



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NMO.141 OF 2013

CHAABHADIYA ENTERPRISES..... APPELLANT

VERSUS

DAVID WAMBUTSI WAMBUKOYA..... RESPONDENT

(Appeal from the judgment of L.M. Nafula, SPM, in Mumias PMCC No.263 of 2012 delivered on 5th November, 2013)

JUDGMENT

1. The respondent brought up this suit against the appellant in a claim for general and special damages after the respondent was injured in the course of his work while working for the appellant. Parties entered consent on liability in the ratio of 20.80 in favour of the respondent against the appellant. The trial magistrate subsequently awarded the respondent Kshs.300,000/- in general damages and Kshs.3,500/- in special damages. The appellant was aggrieved with the said award and has appealed against the judgment.

2. The grounds for the appeal are as follows:-

“1. That the learned trial magistrate erred in law and fact in awarding the respondent special damages of Kshs3,500/- that were not proved to the required standard in law.

2. That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained by the respondent and on the medical chits and/or reports.

3. That the learned trial magistrate erred in law and in fact in failing to take into account that the respondent herein sustained minor soft tissue injuries.

4. That the learned trial magistrate erred in law and fact in disregarding relevant evidence on record hence resulting to a wrong decision.

5. That the learned trial magistrate erred in law and in fact in making an award in general damages of Kshs.300,000/- that was grossly excessive as to amount to an erroneous estimate of loss of damage suffered by the respondent.

6. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support thereof.

7. That the learned trial magistrate erred in law and fact by over relying on the respondent's submissions and legal authorities which were not relevant and without addressing her mind to the

circumstances of the case.”

The appeal was strenuously opposed by the respondent.

3. RESPONDENT'S CASE:

The respondent's evidence in the lower court was that he was injured by a jerk when repairing a puncture for the appellant's motor vehicle after the jerk that he was using got broken. He sustained injuries on the left upper hand. He was treated at St Mary's Mission Hospital, Mumias where an x-ray was taken. Later he was examined by a Dr. Andai who prepared a medical report that indicated the following injuries:

1. *Contused wound to the left elbow*

2. *Nicked lateral supra-condylar region of the left humerus*

4. In support of the case the respondent produced the treatment booklet from St. Mary's Hospital, PEx2, the X-ray film, PEx3 and the medical report, PEx4(a). Dr Andai opined that the respondent had suffered serious soft tissue and skeletal injuries that were expected to heal within one year.

In his evidence in court the respondent stated that he had healed of the injuries.

5. CASE FOR APPELLANT:

The appellant did not adduce any evidence in the lower court.

6. SUBMISSIONS BY ADVOCATES:

The advocates for the appellant, Omwenga & Co. Advocates, submitted that the respondent did not adduce evidence to prove that he had sustained a fracture. That the respondent in his evidence did not state that he had sustained a fracture. That the treatment notes produced did not prove that the respondent had sustained a fracture. The initial treatment given was for soft tissue injuries. The treatment notes indicate that the respondent was later x-rayed and found with nicked lateral supra-condylar but still the recommended treatment was for soft tissue injury. The advocates thus submitted that there was no evidence to prove a fracture. That Dr Andai's conclusion that the patient had sustained a fracture was unfounded as this was not supported by the treatment notes. The trial court therefore did not have adequate evidence to enable it conclude that the respondent sustained injuries such as to attract an award of Kshs.300,000/-.

7. The advocates also submitted that the authority relied on by the advocates for the respondent – *Harun Macharia Thuo (minor) vs Mrs Winfred Mwai & Anor, Nairobi HCCC No.1762 of 1989* – was for a person who had sustained far more serious injuries than those sustained by the respondent herein. In that case the plaintiff had suffered supra-condylar fracture of the left humerus that had healed with severe limitation of the elbow flexion at 90% and 20% surgical scar along the posterior aspect of the elbow, which is not the case in the matter under consideration as the respondent herein had completely healed.

8. The advocates further submitted that the authority they had relied on of *David Okoka Okero vs Kilindini Tea Warehouse Ltd, Mombasa RMCC 2294 of 2004* (2008) eKLR, was far more relevant in that Kshs.40,000/- was awarded in that case for an appellant who had sustained soft tissue injuries of the lumbar spine that had healed without any incapacity, which injuries are comparable to those sustained by the respondent in this case who had also sustained soft tissue injuries.

9. The advocates for the respondent, C.M. Mwebi & Co Advocates, on the other hand submitted that the medical report of Dr Andai indicated that the respondent had sustained a fracture which was confirmed by X-ray film and the treatment notes. That the plaintiff in *Harun Macharia Thuo (minor) vs Mrs Winfred Mwai & Anor* (supra) had similar injuries to those suffered by the respondent herein and was awarded Kshs.270,000/- in 1994. That the authority is 18 years old and given the rate of inflation an award of

Kshs.300,000/- is reasonable.

10. The advocates further submitted that the medical report was not challenged in the lower court as the appellants did not call for a second medical report.

11. DETERMINATION:

This is a first appeal. The court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle vs Associated Motor Boat* (1968) EA 123.

The appeal is on two grounds:-

(1) Whether the respondent had sustained a fracture.

(2) Whether the award of kshs.300,000/- in general damages was justified.

12. ISSUE OF FRACTURE:

The treatment booklet PEx2 indicates that the respondent went to hospital on 20th March, 2011 where on examination he was found to have sustained a wound at the lateral left upper arm. He was treated on 24th March, 2011, he went back to hospital with a swollen left elbow joint. An ex-ray was taken and he was found with a nicked lateral supra condylar region of left humerus. The recommendation for treatment was noted as “treat as soft tissue injury.”

The medical report by Dr Andai stated, inter alia, as follows:-

“He (the respondent) availed to me for perusal his treatment notes from St Mary’s Hospital. I also had a look at the x-ray film of his left elbow taken soon after the mishap and it confirmed the above fracture.”

13. The appellant did not challenge the treatment notes and the medical report when they were produced in court. They did not have the respondent examined by their own doctor. They cannot at this stage challenge the contents of the medical reports. In the case of *Ephantus Mwangi & Geofrey Nguyo Ngatia vs Duncan Mwangi Wambugu* (1982-88) 1 KLR 2871 Justice N. Nambuye (as she then was) stated as follows:

“Medical evidence cannot be attacked from the bar. If the defence doubted the injuries they should have sent the patient to be examined by a doctor of their choice. In the absence of that, this court has no alternative but to go by that medical evidence on record.”

14. It is apparent that when the respondent appeared in hospital on the first day, an x-ray was not taken. The x-ray was taken when he appeared there on the second occasion. Dr. Andai checked the x-ray film and confirmed the fracture. The x-ray film was an exhibit in this case. In the absence of any evidence to the contrary, the court finds that there was a fracture. The argument that there was no evidence to prove a fracture is thereby dismissed.

15. QUANTUM:

The principles applicable by a court when considering an appeal against an award for quantum for damages were stated by the Court of Appeal in *Kemfro Africa Ltd t/a “Meru Express Services (1976) & Another vs Lubia & Another* (No.2) (1985) eKLR to be as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Eastern Africa to be that it must be satisfied that either that the Judge in assessing the damages,

took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage.”

16. In the authority relied on by the advocates for the respondents, the plaintiff had healed with severe incapacity, which was unlike in the present case where the appellant had healed without any incapacity. In the present case the treatment given was that usually given to treatments for soft tissue injuries. The conventional treatment given for fractures in an application of plaster of paris. That no plaster was applied suggests that the fracture was not a serious one. Definitely a fracture that can heal without application of a plaster is not a very bad fracture. The injuries sustained by the respondent herein were not comparable to those sustained by the plaintiff in the case of *Harun Macharia Thuo (minor) Vs Mrs Winfred Mwai and Another* (Supra) so as to warrant an award of Kshs.300,000.00

The authority relied on by the advocates for the appellant did not involve a fracture. The authority is thereby not relevant for the purposes of this case.

I however find that the trial magistrate when making the award relied on an authority where the plaintiff had sustained far serious injuries than those sustained by the respondent in this case.

I have on my own considered the award in the case of ***Catherine Ngore Obare –vs Stephen Mulatya Kula & 2 others, Nakuru HCCA No.63 of 2010*** (2014) eKLR where ***Justice J.A. Emukule*** increased the award to Kshs.180,000/- for an appellant who had sustained a fracture of the distal end of the humerus and soft tissue injuries of the right elbow. In my view this case is a better guide for the award of damages in the present case.

I accordingly reduce the award in this case to Kshs.200,000.00.

17. The claim for special damages of Kshs.3500/- was proved by production of a receipt. There are no grounds to interfere with it.

The award is therefore as follows:-

- General damages - Kshs.200,000/-
- Special damages - Kshs. 3,500/-
- Sub-total- Kshs.203,500/-
- Less % liability- Kshs. 40,700/-
- Total-Kshs.162,800/-

The award of the lower court is set aside and substituted with an award of Kshs.162,800/- with interest from the time of judgment.

The respondent to have 1/3 (one third) of the costs of this appeal. Orders accordingly.

Delivered, dated and signed at Kakamega this 18th day of May, 2017.

J. NJAGI

JUDGE

In the presence of:

Onsando HB Omwenga for appellantMwebi for respondent

Parties absent

Cc – Paul

Onsando: I apply for stay of execution for 30 days.

Court 30 days stay of execution granted.