REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 163 OF 2006

CHRISTOPHER K. TANUI……..…….…….APPELLANT

VERSUS

DALMAS MWOKA LENJO……. 1ST RESPONDENT

YUSSUF HUSSEIN….……...2ND RESPONDENT

JUDGEMENT

This appeal is filed by Christopher Tanui (appellant) against Dalmas Lenyo (1st respondent)and Yusuf Hussein (2nd respondent) and contests the award of general damages in the sum of kshs. 600,000 made in favour of the respondents, plus costs and interest. The appellant's claim for special damages in the sum of kshs. 599,902 was dismissed.

The appellant's claim arose from a road traffic accident which occurred on 23.11.1999 and according to the appellant, he lost consciousness and woke up in hospital where he remained until 23rd February, 2000. According to the medical report by Dr. KSM Mbati the appellant had (1) crush injury of the right leg with loss of stun muscles and bone tissue, (2) Soft tissue injuries of the right shoulder. He had already undergone surgery twice to fix plate plus screws.

a) His right foot was bent downward and he could not flex it upward as a result of muscle damage.

b) He had a shortening of the right leg by about 3 inches due to bone loss. He had bone grafting.

c) The right foot was swollen with oedema and a surgical scar on the right side of the pelvis measuring 8 cm long.

d) Loss of blood and had to be transfused

Dr. Mbati observed that the appellant's leg was so crushed that it was almost amputated. The prognosis of salvaging the leg was guarded.

The parties had entered a consent judgement on liability in favour of the appellant against the respondents at 75% . The trial magistrate considered past decided cases and noted that the authorities cited by the defence counsel were over ten years ago, and the injuries were met as severe as those suffered by the appellant. Further, that the authorities cited by the appellant addressed injuries relevant and comparable to those suffered by the appellant,

The trial magistrate stated

"A cardinal principle of civil law is that the purpose of law is to compensate a party for loss actually suffered and not to enrich him".

In rejecting the claim for special damages the trial magistrate noted that all the plaintiff's treatment costs were born by his employer and no evidence had been presented to suggest that the appellant was to reimburse his former employer.

The decision is contested on the grounds the trial magistrate erred in awarding the claim for special damages. The trial magistrate is accused of taking into consideration irrelevancies in refusing to award the special damages. The award is described as being inordinately low.

The appeal was disposed off by way of written submissions. The appellant's counsel submits that given the traumatic experience both in the injury sustained and during treatment; then the appellant deserved an award of kshs. 1,244,520.

At the trial in the lower court, the respondent's counsel had proposed general damages of kshs. 200,000 and points out that the trial magistrate infact took his consideration the nature of injuries suffered by the appellant. I cannot fault the respondent's counsel on that, indeed the trial magistrate stated in his judgement;

"I find that the injuries suffered by the plaintiff in this case were more serious than those suffered by the plaintiff in the Gakunju case and less than those suffered in the Macharia case".

Indeed the trial magistrate appreciated the nature of the injuries suffered by plaintiff, when discussing quantum of damage.

The long held principle discussed in many decisions including Kamau Vs Mungai & Another (2006) 1 KLR is that

"A court on appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a mis-apprehension of the evidence, or the judgement is demonstrably to have acted on wrong principles in reaching the finding he did".

The appellant has not pointed out a single aspect of the judgement which would satisfy the above quoted principles. There is nothing whatsoever to determine that the sum awarded (which infact was kshs.800,00 before apportioning the agreed percentage ratio) was inordinately low and I decline to interfere with that award.

As per the special damages there was indeed no evidence to show the sum paid on his behalf by his employer would be recovered from him, or that an insurance cover had been taken by the employer on his behalf. The trial magistrate correctly asserts that an award of damages was not intended to unjustly enrich another party and there indeed was no basis upon which to award the claim for special damages. I cannot fault the trial magistrate's finding.

Consequently, the appeal has no merit and is dismissed with costs to the respondents.

Written and dated this 16th day of December 2014 at Bungoma.

H. A OMONDI, J

Delivered and dated this 29th day of January 2015 at Nakuru.

JANET MULWA

JUDGE