

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 75 OF 2004

AKAMBA PUBLIC ROAD SERVICES LIMITED.....

.....APPELLANT

VERUS

URBANUS MUTUA KAVAVU.....

.....RESPONDENT

JUDGMENT

1. This is an appeal against the quantum of damages awarded to the Respondent by the trial magistrate. The appeal was canvassed by way of written submissions. If I understood counsel for the appellant properly the reason they appeal against the award of ksh. 90,000/- is because the Trial Magistrate in arriving at the award relied on medical evidence that indicated that the respondent had sustained injury to his abdomen whereas the said injury was not pleaded in the plaint. Counsel submitted that as parties are bound by their pleadings the Trial Magistrate ought not to have taken that injury into account while arriving at his award. He proposed a reduction of that award to ksh. 50,000/-.

2. On their part counsel for the respondent urged the court to find that the sum awarded was reasonable and submitted that the appellant has not demonstrated that the award was inordinately high nor that it emanated from an erroneous application of the law and neither did the Trial Magistrate fail to appreciate the evidence adduced or take into account the then prevailing limits which damages were assessed.

3. It is indeed trite that parties are bound by their pleadings and authorities abound on that. This court does also appreciate that it can only interfere with the Trial Magistrate's assessment of damages if it is satisfied that he acted on a wrong principle of law or misapprehended the facts or that he made a wholly erroneous estimate of the damage suffered. It is not about what this court would award but whether the lower court acted on the wrong principles – see **Mariga V. Musila (1984) KLR 252**. The medical evidence was in this case produced in evidence by consent without the necessity of calling the makers, and apart from being examined by his own Doctor, the Respondent was also examined by a Doctor of the Appellant's choice. All that evidence discloses that he sustained an injury to the lumbar region. The P3 form and the report by the appellant's Doctor are even more specific. The P3 form indicates that he had tenderness on the lumbar while the Appellant's Doctor indicates that the Respondent sustained a soft tissue injury to the abdominal wall. It is noteworthy that Doctor P.M. Ajuoga gave evidence for the respondent but unfortunately, the issue of this injury was not put to him. However, a search from Wikipedia, the Free Encyclopedia gives me the definition of the lumbar as an “**adjective that means of or pertaining to the abdominal segment of the torso between the diaphragm and the sacrum (pelvis)**”. The Trial Magistrate's finding that the respondent sustained injury on the abdomen was therefore not based on a misapprehension of the facts. Even the appellant's own doctor confirmed that injury and it was also pleaded in the plaint. I see no good reason; therefore, to interfere with the award and dismiss this appeal with costs to the Respondent. It is so ordered.

Dated signed and delivered at Kisumu this 26th day of February, 2015.

E.N.MAINA

JUDGE

In the presence of;

Miss Ongira for Appellant

Moses Okumu – Court interpreter

No appearance for Respondent

ENM/aar