



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 545 OF 2012
MAGNATE VENTURE LIMITED.....APPELLANT
VERSUS
JOHN KIOKO KYUMBISYO.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Mrs. T.C. Wamae,

Chief Magistrate at Nairobi in CMCC No. 4096 of 2010

delivered on 21st September, 2012)

JUDGEMENT

The respondent's claim against the appellant was for damages following injuries sustained while in the appellants employment. He blamed the appellant for the injuries alleging that he was not provided with a safe system of work or suitable equipment and that he was exposed to risk which the appellant knew or ought to have known.

This was denied by the appellant but after a full trial the appellant was found liable and an award of Kshs. 2,000,000/= general damages, Kshs. 100,000/= future medical expenses, Kshs. 2000/= special damages plus costs and interest was made in favour of the respondent.

Aggrieved by the said judgment the appellant filed this appeal essentially complaining that the award of Kshs. 2,000,000/= made to the respondent was excessive, and that the award for future medical expenses disregarded fundamental principles of awarding damages.

The final determination of this appeal was delayed by the raising of a preliminary objection by the counsel for the respondent on the subject of jurisdiction. By a ruling dated 30th March, 2016 this court held that it has jurisdiction to determine the appeal.

The parties recorded a consent judgment on liability for the appellant to shoulder 80% and the respondent 20% contributory negligence.

The suit was then listed for assessment of damages but going by the record, no oral evidence was adduced. Instead, the medical report by Dr. Kinuthia dated 23rd July, 2010 was admitted in evidence by consent and parties filed written submissions on quantum.

I have considered the material before me. The medical report by Dr. Kinuthia was prepared four months after the accident. The injuries listed therein were,

1. Head injury with transient loss of consciousness,.
2. Fracture right radius.
3. Fracture left radius.
4. Fracture of multiple ribs (2-6th left rib).
5. Fracture right acetabulum.
6. Blunt trauma with loosening of incisor teeth.

The respondent was admitted to hospital for two weeks. In the opinion of Dr. Kinuthia the fractures had not healed by then, and full resolution would be anticipated in a period of 15 months. Radial fractures were fixed with K – wires while acetabular fractures were fixed with metallic implants. These would require removal at an estimated cost of Kshs. 100,000/=. He was pre- disposed to post traumatic osteoarthritis of both wrists and hip joint.

There is another report in the record from Avenue Health care signed by Dr. Nyawira Kinyua dated 17th February, 2011 but which however, does not feature in the judgment of the trial court. Significantly however, it refers to admission of the respondent for a period of 4 days from 30th August, 2010 to 2nd September, 2010 for the removal of the right acetabular plate screws. He was reviewed by the orthopaedic surgeon on 20th and 28th September, 2010 where he complained of pain in right hip joint. Thereafter no further visits were made.

In assessing general damages the trial magistrate relied on some decided cases. I note however in **HCC No. 135 of 2001 James Katua Peter Vs. Simon Mutua Muasia** the plaintiff's disability had been assessed at 70%. That is not the case with the respondent herein. In HCC No. 504 of 1990 Crispen Emmanuel Odhiambo Vs. Musa Kassim & Another the plaintiff had suffered a fracture of the base of the skull alongside fracture of four ribs and humerus. Clearly those two cases could not provide a good guide to the lower court as those injuries were more serious than those suffered by the respondent herein.

The appellate court would only interfere with the award of the lower court if it proceeded on wrong principles or the award was inordinately too high or low so as to present wrong appreciation of the facts.

From the material before me, I have considered the injuries sustained by the respondent. I believe an award of Kshs. 1,000,000/= general damages is adequate compensation for the injuries sustained by the respondent. Future medical expenses of Kshs. 100,000/= was contained in the medical report of Dr. Kinuthia which was admitted in evidence by consent. It cannot be discounted at this stage. Accordingly this appeal is allowed by setting aside the award of Kshs. 2,000,000/= general damages and in place thereof substituting the sum of Kshs. 1,000,000/= general damages. The total award due to the respondent is Kshs. 1,102,000/= which shall be subject to 20% contributory negligence leaving a balance of Kshs. 881,600/=. There shall be judgment for the respondent against the appellant in the sum of Kshs. 881,600/= plus costs and interest at court rates. The said costs and interest shall also be subject to 20% contributory negligence.

Dated, signed and delivered at Nairobi this 26th Day of April 2017.

A. MBOGHOLI MSAGHA

JUDGE