



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

H.C.C.A.107 OF 2011

(Being an Appeal from the Judgment delivered by Honourable M.K.Mwangi, Senior Magistrate on 20th May, 2011 at Mombasa)

STELLA EGWA BENARD.....PLAINTIFF

VERSUS

SAMUEL MUCHOHI CHEGE.....DEFENDANT

JUDGMENT

1. At the hearing of this appeal Mr.Asena for the Appellant abandoned grounds 1 and 5 in the memorandum of appeal hence the appeal was argued only on grounds 2,3,4 & 6 all attacking the assessment and award of general damages.

2..That development therefore compresses the issue for determination in this appeal to one; whether or not the general damages awarded by the trial court were properly awarded.

3. At trial; the plaintiff led evidence and called DR S.K.Ndegwa as a witness. The aggregate of the evidence adduced as far as it touches on the quantum of damage was to the effect that the plaintiff suffered.

- Fracture of the distal right tibia
- Bruises to right knee
- Confusion of the chest and blunt trauma to right firearm.

4. While the plaintiff led evidence by himself and the doctor, the different did not call any evidence to challenge the evidence by the plaintiff.

5. Both sides filed written submissions. Submissions as are relevant to this appeal is only limited to the portions on the quantum of damages payable. There was no dispute on the injuries suffered by the Respondent. There was not even an attempt to tamper with the disclosed effect of such injuries on the Respondent. It was therefore a question of the trial court exercising its discretion while guided by crystallised principles that comparable injuries should attract comparable awards. To this court the operative word is comparable not the same.

6. Having reviewed the evidence and the submissions the court rendered itself as follows:

“Considering the injuries suffered, authorities cited and incident (incidence) of inflation, I

award the plaintiff a sum of kshs.500,000 as general damages, and kshs.29,040 as special damages on considering that the same was provided (pleaded) and strictly proved.”

7. Indeed it was the duty of the trial court, having been availed the evidence, albeit uncontroverted and submissions supported by authorities that were binding as guidelines on the comparable awards, to have considered in details and made a decision on why it was agreeing with one side and disagreeing with the other side. I find that from the trial courts judgment it is difficult to discern what influenced it to arrive at the figure of kshs.500, 000 for general damages.

8. It is not easy from the Judgment to say what considerations made it to apply the incidence of inflation and in relation to which of the decisions sited to it. To that extent, the decision lack reasons leading to it and I am in no doubt that to that extent the trial court erred. For that reason ground 6 of the Memorandum of Appeal succeeds.

9. This being a first appeal I am enjoined by law to reevaluate, reassess and reexamine the entire evidence and come to own conclusion with full appreciation that it is not enough that had I sat as the trial court I would have awarded a different figure.

10. In urging this appeal the parties chose to rely wholly on the decisions they relied upon and cited to the trial court without more. Those decisions are of course persuasive upon this court.

11. The only difference is that the plaintiff relied on two different decisions by the different judges while the Defendant relied on a single decision by another judge. While the trial court was bound to consider the decision cited, it equally had not otherwise but to come to a decision. That decision needed not be Solomonic to pass the test. The court was exercising discretion and can only be faulted if it is demonstrated that the discretion was exercised wrongfully. When I heard the advocates in the submissions, the most Mr.Asena said was that the decisions cited by the Respondents were never a good guide to the court. He did not advance any reasons for holding that position.

12. On my part I am, minded and aware that I must restrain from the temptations to substitute my opinion on the trial court as to what would a sufficient or reasonable damages for the injuries suffered. I would however readily interfere with that discretion if the trial court acted upon wrong principles of law or that the amount awarded was extremely high or very small as to make it, in my judgment, an entirely erroneous estimate of the damages to which the plaintiff was entitled. This threshold has not been met and I have no otherwise in these circumstances but to dismiss the appeal for lacking merits. I award the costs of this appeal to the Respondent.

Dated, signed and delivered at Mombasa this 23rd day of May, 2016.

P.J.O.OTIENO

JUDGE

23.5.2016

Mr.Asena; I seek stay of execution for 30 days to enable my client organise payment.

Mrs. Kwaya: I am constrained to oppose the application for stay. You may however give a shorter period of stay.

Court: I do not understand what may be executed just now before a decree is drawn and costs taxed.

It is unfortunate that both counsels are not able to enlighten court on which terms the decree of the lower court was stayed pending the outcome of this appeal.

As Ms.Kwaya is not averse to a shorter period of stay, I order that the Appellant gets 30 day to arrange payment as prayed by Mr.Asena.

P.J.O.OTIENO

JUDGE

23.5.2016