.....RESPONDENT

(An appeal from the judgment delivered by S. Mbungu (Ag. Chief Magistrate) on 24th April, 2015 in Thika Chief Magistrate's Civil Case No. 440 of 2012)

J U D G M E N T

1. By way of a plaint dated 11th June, 2012 in Thika Chief Magistrate's Civil Case No. 440 of 2012 the Respondent filed a suit against the Appellant seeking general and special damages in addition to costs and interest thereon. Briefly, the Respondent pleaded that while working for the Appellant company as a machine operator, he sustained severe injuries on or about the 19th day of March, 2012 resulting from the appellant's negligence and/or breach of its statutory duty of care owed to him.

2. The Respondent thereafter served the Appellant with copies of the summons to enter appearance together with the plaint but the Appellant did not enter appearance and/or file a statement of defence within the stipulated timelines, thereby prompting the respondent to apply for an interlocutory judgment to be entered. The same was entered on 2nd July, 2012 but later set aside following an application by the appellant.

3. At the hearing, the parties called two (2) witnesses each in support of their respective cases. At the close thereof, the parties put in written submissions.

4. Ultimately, the court entered judgment in favour of the Respondent in the following manner:

a) *Liability-100%*

b) *General damages-Kshs.600,000/=*

c) *Special damages-Kshs.3,000/=*

Total-Kshs.603,000/=

5. The aforementioned judgment is now the subject of the appeal before this court. The appellant's memorandum of appeal is anchored on four (4) grounds thus:

(i) THAT the learned trial magistrate erred in law and in fact by awarding an excessive amount in general damages of Kshs.603,000/= which was not commensurate to the claim or what was proved.

(ii) THAT the learned trial magistrate erred in law and in fact in his analysis of the evidence presented and therefore misdirected himself as pertains to the award on general damages.

(iii) THAT the learned trial magistrate erred in law and in fact by failing to look at the documentary evidence already on record and therefore misdirecting himself as pertains to the quantum of damages awardable.

(iv) THAT the learned trial magistrate totally misapprehended the facts of the case, thereby leading to an erroneous application of the facts into law.

6. Parties agreed to have the appeal disposed of through written submissions, though the record shows that only the Appellant filed

submissions. That being the case, the Appellant has submitted that the award on general damages made by the learned trial Magistrate is manifestly excessive and ought to be interfered with, citing the principles to be considered in determining whether to interfere with an award on quantum as addressed in Arrow Car Limited v Elijah Shamalla Bimomo & 2 others [2004] eKLR.

7. The said appellant has also urged this court to consider the rendition in Cecilia W Mwangi & another v Ruth W Mwangi [1997] eKLR that:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford.”

8. In conclusion, the Appellant proposed the sum of Kshs. 230,000/= as a reasonable award on general damages, citing Paul Karimi Kithinji v Joseph Mutai Kireria [2018] eKLR where the appellate court substituted an award of Kshs.250,000/= with that of Kshs.150,000/= as well as Simon Mungai Kariuki v Fatma Hassan [2017] eKLR in which case the High Court on appeal upheld an award of Kshs.230,000/= as general damages.

9. I have carefully considered the submissions articulated by the appellant. I have also re-evaluated the evidence placed before the trial court in addition to reviewing the impugned decision.

10. It is noteworthy that the appeal touches solely on quantum and more specifically, the award in respect to general damages.

11. In the premises, I will proceed to address the first ground of appeal concerning whether the award made is manifestly excessive.

12. I refer to the plaint found on page 3 of the record of appeal. Therein, the respondent pleaded that he sustained the following injuries:

- a) *Compound fracture-right proximal radius*
- b) *Soft tissue injuries with cut wounds to the right forearm*

13. The aforementioned injuries were verified by the medical report dated 27th April, 2012 prepared and produced by Dr. Jane Ikonya who in her oral testimony as PW 1 termed the respondent's injuries as skeletal and grievous harm in nature. The said witness also confirmed that the injuries had healed but mentioned that upon reviewing the respondent a second time, her prognosis was that he has suffered 50% permanent incapacity.

14. I now turn to the trial court's judgment. Therein, the learned trial magistrate acknowledged the respondent's proposed award of Kshs.1,600,000/= as general damages but observed that the injuries sustained in Leonard Kinuthia v William Sirma Kiboros & Another [2000] eKLR cited by the said respondent were of a greater degree of severity. The trial magistrate also took into account the appellant's proposed award of Kshs.200,000/=, ultimately settling for the sum of Kshs.600,000/= as a reasonable award on general damages for pain and suffering and loss of amenities.

15. Having noted the above, I now refer to the guiding principles surrounding the interference of awards on appeal. These were set out in Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR and reinforced by the court in Arrow Car Limited (supra) thus:

- a) *Whether an irrelevant factor was taken into account.*
- b) *Whether a relevant factor was disregarded.*
- c) *Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

16. In addition to the above, any award made ought to align itself with comparable awards and take into consideration economic factors, as rendered in Cecilia W Mwangi & another (supra).

17. Of relevance to this court is the principle on whether the amount awarded is so manifestly high as to warrant interference. I have looked at the authorities incorporated into the appellant's filed submissions and noted that the injuries sustained therein were considerably minor in comparison to those suffered by the respondent. I have also considered the rival submissions together with authorities cited before the trial court.

18. The court in Leonard Kinuthia v William Sirma Kiboros & Another [2000] eKLR relied upon by the respondent and considered by the trial court, awarded a sum of Kshs.700,000/= for related but slightly more severe injuries and with an assessment of incapacity at 10%. Moreover, in the case of Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR wherein the plaintiff suffered a fracture to the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle in addition to a prognosis of 3% permanent partial disability, an award of Kshs.800,000/= was substituted with one of Kshs.500,000/= as general damages on appeal.

19. From the foregoing, it is fair to conclude that the injuries described in those authorities were more severe than those of the respondent. Further to this, while PW 1 testified that the respondent has suffered permanent disability of 50%, no documentary evidence was availed before the trial court to support such prognosis. In addition, whereas the medical report produced indicated that there was a probability the respondent would experience temporary incapacity of four (4) months, this was not ascertained in terms of documentary evidence,

notwithstanding PW1's oral testimony to this effect. PW1 stated that she reviewed the respondent a second time on 2nd June, 2014 yet she did not avail a report supporting such statement.

20. In the premises, I am of the considered view that the award made by the trial court warrants my intervention and interference. Having taken due regard to comparable awards and inflation trends, I am of the considered view that general damages of Kshs.400,000/= would suffice.

21. On the flip side and in respect to the case of ***Kitheka Mumo v Narshidas & Co. Ltd (Msa HCCC No. 220 of 1984)*** cited by the appellant before the trial court, it is my observation that while the same is comparable in terms of the injuries sustained, it was decided ages ago as rightly put by the learned trial Magistrate.

22. The upshot is that the appeal succeeds in part. Consequently, the trial court's award of Kshs.600,000/= on general damages is hereby set aside and substituted with an award of Kshs.400,000/=. The special damages of Kshs.3,000/= remain unaffected. Since the Appeal has partly succeeded, each party shall bear its own costs of the Appeal.

Dated, signed and delivered at NAIROBI this 20th day of JUNE, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent