



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 104 OF 2013

TRANSAFRIC TIMBER LIMITED.....APPELLANT

-VERSUS-

JOHN OPIYO ONDIEGE.....RESPONDENT

JUDGMENT

1. **John Opiyo Ondiege** (hereinafter respondent) was employed by **Transaftric Timber Ltd** (appellant) as a casual labourer in 2008. On 13th September, 2011 he sustained injury while placing beams on the appellants' roller bench for sawing. He sued the appellant in Nakuru CMCC. No.884/2011 for general and special damages. The parties recorded a consent judgment on liability at 70% to 30% in favour of the respondent. The court then proceeded to assess damages and awarded Kshs.600,000/= for pain and suffering, Kshs.19,850 as special damages and Kshs.300,000 for future medical expenses. He was also awarded costs and interest.

2. The appellant contended that the award was too high and has appealed to this court on grounds that:-

- i. That the learned trial magistrate erred in fact and in law in failing to find that the respondent did not prove his case to the standards required by law.*
- ii. That the learned trial magistrate erred in law and in fact in failing to take into account relevant factors such as mismanagement of the wound etc.*
- iii. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions.*
- iv. That the learned trial magistrate erred in law and in fact in awarding Kshs.600,000 general damages and Kshs.19,850 special damages and Kshs.300,000 future medical expenses which amount was excessive in the circumstances and against alleged injuries sustained.*

3. The appeal proceeded by way of written submissions which I have duly considered. In submissions filed on 19th July, 2017 the appellant submitted that the trial magistrate, never appreciated the injuries sustained by the respondent and erred in principle in not considering the authorities cited by the appellant's counsel in respect of general damages. They submit that the court did not consider comparable awards and erred in awarding Kshs.600,000/= without any basis. They further submit that the award was inordinately high and an award of Kshs.300,000 would suffice. In respect of the medical evidence, they submit that the latter medical report prepared by **Dr. Malik** should have been used by the court in making an award for future medical care.

4. The respondents filed their submissions on 19th July 2017. They submit that the trial court rightly awarded the respondent the damages based on the authorities submitted and the medical report by **Dr. Malik** on the extent of injuries sustained by the respondent. That the appellant had not demonstrated that the court failed to take into account any relevant factor or considered any irrelevant factor in assessing the damages. They further submitted that there was no justification for the court to interfere with the trial court's discretion in awarding the damages.

5. The only issue in this appeal is whether the damages awarded were excessive. This is the issue around which the five grounds of appeal revolve and which has been submitted on extensively by the parties. In essence, the appellant has invited the court to re-evaluate the evidence and interfere with the award of damages.

6. The appellant has stated in the first ground of appeal above that the respondent did not prove his case to the standards required by law. However, it is to be recalled that the parties entered a consent on liability. I will therefore limit this ground to the issue of quantum only.

7. The test as to whether an appellate court may interfere with an award of damages was stated by the court of appeal in the case of **Mbogo and another Vs. Shah 1968 E.A.93** in the following words:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and doing so arrived at a wrong conclusion.”

8. Further, an appellate court would not be justified to disturb an award unless it is shown that the amount was “so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage”. See **Kemfro Africa T/A Meru Express & Another Vs. A. M. Lubia & Another (1982 – 88) 1 KAR.**

9. The appellant’s complaint is that the trial court failed to consider the authorities cited to it so as to arrive at a comparable award. I have looked at the record. It shows that the respondent (then plaintiff) had cited only one authority to the court being **Kericho H.C.C. Philip Kipkorir Cheruiyot Vs. Neblo Limited and another Civil Suit No.70 of 2000** in which **Kimaru J** awarded Kshs.600,000 general damages. The appellant (defendant then) on the other hand had cited the case of **Charo Karisa Randy Vs. Charokenga & Another (HCC. No.5821 of 1990, Nairobi)** where the court (**Mwera J**) awarded Kshs.100,000 and, **Lawrence Kamandiu Kole Vs. Geoffrey Musau & Another (Nairobi HCC.1718 of 1981** where the court (**Mboghli Msagha J**) awarded 80,000/=.

10. I have considered the authorities cited in the lower court. It is clear that the authorities cited by the appellant were fairly old (1990 and 1991 respectively) in comparison to the date of the present suit which was decided in 2011. The said authorities could not therefore have been helpful to the trial court. On the other hand, the authority cited by the respondent for which Kshs. 600,000/= was awarded in 2000, was for more serious injury than suffered by the respondent. Indeed the court acknowledged this in its judgment b stating thus: “the injuries in that case were not very different from the instant case but in the former, the injuries were more severe.”

11. The respondent was seen by two doctors. Dr. **Wellington Kiamba** examined him on 26th September, 2011 formed an opinion contained in Exhibit 2 (a) that he suffered compound fracture of the left humerus which was treated and the hand secured with a plaster. He was also of the opinion that the fracture would take several weeks to heal. He estimated that future treatment would cost 350,000/=.

12. **Dr. S. M. Malik** examined the respondent on 17th April, 2012. He observed that the upper left arm had a large bandaged wound with a plaster applied about a month earlier. The wound was smelly and infected and the fracture was not knotted and the muscles of the arm wasted. Dr. Malik opined that the respondent needed to be admitted again for proper management of the wound and a bone graft application on the fracture site. He estimated the treatment to cost 200,000/=.

13. It is a relevant fact that the respondent suffered injury for which he deserved compensation. It is also a relevant fact that the disability he suffered was of such nature that he was able to work after two weeks and that the injury did not prevent him from working. The medical reports placed his disability at 30% as at the time of examination but which percentage was expected to reduce after the full treatment. In Considering comparable awards for similar injuries I would agree with the appellants that the award of Kshs.600,000 was inordinately high. I set it aside and award the sum of Kshs.350,000 which I consider adequate in the circumstances. In doing so, I am guided by the principle that an award of damages is not aimed at enriching a party but putting them in the same position as they were before the injury. See **Kemfro Africa case Meru Express & Another Vs. A. M. Lubia & Another cited above.**

14. I see no reason to disturb the rest of the award. The future medication of Kshs.300,000/= was reasonable taking into consideration that the two doctors had estimated Kshs.350,000/= and Kshs.200,000/= respectively. The special damages on the other hand were proved. In the final analysis therefore the appeal partially succeeds and the award shall be as follows:-

a) General damages - Kshs.350,000/=

b) Future medication - Kshs.300,000/=

c) Special damages - Kshs. 19,850/=

d) Total - Kshs.669,850/=

e) Less 30% - Ksh. 200,955/=

f) Total - Kshs. 468,895/=

15. The respondent shall have the costs of the suit and interest at court rates from date of filing while the appellant, having partially succeeded on this appeal shall have half the costs of the appeal.

Orders accordingly.

Judgment delivered, dated and signed in open court

This 22nd day of February, 2018

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Ms. Chelagat for appellant

Mr. Ntabo for Respondent