



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 495 OF 2015

SEYANI BROTHERS & COMPANY LIMITED.....APPELLANT

VERSUS

DOMINIC MUTISYA..... RESPONDENT

(Being an appeal from the judgment and decree of the Hon Principal Magistrate A. M. Obura (Mrs) delivered on 23rd September, 2015 in CMCCC No. 3778 of 2013)

JUDGMENT

1. The respondent in this appeal was the plaintiff in the suit filed in the lower court in which he had sued the appellant for general and special damages in respect of injuries he had sustained in the course of employment in an accident whose occurrence was blamed on the appellant, its servants or agents negligence.
2. In the course of the trial, parties recorded a consent on liability in the ratio of 80:20 in favour of the respondent against the appellant. Judgment in the suit was delivered on 23rd September, 2015 and the respondent was awarded general damages in the sum of KShs.800,000 and KShs.2,000 as special damages.
3. The appellant was aggrieved by the quantum of damages awarded to the respondent hence this appeal. In the memorandum of appeal filed on 23rd October, 2015, the appellant relied on four grounds which are as follows:
 - i. *The learned magistrate erred in fact and law by disregarding the authorities of the appellant which stipulate the rationale for arriving at the appropriate quantum of damages.*
 - ii. *The learned magistrate erred in fact and law by awarding exorbitant and excessive quantum of damages not based on any authority.*
 - iii. *The learned magistrate erred in fact and law by awarding special damages when the same were not strictly proven.*
 - iv. *The learned magistrate erred in fact and law by relying on receipts in support of the special damages when the same had not complied with the mandatory statutory provisions of law and thereby relying on inadmissible evidence.*
4. At the hearing, the parties agreed to prosecute the appeal by way of written submissions. Both parties filed their submissions on 27th November 2017.
5. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the rival submissions and the authorities cited. The grounds of appeal and the submissions made by the parties clearly show that this appeal only challenges the general and special damages awarded to the respondent. The only issue therefore for my determination is whether any reason exists to justify interference with the award made by the trial court.
6. I wish to start by pointing out that the assessment and award of damages is always at the discretion of the trial court. As a general rule, an appellate court will not interfere with the exercise of that discretion unless it is satisfied that in arriving at the decision, the trial court wrongly exercised its discretion by acting on matters which it should not have acted upon or failing to take into account relevant facts thereby arriving at the wrong decision. See: ***Mbogo & Another V Shah, [1968] EA 93*** at page 96.
7. An appellate court would also be entitled to interfere with an award of damages if it is satisfied that the trial court considered the wrong legal principles or misapprehended the law or that the award was either too high or inordinately low as to lead to an inference that it was based on an erroneous estimate of the damage suffered. See: ***Butt V Khan, (1982-1988) KAR 1; Arky Industries Ltd V Amani, [1990] KLR 309; Kemfro Africa Ltd & Another V Lubia & Another, (No. 2) 1987 KLR 30.***

8. I have perused the record of appeal. It shows that no oral evidence was adduced before the trial court. Following a consent recorded by the parties, the trial court based its decision on quantum on the medical reports prepared by *Dr Wandugu* dated 21st May 2013 and *Dr Shah* dated 23rd September 2013 and the written submissions filed by the parties. The medical reports were admitted in evidence without calling their makers. Though the admission of documents in evidence by consent of the parties without calling their makers is a good practice that saves time in the trial process, a consent to circumvent the giving of oral evidence even by the plaintiff more so in injury claims should be discouraged. It robs a trial court the opportunity to see the witnesses especially the plaintiff and assess for itself the impact or otherwise of the injuries subject matter of the suit and to have the evidence available tested by way of cross-examination. It also denies the trial court an opportunity to see and observe the demeanour of the witnesses whose evidence the parties seek to rely on.

9. That said, after considering the record and the submissions filed by the parties, I find that the injuries sustained by the respondent are not disputed. What is disputed is the amount of general damages awarded to the respondent which the appellant claims were inordinately high bearing in mind the injuries he had sustained and the expert evidence relied on by the parties.

10. I have studied the two medical reports. I find that the two doctors were in agreement that the only injuries suffered by the plaintiff were a fracture on the skull and right forearm. According to *Dr Wandugu's* report, the plaintiff had not fully recovered from his injuries on 21st May, 2013 when he examined him as he had resultant chronic headaches and permanent weakness of the right forearm. However, according to *Dr Shah's* report, the plaintiff had fully recovered and had regained full strength and function of the forearm about four months later when he examined him on 23rd September, 2013.

11. In her judgment, the learned trial magistrate considered the proposals on quantum made on behalf of the parties and the authorities cited in support thereof.

The respondent had proposed an award of KShs.900,000 relying on the authority of *Ismael Mohamed Ahmed V Edwin Odhiambo, [2013] eKLR* in which the plaintiff was awarded KShs.600,000 for fracture of the skull, head injury with brain contusion, fracture of the left femur and multiple cuts in the lower limbs. The appellant on its part relied on two authorities namely: *Isaac Mwenda Micheni V Mutei Murango, [2004] eKLR* and *Mulwa Musyoka V Wadia Construction, [2004] eKLR* where the plaintiffs were awarded KShs.100,000 and KShs.150,000 for purely soft tissue injuries.

12. From a reading of the judgment, it is evident that the learned trial magistrate was alive to the principles that should guide a court in the assessment of general damages for pain, suffering and loss of amenities.

In her assessment, she relied on the authority cited by the respondent which was correct since it was the authority that was most relevant to the injuries sustained by the respondent considering that the plaintiffs in the cases cited by the appellant had sustained only soft tissue injuries and had no fractures.

13. In the authority relied on by the trial court in its decision on quantum, that is, the *Ismail Mohamed Ahmed V Edwin Odhiambo case [supra]*, the plaintiff as stated earlier had sustained a fracture of the skull, head injury with brain contusion, fracture of the left femur and multiple cuts on the lower limb. He was admitted in hospital for 56 days and had a metal implant inserted on his left femur which would require KShs.100,000 for its removal. From the record, the respondent was admitted at Kenyatta National hospital for about eight days and did not undergo any surgery. It is therefore quite clear that the plaintiff in the aforesaid case had sustained much more severe injuries than the respondent in this appeal.

14. In *Ismail Mohamed Ahmed V Edwin Odhiambo (Supra)*, the plaintiff was awarded general damages in the sum of KShs.600,000 in the year 2011 which award was confirmed by the High Court in October 2013. The learned trial magistrate in this case did not adequately justify an award of KShs.800,000 to the respondent given that he had sustained less serious injuries. It is apparent from a reading of the judgment that the learned trial magistrate failed to consider *Dr Shah's* findings that the respondent had fully recovered from his injuries by 23rd September, 2013. In my view, the learned trial magistrate erred in failing to appreciate that the plaintiff in the *Ismael Mohamed Ahmed case, [supra]* had suffered more serious injuries than the respondent and that the respondent had fully recovered from his injuries about two years before the trial began. Had the learned trial magistrate considered these two relevant facts, it is likely that she would have arrived at a different conclusion even after considering inflationary trends. It is therefore my finding that the award of KShs.800,000 in this case was inordinately high and would justify interference by this court. I find that an award of KShs.600,000 would have been adequate compensation for the respondent's injuries in the year 2015. I consequently set aside the award of general damages in the sum of KShs.800,000 made by the trial court and substitute it with an award of KShs.600,000.

15. Regarding special damages, the law is that special damages must be specifically pleaded and strictly proved. In this case, the plaintiff prayed for special damages in the sum of KShs. 2,000 being the cost incurred in obtaining a medical report by *Dr Wandugu*. This amount though specifically pleaded was not proved since the copy of the receipt for the amount exhibited as proof of the amount pleaded was not among the documents that were admitted in evidence without calling their makers vide the consent recorded by the parties on 22nd June, 2015. The learned trial magistrate therefore erred by awarding the respondent special damages which were not strictly proved. The award on special damages is consequently set aside.

16. In the end, I find merit in this appeal and it is hereby allowed. The judgment of the lower court is hereby set aside and is substituted with a judgment of this court awarding the respondent general damages in the sum of KShs.600,000 less his 20% contribution on liability. The award shall attract interest from the date of judgment of the lower court until full payment. Each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Kamau for Mr Musaka: for the Appellant

Ms Mutuku for Mr Nzavi: for the Respondent

Mr Fidel Salach: Court Clerk