



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 8 OF 2013

A.N. ISAACK HARDWARE LTDAPPELLANT

VERSUS

FRANCIS CHIURI WANJIKURESPONDENT

J U D G M E N T

1. In this appeal, the appellant faults the trial court for awarding general damages that were excessive as to manifest an error in principle. In the judgment sought to be upset the trial court having taken into account the judgment on liability entered by consent of the parties said:-

“I have juxtaposed the injuries and summarized above against the injuries said to have been suffered by the plaintiff in the respective authorities cited by both plaintiff and defendant. It is my view that while the authorities act as a guidance, generally, the authority cited by plaintiff had more severe injuries while the ones cited by defendant had less severe injuries than plaintiff in the present case.

However, taking all matters into perspective e.g. the age of the injuries and the monetary trends, I find the sum of Kshs.1,000,000.00 to be reasonable compensation for the plaintiff herein. I award him that much.

2. When an appellate court would interfere with a trial courts discretion in assessing damages is now settled not to be a free-fall. The appellate court must be satisfied that in coming to the decision the trial court did, it took into account irrelevant matters or left out a relevant matter and short of that, that the judgment on damages is evidently so exorbitant, excessive and inordinately high or low as to wholly represent an erroneous estimate. These principles, I think are governed by equally established principle that assessment of damages being an exercise of judicial discretion, it is indeed a strong step to be taken by an appellate court and ought to be sparingly resorted to before an appellate judge sets to upset such decision. See **Shah -vs- Mbogo [1967] EA 166, Ilango vs Manyoka [1961] E.A 705, Lukenya Ranching and Farming Cooperative Society Ltd vs Kavoto [1970] EA 414 and Kemfro Africa Ltd t/a Meru Express Service -vs- A.M. Lubia & Another.**

3. It may only be necessary to add that a court assessing damages, like the trial court in this case, ought to be guided, and not necessary bound, by judicial pronouncements in assessment of damages so that there is uniformity even if not for the principle that comparable injuries should as far as possible attract comparable awards but also for the Constitutional principle that everybody is entitle to equal treatment and application of the law.

4. In this appeal, the trial court took into account the plaintiffs injuries, the decisions cited to him as well as the monetary trends and came to his assessment of Ksh.1,000,000/- having equally noted that the parties in their submissions took extreme positions by citing decisions that were either based on very extensive and more severer injuries, for the plaintiff, and those grounded on less severer injuries for the defendant. Those, indeed, were the factors the court was expected to take into account for which reason there is no error in principle demonstrated.

5. The appellant in their oral submissions single out the statement by the trial court, at page 43 of the Record of Appeal, that the two doctors had agreed on the facts that the '*plaintiff suffered multiple fracture.....*' to found the charge that the court was wrong on its appreciation of the evidence.

6. To the appellate Dr. Udaya said the plaintiff had completely and fully recovered. For this judgment I have read that report to be found at page 26 of the record on the heading "on examination" and I note that the doctor says:-

"I find healed operative scar mark about 8" over the left thigh. I find 4cm healed scare mark over left leg, there are multiple healed scar marks of bruises over left leg. Movement of left ankle and knee are full. There is no shortening of the leg. He is walking with the help of one stick. At present, he has full recovered; there is no deformity and no permanent incapacity. He will need to remove implants at Coast Provincial General Hospital which will cost him approximately Kshs.15,000.00"

7. It is true that the doctor concluded that the plaintiff had fully healed but there is no remark by the doctor that the use of one stick in walking by the plaintiff was a ploy or theatrical.

8. However, the court did not in its judgment base its award on the residual effects of the injuries. To this court, even if it is not express in the judgment, the award was for pains and suffering and maybe loss of amenities. To this court the injuries as pleaded and proved, even without the residual effects, inflicted on the plaintiff considerable pain and suffering. He was confined in hospital bed for a period of 34 days during which duration he underwent medical surgeries and was still expected to undergo a further surgery to remove the implant. To this court the fact that the plaintiff was still using a stick some twelve months after the accident underscores the length and duration of his pains and suffering. Coupled with the fact that as he went about his duties he was kept reminded that someday, in the future, he would have to face a surgeon's knife to remove the implant, was additional evidence of pain and suffering. It is not lost to the court why courts award general damages for pains and suffering. The author of Hershurys' Laws of England 4th Edition, Volume 12(1) gives the consideration the court takes into account. The author writes:-

"Pain and suffering damages are awarded for the physical and mental distress caused to the plaintiff, both pretrial and in the future as a result of the injury. This includes pain caused by the injury itself and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiffs conditions may deteriorate".

8. In conclusion, I find no fault with the trial courts approach to assessment of damages. No error has been demonstrated for which reason I find and hold that this appeal lacks merit and the same is therefore dismissed with costs.

Dated and Delivered at Mombasa this **20th** day of **December 2016**.

HON P.J.O. OTIENO

JUDGE