



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 349 OF 2011

ALI ISSA ALI.....APPELLANT

VERSUS

THE EAST AFRICAN PORTLAND CEMENT COMPANY..... RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable W. Mokaya (Ms) Principal Magistrate delivered on 23rd June, 2011)

JUDGMENT

1. The Appellant, Ali Issa Ali sued the Respondent, East African Portland Company Ltd claiming damages for injuries sustained on 12th February, 2006. The Appellant attributed the accident to the negligence of the Respondent who was his employer at the material time.
2. The Respondent did not enter appearance or file a defence. The Appellant requested for *interlocutory* judgment which was entered on 24th August, 2009. The case then proceeded for formal proof.
3. The trial Magistrate assessed general damages at Kshs.380,000/=. The Appellant was aggrieved by the judgment and appealed to this court on grounds that can be summarized as follows:
 - That the award of general damages is manifestly low and amounts to miscarriage of justice.
 - That the trial magistrate failed to take into account the authorities cited by the Appellant.
 - That the trial magistrate ignored the submissions made by the Appellant's counsel.
4. During the hearing of the Appeal, the counsels for the respective parties agreed to file written submissions. I have duly considered the said submissions and the authorities cited.
5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make

due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that the has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".

6. The Appellant's evidence was that he was carrying out his duties as a loader in the Respondent's motor vehicle Registration No. KZX 344 mark truck when he was hit by the rear door of the truck on the head. The doctor testified and produced a medical report. According to the doctor, a CT-scan of the Appellant's head revealed that the Appellant had sustained a subdural haematoma. The Appellant was admitted in hospital for ten (10) days. Treatment included "craniology, elevation and evacuation of the haematoma" The Appellant healed but he was left with a "crescentic craniotomy scar on the right frontotemporal scalp". The doctor further testified that despite the elevation of the depressed skull fractures, the Appellant was left with a "frontal parietal bony depression". The scars and the depression are permanent in nature. The Appellant was also pre-disposed to post traumatic epilepsy due to the severe head injuries.

7. The Appellant's counsel submitted for an award of kshs.2,000,000/=. The Appellant's counsel cited the following authorities:

- **Sosphinaf & Co. Ltd & another v Daniel Nganga Kanyi 2006 eKLR** where the Court of Appeal did not interfere with an award of Kshs.2,000,000/= as general damages for injuries which included a compound depressed fracture of the skull of the right frontal bone and removal of part of the frontal bone which left a large depression and unsightly scar on the frontal region of the head and development of traumatic epilepsy. Admission was to 4 ½ months.
- **Alfred Ngige Karanja vs Charles Ndung'u Mundia HCCC Nakuru 507 of 1999** where a minor was awarded Ksh1,200,000/= as general damages for head injuries which included a fracture of the base of the skull anterior and middle cranial fossa and developed post traumatic epilepsy which required life time treatment. Permanent disability was assessed at 10%.

8. The Respondent supported the award of kshs.380,000/=. The court was referred to the Magistrates' Courts Act Cap 10 laws of Kenya (2007 Edition) which provided for the pecuniary jurisdiction of a principal magistrate as not exceeding Ksh. 300,000/=. However, the limit of jurisdiction of the trial magistrate, W. Mokaya PM was enhanced by the Chief Justice to Ksh. 1,000,000/= with effect from 1st June, 2008 vide Gazette notice No.5148.

9. The following authorities were relied on by the Respondent:

- **Dickson Ndungu Kirembe & another v Theresa Atieno & 4 others [2014] eKLR** where an award of general damages of kshs.600,000/= was reduced to Ksh.400,000/= on appeal. Injuries included head, chest, ankle joints, bruises and a compound fracture of the tibia/fibula
- **John Oduori Pondo & another vs Mathew Kipng'etich Soi & 2 others [2004] eKLR:** Kshs50,000/= was awarded as general damages for injuries to the head, scalp (laceration and haematoma), contusion right leg, abrasion left knee and contusion chest wall.

10. It is apparent that the injuries in the cases cited by the Appellant bear more severe injuries than in the case under consideration. On the other hand, the injuries in the cases cited by the Respondent are less severe than in the instant case. I have looked at other cases with injuries comparable to the instant case. Suffice it to quote the case of **Julius Chelule & another v Nathan Kinyanjui [2013] eKLR** which contains several other authorities with similar injuries. In the said case, an award of Ksh.600,000/= as general damages was confirmed in an appeal to the High Court. The injuries included a fracture of the Skull and injuries to the elbow with a small cut wound and tenderness.

11. Other authorities cited in the **Julius Chelule Case (supra)** with depressed fracture of the skull

injuries with general damage awards of between Kshs500,000 to Ksh.650,000/= include

- **HCCC NBI 4077/1992 Jackson K Kamau v Peter Mutuku & another**
- **HCCC MSA 834/1995 Mutinda Sammy v Tawfiq Bus Services**
- **HCCA Kakamega 21/2008 West Kenya Sugar Ltd v Sabion Ndula Kayugira.**

12. On the issue of quantum, I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

13. With the foregoing, my considered view is that the award of Ksh.380,000/= as general damages was too low as to amount to an erroneous estimate of the damages. An award in the sum of Ksh.600,000/= would in my view reasonably compensate the Appellant for the injuries sustained.

14. The appeal has merits and is allowed. The judgment of the lower Court is hereby set aside and judgment entered for the Appellant against the Respondent as follows:

- a) General damagesKsh. 600,000/=
- b) Special damagesKsh. 3,000/=
- c) The costs in both the Lower Court and the appeal to the Appellant.

Dated, signed and delivered at Nairobi this 19th day of Oct, 2016

B THURANIRA JADEN

JUDGE