



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 709 OF 2016

ODDS & END LTDAPPELLANT

-VERSUS-

JOASH ODHIAMBO AGARE.....RESPONDENT

(An appeal from the judgement of the Hon. Rachael Ngetich delivered on 27th October, 2016 in the Chief Magistrate's Court at Nairobi in Milimani CMCC No. 3901 of 2013)

JUDGEMENT

1. On 27th October 2016, Hon. Ngetich, learned Chief Magistrate, delivered a judgment in favour of Joash Odhiambo Agare, the respondent herein and against Odds and Ends, the appellant herein in the sum of ksh.1,406,788/= less 10% contribution vide Milimani Commercial Court, Nairobi C.M.C.C. No. 3901 of 2013. The aforesaid amount is said to be damages for the injuries the respondent sustained while working for the appellant.

2. The appellant being aggrieved filed this appeal and put forward the following grounds in its memorandum:

i. THAT the learned magistrate erred in fact and ended up misdirecting himself in award exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries sustained by the plaintiff/respondent herein.

ii. THAT the learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.

iii. THAT the learned magistrate's award on general damages of kshs.800,000/= was so high as to be entirely erroneous.

iv. THAT the learned magistrate's award was made without considering the medical evidence and respondent's submissions before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.

v. THAT the assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.

vi. THAT the award of ksh.514,740/= for loss of earnings was not justified as the same was not proved during the hearing.

vii. THAT the learned magistrate erred in law in failing to apportion the award on loss of earning to the degree of incapacity.

viii. THAT the learned magistrate erred in law and fact in failing to appreciate the nature of injury sustained by the plaintiff affected the left hand and ended up misdirecting herself in assessing general damages and loss of earnings.

ix. That the whole judgment on quantum was against the weight of evidence before the court.

3. When this appeal came up for hearing, the parties recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was presented before the trial court. I have also considered the rival written submissions filed by the parties.

Though the appellant put forward a total of nine grounds of appeal, it is apparent from those grounds that the issue in contention revolves around the question of quantum, therefore those grounds will be determined together.

4. It is the submission of the appellant that the award of ksh.800,000/= as general damages for pain and suffering is excessive and is not commensurate with the injuries sustained. It is also pointed out that the learned Chief Magistrate did not indicate how she arrived at the aforesaid figure.

5. The appellant further pointed out that the parties to this dispute had made proposals on the appropriate award but the learned Chief Magistrate completely ignored those proposals.

6. The appellant also argued that the available authorities show that the High Court previously made awards for near similar injuries between ksh.200,000/= and ksh.300,000/=.

7. The respondent was of the view that the award given by the trial court is not excessive indicating that the trial court relied on the authorities cited therefore the appellant's submission that the trial court did not show how the aforesaid figure was arrived at is not true.

8. Having considered the rival submissions, it is apparent from the learned Chief Magistrate's judgment that the trial magistrate did not assign any reasons for the award of ksh.800,000/= for pain and suffering. By way of re-evaluation the record shows that the appellant had proposed in its submissions a sum of kshs.200,000/=. The appellant cited three authorities namely:-

i. Telkom (K) Ltd =vs= Ndolo Owango (2012) eKLR

Where this court awarded a sum of ksh.280,000/= for sustained amputation of the left thumb, massive blood loss and contusion of the left hand.

ii. Mumias Sugar Co. Ltd =vs= Francis Wanalo (2007) eKLR, in which the Court of Appeal awarded a sum of kshs.200,000/= as general damages for a sustained traumatic amputation of the small finger and soft tissue contusion with bruises on the right thigh.

iii. Kings Bakery Ltd =vs= Raphael Onjoro Oloo, this awarded ksh.200,000/= for the traumatic amputation of the 2nd left finger blunt injuries on the 3rd, 4th and 5th fingers of the left hand.

9. The respondent on the other hand proposed that an award of ksh.1,000,000/= was sufficient due to the diminishing earning capacity because of the large percentage of incapacity coupled with the respondent's tender age. The respondent cited five authorities namely:

i. Roto Moulders Ltd =vs= Lawrence Maingi John where this court awarded ksh.270,000/=.

ii. Woodtex (K) Ltd =vs= Moses Otiangala Solomon (2005) eKLR where the claimant was awarded Ksh.290,000/=.

iii. Crystal Industries Ltd =vs= Sevas Mutunga Kilonzo (2015) eKLR, in which the court made an award of kshs.400,000/= for cut fingers.

iv. In C & P Shoe Industries Ltd =vs= Gilbert Khalwale (2012) eKLR, an award of kshs.500,000/= for near similar injuries.

v. Joseph Wandao Oketch =vs= Corrugated Sheet Ltd (2002) eKLR the court awarded ksh.600,000/= being damages for near similar injuries.

10. I have already enumerated the grounds by the appellant. The record shows that the learned Chief Magistrate did not consider the authorities by the parties. That in itself is a great misdirection because she failed to take into account the relevant past decided cases on quantum in respect of near similar injuries. It is apparent from the aforesaid submissions that the parties had made proposals between ksh.200,000/= and ksh.1,000,000/=. However the authorities cited by both sides indicate that the courts have awarded a figure between ksh.200,000/= and ksh.600,000/=.

11. After a careful evaluation of the case that was before the trial court, I am satisfied that the learned Chief Magistrate failed to take into account relevant factors. This entitled this court to interfere with award of ksh.800,000/= which in my view is excessive. I am convinced that an award of ksh.500,000/= is a reasonable figure for general damages for pain and suffering and is also commensurate with the injuries sustained.

12. The second ground which was ably argued on appeal is that the trial court erred when it treated a claim for loss of earnings as a general damage yet it is a special damage which must be specifically pleaded and proved. The appellant pointed out that the medical report clearly indicated that if the corrective surgery was carried out, the respondent's hand could have regained its functionality.

13. The appellant urged this court to find that since the claim for loss of earnings had not been specifically pleaded, the same was not awardable. The respondent did not address this court over the issue but merely stated in his written submissions that the trial court evaluated the evidence before it and came to the correct decision. The record shows that the trial Chief Magistrate was of the opinion that the respondent may engage in some form of employment after corrective surgery which had not been done at the time of the trial.

14. The learned Chief Magistrate was of the opinion that the respondent would take a minimum of 5 years to start earning a regularly monthly income of ksh.8,579/80 and therefore proceeded to award a sum of ksh.514,788 which amount is calculated as follows:

$$8,579/80 \times 5 \times 12 = 514,788$$

15. The appellant avers that the amount has not been pleaded. I have carefully perused the plaint and it is clear that the prayer for loss of earnings is specifically pleaded in paragraph 6 of the plaint therefore the appellant's argument cannot stand. I am satisfied that the learned Chief Magistrate considered all the relevant factors in arriving the award of loss of future earnings.

16. In the end, the appeal partially succeeds. Consequently the award of ksh.800,000/= for pain and suffering is set aside and is substituted with an award of ksh.500,000/=. Therefore the award on appeal is as follows:

i. General damages for pain and suffering ksh.500,000/=

ii. Special damages

a. Loss of future earnings ksh.514,788/=

b. Future treatment ksh. 90,000/=

c. Medical report ksh. 2,000/=

Grand total ksh.1,106,788

Less 10% contribution ksh. 110,678/80

Net total ksh. 996,109/20

iii. The appellant and the respondent each meet their own costs of the appeal.

Dated, signed and delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent