



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL CASE NO. 177 OF 2014

1. KENYA SHELL LIMITED
2. SIMON KIMANI TUMBU.....APPELLANTS/APPLICANTS

VERSUS

JOSEPH MUTISO KIMAURESPONDENT

(Being an Appeal from the judgement of the Principal Magistrate Karani in SRMCC No. 87 of 2011 At Yatta – Josph Mutiso Kimeu =Vs= Kenya Shell Ltd & Simon Kimani Tumbu on 2.11.2012)

JUDGEMENT

1. This is an Appeal from the judgement of Yatta SRM Court in Civil Suit Case No.87 of 2011 delivered on the 2nd day of November, 2011 by Hon. Karani wherein the Respondent was awarded general damages of Kshs.150,000/=. The Appellant was thereby aggrieved and has lodged this Appeal raising the following grounds:-

(i) The learned Magistrate erred in law and fact by making an award on general damages which was manifestly excessive given the injuries sustained by the Plaintiff and the relevant case law produced by the Appellant.

(ii) The Learned trial Magistrate erred in law and fact by applying, wring principles of law in assessing general damages hence arriving at manifestly excessive damages.

(iii) The learned trial magistrate erred in law and fact by informing the Appellants submissions in his judgement without proper reason to do so.

(v) The learned trial magistrate erred in law and fact by awarding excessive general damages that had not been proved.

2. The Appeal therefore sought for the setting aside of the trial court's judgement and substituting it with a fair judgement on quantum that it deems fit with costs of the appeal to the Appellants.

3. Parties agreed to canvass the appeal by way of written submissions. It was submitted for the Appellant that the award made by the trial court was excessive considering the injuries sustained which were as follows:-

- Blunt trauma to the neck

- Haematoma to the left lower lip.
- Blunt trauma to interior chest wall
- Blunt trauma to both knees.

Counsel for the Appellant went on to submit that the cases cited for the Respondent in the trial court did not have comparable injuries as compared to those cited by Appellant that a sum of Kshs.70,000/= as general damages be awarded with the following cases being:

(a) Robert Ngari Gateri Vs Maningo Transporters [2005] eKLR where a Plaintiff who suffered injuries to lower chest, elbow, right thigh and right buttock was awarded Kshs.60,000/= and which was upheld on Appeal.

(b) Sokoro Saw Mills =Vs= grace Nduta where a plaintiff who sustained soft tissue injuries on right hip joint and back was awarded kshs.30,000/=.

It was submitted for the Respondent that the award by the trial court was not manifestly high but same was fair and reasonable since the appellants doctors in their medical report concurred with the findings of the Respondent's doctor. Counsel for the appellant urged this court not to disturb the trial court's award and further cited the following cases.

(a) Equator bottlers Ltd=Vs= Denis Kemori Mecha Njega – Kisumu HCC 108 of 2007 where a sum of Kshs.130,000/= was awarded for less severe injuries.

(b) Douglas Mwirigi Francis =Vs= Andrew Miriti – Meru HCCA No. 34 of 2005 where Kshs.150,000/= was awarded for similar injuries.

(c) Leah Nyaguthi =Vs= Kenya Broadcasting Corporation – NBI HCCC No. 1128 of 1993 where a sum of Kshs.200,000/= was awarded for soft tissue injuries.

4. As this is the first Appellant, its duty is to re-evaluate the evidence afresh and come to its independent conclusion bearing in mind that the trial court had the advantage of seeing and hearing witnesses. (See **SELLE & ANOTHER =VS= ASSOCIATED MOROT BOAT CO. LTD [1968] EA 123.**)

5. It is noted from the record of the lower court that a full trial did not take place as the parties entered into a consent on liability in the ratio of 80% to 20% in favour of the Respondent and that the parties adopted the medical reports by doctors Mutuku and Wambugu. The Respondent also relied on some receipts in support of special damages that had been pleaded. Evidence therefore was not tendered by the parties.

6. As the issue of liability had been agreed upon by the parties the remaining issue was on quantum of damages. The two medical reports filed then became the focal point as regards the extent of injuries sustained by the Respondent and which were relied upon by the trial court in assessing the award of damages herein. According to Dr. Mutuku P. N. the Respondent had sustained blunt injuries to left cheek, trauma on anterior chest wall, trauma on both knees as well as haematoma on left lip which were assessed by the doctor as soft tissue in nature save that he requires dental review as regards the left temporal – mandibular joint but was expected to recover well. According to Dr. Wambugu in his report dated 6/3/12 the Respondent had sustained blunt trauma to the left cheek and both legs with occasional lower lip pain which injuries were stated to be soft tissue in nature with no permanent disability.

7. It is trite law that an appellate court can only interfere with an award of damages when the same is manifestly too low or manifestly high so as to represent an erroneous estimate of the damages. The assessment of damages is always left to the discretion of the trial court which discretion ordinarily ought not to be interfered with unless the trial court acted on some wrong principle or awarded excessive or little damages or has taken into consideration irrelevant matters and ended up arriving at an erroneous

estimate (see Kenya African limited t/a Meru Express Service and another Vs Lubia, and Olive Lubia [1982 – 1985] KAR 728.)

8. Looking at the authorities cited by the parties before the trial court and now before this court, I find that indeed the Respondent had sustained soft tissue injuries with no permanent disability. The two doctors who examined the respondent indeed confirmed the same. I find the case of **EQUATOR BOTTLERS LTD =VS= DENIS KIMORI MECAH NJENGA & ANOR – KISUMU HCCA NO. 1108 OF 2007** cited by the counsel for the Respondent in this appeal to be relevant since the injuries sustained by the plaintiff in that case comprised of bruise on face, blunt injury on the throat, dislocation of left wrist and bruises on both knees which are similar to those suffered by the Respondent in this case. The Plaintiff in that case was awarded general damages of Kshs.130,000/= for pain and suffering. The said case was decided on 28th June, 2011 whereas the decision appealed herein was made on 21/11/2012. The trial court in this matter had considered the effects of inflation on the economy and arrived at the sum of kshs.150,000/= as general damages. I am unable to fault the decision of the trial magistrate since he had considered all the relevant factors and further the award was not manifestly high as contended by the appellant. I find the award of Khss.150,000/= by the trial court to be reasonable in the circumstances. As there is no dispute on the special damages awarded, I find the same remains undisturbed as well.

9. In the result I find the Appellant's Appeal lacks merit. The same is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Machakos this 24th day of November, 2017.

D. K. KEMEI

JUDGE

In the presence of:

Muumbi for Kavita for Respondent

No appearance for Masika for Appellant

C/A: Kituva