



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 363 OF 2017

CITY ENGINEERING WORKS (K) LIMITED APPELLANT

VERSUS

LAWRENCE AYINO OSALLA RESPONDENT

(Being an appeal from the judgment of Hon E. Wanjala delivered in CMCC No. 7653 of 2015 dated 23rd March 2017)

JUDGMENT

1. This appeal arises from the judgment of *Hon. E. Wanjala (SRM)* in Milimani CMCC No. 7652 of 2017 in which the learned trial magistrate awarded the respondent, then the plaintiff, general damages in the sum of KShs.750,000 and special damages in the sum of KShs.1,500 together with costs of the suit and interest.

2. The award of general damages was compensation for pain and suffering sustained by the respondent as a result of injuries he had sustained in an accident in the course of his employment with the appellant whose occurrence was blamed on the appellant or its agent's negligence.

3. The court record shows that in the course of the trial, on 10th November 2016, the parties recorded consent on liability following which judgment on liability was entered in favour of the respondent against the appellant in the ratio of 80:20. Pursuant to this consent, the general and special damages awarded to the respondent were subjected to his 20% agreed contribution to liability leaving a net award of KShs.601,200.

4. The appellant was aggrieved by the quantum of general damages awarded to the respondent hence this appeal. In the memorandum of appeal dated 18th July 2017 and filed in court on 20th July 2017, the appellant advanced six grounds of appeal which were basically similar.

5. A close scrutiny of the grounds of appeal show that the appellant's main complaint was that the learned trial magistrate erred by awarding the respondent exorbitant and manifestly excessive damages which were not commensurate with the nature of injuries sustained by the respondent and that this was done without considering the authorities cited by the defendant on comparable awards; that the amount awarded was so inordinately high as to amount to a miscarriage of justice.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed its submissions on 19th March 2019. The Respondent's submissions are dated 29th March 2019 but the date of their filing is not clearly legible from the filing stamp endorsed by the court registry.

7. This is a first appeal to the High Court. I am well aware of the duty of the first appellate court which is to re-evaluate and to reconsider all the evidence and material that was presented before the trial court in order to draw my own independent conclusions. The Court of Appeal has restated this duty in a number of authorities in which it has also stated that though an appellate court is mandated to interfere with decisions made by a trial court, it should do so with caution bearing in mind that unlike the trial court, it did not have the benefit of hearing and seeing the witnesses and it should give due allowance to that disadvantage. See: *Selle & Another V Associated Motor Boat Company Limited & others [1968] EA 123; Peters V Sunday Post [1958] E A 424.*

8. As stated earlier, this appeal is only on quantum of damages the issue of liability having been settled by consent of the parties.

I have carefully considered the grounds of appeal, the evidence before the trial court in the form of medical reports produced in evidence by consent of the parties as well as the written rival submissions filed by the parties.

9. Having done so, I find that the only issue that arises for my determination is whether or not the general damages awarded to the respondent were manifestly excessive taking into account the injuries sustained by the respondent.

In order to properly address the above issue, it is important to enumerate the injuries the respondent suffered in the accident in question

which are not disputed.

10. According to paragraph 7 of the plaint dated 16th December 2015, the respondent sustained a fracture of the right ankle; severe pains and discomfort which resulted into a 20% permanent incapacity.

11. At the outset, I wish to point out that the award of damages is always at the discretion of the trial court. However, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case and awards made in previous cases where the plaintiffs had sustained comparable injuries.

12. It is now an established principle of law that an appellate court will interfere with an award of damages by the trial court only if it is satisfied that in making the award, the trial court applied the wrong legal principles or took into account irrelevant factors or disregarded relevant ones or that the amount awarded was so inordinately low or high as to give rise to an inference that it was an erroneous estimate of the damage suffered. See: **Kemfro Africa Limited T/A "Meru Express Services (1976)" & Another V Lubia & Another, (No 2) [1985] eKLR; Ilanga V Manyoka [1961] EA 705.**

13. Having read the judgment of the trial court, I find no substance in the appellant's claim that in assessing the damages, the learned trial magistrate did not give due consideration to the authorities cited by the appellant; comparable awards and the medical evidence availed by the parties. The judgment clearly reveals that the learned trial magistrate considered the proposals on quantum made by both parties and the authorities cited in support of their respective proposals before making her decision on quantum of damages awarded to the respondent.

14. The trial court's record shows that the learned trial magistrate also considered the medical report dated 13th October 2015 prepared by Dr. Okoth Okere and the form prepared by the Directorate of Occupational Safety and Health Services (DOSHS Form) dated 19th February 2013. However, the trial magistrate failed to consider the medical report prepared by Dr. Joab Bodo dated 27th July 2014 because in her view, the appellant had failed to avail the same. This finding by the trial court was made in error since the report was actually part of the court record. It was attached to the appellant's list of witnesses and documents dated 11th January 2016 which was filed on 13th January 2016.

15. On my part, I have considered the two medical reports prepared by Dr. C. O. Okere and Dr. Joab Bodo as well as the DOSHS Form. These three documents confirm that the only injury sustained by the respondent was a fracture on the right ankle which was treated initially by way of a plaster cast but subsequently, the respondent underwent surgery to have the fracture treated by open reduction and fixation of plates and screws. Dr. Bodo assessed the respondent's degree of permanent disability at 5% while Dr. Okere put it at 20%.

16. In awarding the respondent KShs.750,000 in general damages, the learned trial magistrate considered the authority of **Peter Maina Mwaura V Solomon Kinuthia Mwaura & Another, HCCC No. 1081 of 1991** cited by the respondent where the plaintiff had sustained a compound fracture of the right ankle, bruises over the chest, shoulder, dorsal spine and left foot. He was awarded KShs.300,000 in general damages for pain and suffering on 1st April 1998. In this case, the respondent suffered a single injury, namely a fracture on the right ankle which had united save that the plates and screws had not been removed.

17. Considering the injury sustained by the respondent in this case, I agree with the appellant that the award of KShs.750,000 in general damages as compensation for his pain and suffering was excessive and inordinately high as to justify an inference that the same was based on an erroneous estimate of the damage suffered. This is more so when one considers the awards that were made in the authorities relied upon by the appellant namely, **James Cartwright V John Namjaa Lekipiri [2012] eKLR** and **Jefa V Kenya Ports Authority [1992] eKLR** where the plaintiffs had sustained soft tissue injuries in addition to fractures on the right foot and right ankle respectively. In these cases, the plaintiffs were awarded KShs.100,000 and KShs.125,000 in general damages for pain, suffering and loss of amenities.

18. In my considered view, given the seriousness of the injury sustained by the respondent and taking into account the awards that were upheld or made by the High Court for comparable injuries in the authorities that were relied upon by the parties, even after taking into account inflationary trends, an award of KShs.500,000 would have been sufficient compensation for the respondent in the year 2017 when the impugned decision was made.

19. In view of the foregoing, I find merit in the appellant's appeal and it is hereby allowed. The judgment of the trial court is consequently set aside and is substituted by a judgment of this court in favour of the respondent against the appellant in the total sum of KSh.501,500 less 20% respondent's contribution. The amount awarded to the respondent is thus KShs.401,200.

20. The award will attract interest from the date of judgment of the lower court till payment in full.

21. Given the outcome of this appeal, the order that best commends itself to me on costs is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of September, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Oduor holding brief for Ms Muchemi for the appellant

Ms Owino for the respondent

Mr. Salach: Court Assistant