



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 608 OF 2015

SENTRIM CONTRACTORS LTD APPELLANTS

VERSUS

JOSEPH MUTINDA MENYE RESPONDENT

(Being an appeal from the judgment of Hon. Kssan (SPM) delivered on 23rd November, 2015 in Nairobi CMCC No. 2476 of 2012)

J U D G M E N T

1. Joseph Mutinda Menye, the Respondent herein, filed an action against Sentrim Contractors Ltd, the Appellant herein, claiming for damages for the injuries the Respondent sustained while working for the Appellant as a mason at the Appellant's site at Kangemi when an excavation wall collapsed onto a metal flat the Respondent was working from and entrapped his leg against the flat form.
2. When the case came up for hearing, the Respondent testified in support of his case while the Appellant closed its case without tendering evidence in support of its defense.
3. Hon. L. Kassan, learned Senior Principal Magistrate heard and determined the case in favour of the Respondent. The Respondent was awarded a sum of Ksh.702,000/- less 1% Contributory negligence.
4. Being aggrieved by the aforesaid decision, the Appellant preferred this appeal and put forward the following grounds:-
 - a) The learned trial magistrate erred in fact and in law by holding the Appellant substantially liable which finding was against the weight of evidence.*
 - b) The learned trial Magistrate erred in both fact and in law by failing to appreciate that the doctrine of volent non fit injuria applied herein against the Respondent.*
 - c) The learned trial magistrate award of general damages for pain, suffering and loss of amenities is so manifestly excessive as to amount an erroneous estimate of the loss suffered by the Respondent and warrant disturbance on appeal.*
5. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
6. I have re-evaluated the case that was before the trial court. I have further considered the rival submissions. The Appellant in its submissions abandoned the appeal as against the liability and instead pursued the appeal as against quantum.
7. It is the submission of the Appellant, that the award of Ksh.700,000/- as general damages was inordinately high and excessive. It was further pointed out that the figure represented an erroneous estimate. This court was urged to adjust the figure downwards to Ksh.300,000/-. The Appellant cited past decisions of this court which indicated that this court awarded between Ksh.250,000/- and Ksh.400,000/- as general damages for near similar injuries.
8. The Respondent on the other hand was of the submission that the award of Kshs.700,000/- as general damages was not excessive nor erroneous. The Respondent pointed out that the authorities cited by the Appellant on appeal were new and the trial court had no opportunity to consider those authorities when determining the case.
9. It is not in dispute the two medical reports prepared by Dr. Wakobi and Dr. Wambugu were produced as exhibits in evidence before the trial court. Those medical reports show that the Respondent sustained a fracture of the right tibia and fibula. It is also apparent from the submissions made before the trial court that the Appellant proposed an award of Ksh.200,000/- while the Respondent proposed an award of Ksh.900,000/-. The learned Senior Principal Magistrate awarded the Respondent a sum of Ksh.700,000/- on the basis of the evidence and submission made before him.

10. It is a well settled principle of law and practice that an Appellate court cannot interfere with a trial court's assessment of damages unless it is shown that the trial court took into account an irrelevant factor or failed to consider a relevant factor or that the award is obviously an erroneous estimate.

11. The Respondent relied on three authorities to persuade the trial magistrate to make a favourable award. In the case of **Omar Musa Hassan & another Vs Rashid Salim & Another, Nairobi HCCC No. 2391 of 1995**, in which this court awarded Ksh.700,000/- in the year 2000. In the case of **Veronica Mwangeli Kilonzo Vs Robert Karume, Mombasa HCCC No. 1750 of 1999**, this court awarded Ksh.700,000/- in the year 2000.

12. The Appellant beseeched the trial court to award the Respondent a sum of Ksh.200,000/- and relied on the case of **Isaac Mwenda Micheni Vs Mutegi Murango [2004] eKLR**, where this court awarded Ksh.100,000/- in the year 2004.

13. This being the first Appellate court in this matter, this court is enjoined to re-evaluate the case that was before the trial court. In other words, the court is to reconsider the material that was placed before the trial court and come up with its decision but bearing in mind that it did not have the benefit of assessing the demeanor of witnesses.

14. I have already considered the authorities, which were relied by the parties before the trial court. The Appellant has introduced totally new authorities on appeal which authorities were not brought to the attention of the trial magistrate. With respect, I agree with the Respondent's submissions that this court should adopt the position taken by Justice Fred Ochieng in the case of **Sila Tiren & Another Vs Simon Ombati Omiambo [2014] eKLR** in which the honourable judge stated inter alia: -

“To my mind, the exercise of parties placed wholly new authorities before the appellant court, and using them to either challenge or to otherwise support the decision of the trial court, is not a proper use of the mechanism of an appeal In order for the appellant court to determine the correctness or otherwise of the decision being challenged using the same material which had been placed before the trial court.”

15. In the circumstances, I decline to consider the new authorities cited on appeal. Having reconsidered the past cases cited by the parties before the trial court, it is apparent that this court made awards between Ksh.500,000/- to Ksh.700,000/- for near similar injuries. The cases cited before the trial court were decided between the year 2000 and 2004. I find the award of Kshs.700,000/- given to the Respondent not high nor excessive. Consequently, I find no merit in this appeal. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondent*