



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.3 OF 2016

ONESMUS KIMATHI KIBITI.....APPELLANT

VS

LENECK GITARI NJOKA.....RESPONDENT

JUDGMENT

ONESMUS KIMATHI KIBITI appealed against the decision of Hon. E.W.Wambugu RM in Meru CMC CC No. 279 of 2012 in which judgment was entered for the respondent in the sum of Kshs. 540,000/- for general damages, Kshs 19,476/= for special damages and Kshs 108,000/= future medical expenses on 10th December 2015.

When matter initially came to court, the defendant didn't take part in proceedings despite being notified severally and judgments was entered for plaintiff for Kshs 700,000/= for general damages, Kshs 120,000/= for future medical expenses and Kshs 24,810 as special damages. This judgment was later set aside and Cause proceeded inter partes resulting into the judgment that has been appealed against.

From the proceedings of 29.9.2015 consent dated 5th August 2015 on liability was adopted to the effect;

“ judgment on liability bid is hereby entered for the plaintiff against the defendant at 90%:10% in favour plaintiff.”

“The case to proceed for assessment of damages by the court.”

The appellant was aggrieved by what he terms in Memorandum of Appeal as excessive award for general damages made by the trial magistrate erroneously and which is an erroneous estimate in the circumstances.

That the trial magistrate misdirected herself in failing to find that the injuries suffered by the Respondent were not of grave severity and had healed and could not attract an award of Kshs 600.000/= in general damages.

That the trial magistrate erred in law and fact in making an award of Kshs 120,000/= as damages for future medical expenses where there was no evidence tendered before the court to support the making of such an award.

That the trial magistrate erred in law and fact in making an award of general damages that is obviously high and excessive and not proportionate with the injuries suffered by the Respondent.

In submissions appellants counsel has referred on the authority of **West(H) and Sons Ltd vs Shephard (1964) ACT 326 at 345** where it was held inter alia;

“.....awards must be reasonable and must be assessed in moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards.....”

The appellants counsel also relied on a number of authorities to support their position that respondent should have been awarded general damages of Kshs 200,000/= and that there was no basis to award future medical expenses. The Respondent on the other hand filed submissions and prayed that appeal should be dismissed for reasons injuries suffered by Respondent were confirmed by the appellants doctor long after judgment had been entered in his favour by the court.

The Respondents counsel submitted that the trial court analysed the evidence before it and the injuries and committed no error. The authority of *Hellen Waruguru Waweru vs Kiarie Shoe Stores Ltd HCA No. 22 of 2014* was relied upon and it sets out circumstances under which the appellate court can interfere with an award of general damages as follows:

- i. Assessment of damages has with the discretion of the trial court and an appellate court will not disturb an award of damages unless it is.
 - a) Inordinately high or low as to represent an entirely erroneous estimate.
 - b) It must be shown that the Judge proceeded on wrong principles.
 - c) Or that the Judge misapprehended the evidence in some material respect and so arrived at that figure which is either inordinately high or low
 - d) The court must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that start of this, the amount is so inordinately high or low that it must be a wholly erroneous estimate of the damages.

This authority makes reference to *Kempro T/S Africa Ltd Meru Express and Another vs A.M. Lubia and Another (1982-88) IKAR 727*, *Peter M.Kariuki vs AG CA No. 79 of 2012 [2014] KLR* and *Bashir Ahmed Butt vs Uwais Ahmed Kinan (1982-1988) KAR5*.

It was submitted that grounds 1, 2 & 5 have no merit and must fail as the trial magistrate satisfied the principles set out Supra.

It was also argued that the court correctly awarded future medical expenses and authorities where future medical expenses were awarded in the past have been quoted.

It was further argued that the authorities relied upon now in appeal should be disregarded as they were not the same ones relied upon now in appeal should be disregarded as they were not the same ones relied on in the submissions at the trial court and ground 4 of appeal should also be dismissed.

Upon consideration of the grounds of appeal and the submissions of both the appellant and Respondent together with the proceedings and judgment of the lower court, I have seen that the appellant has relied on authorities that are mostly over 10 years old and which have not factored in inflations and in the circumstances cannot be said to be relevant in the instant case.

I do find that this court cannot rely on those authorities to vary the award of general damages awarded by the trial court.

In consideration of future medical expenses Kshs 120,000/= was awarded and the Respondent sending

evidence that Dr. John Macharia who examined him and prepared Medical Report assessed the costs at Kshs. 120,000/=.

PW2 Dr. Catherine Mwendu Mutuku on behalf of Dr Macharia produced Medical Report and said that Dr. Macharia estimated cost of removal of implant was Kshs 120,000/= as per Exp 6(a).

I think the consideration herein is whether the special damage of Kshs 120,000/= being future medical expense for removal of implant was pleaded and whether it was proved. Dr Macharia who is an expert confirmed that was the approximate cost of the surgery to remove the implant. The appellant did send the Respondent for examination by his own doctor but interestingly he never bothered to testify and challenge the evidence of the Respondent in this by himself or by the doctor who examined the Respondent and therefore the plaintiff having pleaded this class of special damages which was assessed by an expert in the medical field and do find that it is in order to that the trial magistrate.

The decision of Hon. E. W.Wambugu R.M delivered on 10th December 2015 is therefore upheld. The appeal is dismissed with costs to the Respondent.

HON. A.ONG'INJO

JUDGE

Ruling Signed, Delivered and Dated this 16th of November 2017

HON. A.ONG'INJO

JUDGE

In presence:

C/A: Penina

Appellant: Mr Munene Advocate holding brief for Kaimba for Appellant.

Respondent: Mrs Wanjohi Advocate

HON. A.ONG'INJO

JUDGE