



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 286 OF 2012

HERMAN ONAMU.....APPELLANT

VERSUS

SPIN KNIT DAIRY LIMITED.....RESPONDENT

JUDGMENT

1. The appellant, *Herman Onamu* was the plaintiff in the suit filed in the lower court. He had sued the respondent *Spin Knit Dairy Ltd* for general and special damages following injuries sustained in an accident in the course of his employment whose occurrence he blamed on the respondent, its servants or agents or breach of the respondent's statutory duty and or breach of his contract of employment.

2. The issue of liability was settled by consent of the parties in the ratio of 80:20 in favour of the appellant against the respondent. Thereafter, the trial court proceeded to assess general damages on the basis of two medical reports which were produced in evidence by consent of the parties. The trial court awarded the appellant general damages in the sum of Kshs.100,000 less his contribution of 20% which translated to Ksh.80,000 together with costs of the suit and interest.

3. The appellant was aggrieved by the trial court's decision on quantum hence this appeal. In the grounds encapsulated in his memorandum of appeal, the appellant complained that the award of general damages was too low and was not commensurate with the injuries he had sustained which had been classified as grievous harm; that the award was not in alignment with awards previously made for comparable injuries; that the learned trial magistrate erred in relying on the authority of *Nakuru Nursery School V Bilha Wamaita Maina, (2006) KLR* which was a decision made by another magistrate not by a High Court which was decided ten years prior to the date the decision was made yet the trial magistrate did not consider inflationary trends.

4. The appeal was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered.

5. I am fully conscious of the fact that this is a first appeal and as the first appellate court, I have an obligation to re-evaluate reassess and reconsider the evidence on quantum which was presented before the trial court and make my own independent decision.

6. It is now settled law that an appellate court will be slow to interfere with an award of damages made by a trial court. This is because the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law having regard to the facts of each case.

7. It is trite that an appellate court will only disturb an award of damages if it was satisfied that in arriving at its decision, the trial court considered irrelevant factors or failed to consider relevant ones or applied the wrong legal principals. The court will also interfere with an award of damages if it is clear that the award was either inordinately low or high as to lead to an inference that it was based on an erroneous estimate of the damage suffered: See- *Butt V Khan, (1977) IKAR, Kemfro Africa Ltd T/A Meru Express Services, (1976) & Another V Lubia & Another, No. 2 (1987) KLR 30.*

8. In this case, the injuries suffered by the appellant were listed in paragraph 9 of the plaint as fracture of the distal phalanx of the ring finger and injury to tufts of the little finger.

9. The judgement of the learned trial magistrate shows that before arriving at his decision, the learned trial magistrate considered the injuries that the appellant had sustained and the submissions made by the parties as well as the authorities they relied on. Having done so, the trial court decided to go with the proposal made by the respondent of KShs.100,00 relying on the authority of *Nakuru Nursery School V Bilha Wamaita Maina, (2006) eKLR*. This was a High Court decision in which the trial court's award of ksh.120,000 was confirmed on appeal. It was not a decision made by another magistrate as alleged by the appellant. In that case, the plaintiff had suffered injuries which led to amputation of the last two phalanges of his right index finger. I therefore agree with the trial court that the injuries the plaintiff in that case had sustained were much more severe than the injuries suffered by the appellant in this case.

10. It is however instructive to note that according to the two medical reports, the fracture on the left little finger healed leaving some flexion at the middle phalanx which *Dr. Kinuthia* opined would hinder function of the appellant's left hand. Although none of the doctors indicated that the appellant had suffered any residual disability as a result of the injuries, it is noteworthy that it was not disputed that the injuries he had sustained amounted to grievous harm.

11. It is also important to note that though the authority of *Nakuru Nursery V Bilha Wamaita, (supra)* cited by the respondent involved comparable injuries, it was decided on appeal about six years prior to the date the trial court's decision was made.

12. The appellant's counsel did not avail to this court authorities on comparable injuries to support his contention that the award of general damages made by the trial court was too low.

From my own research, I have come across the case of *Kenya Steel Fabricators Limited V Tom Moki [2018] eKLR* in which the High Court on appeal substituted an award of KShs.350,000 with that of KShs.270,000 as general damages awarded to a plaintiff who had sustained laceration and fracture of the distal phalanx of the left index finger with 4 % permanent incapacity.

13. Though admittedly the injuries suffered by the appellant did not result into any permanent incapacity like those of the plaintiffs in the cases cited above, given that the authority of *Nakuru Nursery V Bilha Wamaita, (supra)* was decided a couple of years before the trial court made its decision, if the trial magistrate had considered inflationary trends, he might have arrived at a different decision.

14. After my own independent analysis of the injuries sustained by the appellant, I have come to the conclusion that the award of Kshs 100,000 general damages made by the trial court was too low as to lead to a reasonable inference that it was based on a wholly erroneous estimate of the damage suffered. In my view, an award of Ksh.200,000 would have been reasonable and sufficient compensation for the appellants pain and suffering following the injuries sustained in the accident.

15. For the foregoing reasons, I find merit in this appeal and it is hereby allowed. The judgment of the trial court on quantum is consequently set aside and is substituted with an award of general damages in the sum of KShs.200,000 less 20% contribution which amounts to ksh.160,000. The amount will attract interest at court rates from the date of judgment of the trial court until payment in full.

16. The appellant is awarded costs of the lower court but each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Gachoka holding brief for Mr. Muturi for the appellant

Mr. Wachira holding brief for Mr. Mwaniki for the respondent

Mr. Salach: Court Assistant