



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO. 112 OF 2011**

**MUMIAS SUGAR COMPANY LTD.....APPELLANT**

**VERSUS**

**JULIUS ABUKO SHIBIA.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The appeal herein is in respect of quantum of damages awarded by the trial Court in a judgment delivered on 01/07/2011.
2. Liability had been agreed between the parties at 25%/75% in favour of the Respondent herein/Original Plaintiff.
3. The trial Court assessed damages at Kshs. 200,000/= subject to the agreed liability apportionment.

**ANALYSIS AND DETERMINATION:**

4. This being a first appeal, it is settled law that this Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga – versus- Kiruga & Another (1988) KLR 348.*

It was further held in the case of *Hahn Vs. Singh (1985)KLR 716* that the appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

5. It is the Appellant's position as is clearly demonstrated in the Memorandum of Appeal that the Appellant was aggrieved by the assessment of damages moreso when the Learned Magistrate allegedly erred in failing to consider the case law relevant to the issues at hand. I have had the advantage of going through the entire record before me including the submissions of the parties and the respective case law referred to in this appeal.

6. The principles to be applied when considering whether to interfere with damages awarded by

the trial Court were clearly laid down by the Court of Appeal in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI vs A.M.M. LUBIA & ANO. (1982-88)1 KAR 777** where the Court stated as follows:

*‘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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.’*

This position was restated by the Court of Appeal in the case of **ARROW CAR LIMITED vs BIMOMO & 2 OTHERS (2004)2 KLR 101** and so recently in the case of **DENSHIRE MUTETI WAMBUA vs KENYA POWER & LIGHTING CO. LTD (2013)eKLR**.

7. I am also reminded by the Appellant of the Court of Appeal decision in **Nyeri Civil Appeal No. 251 of 1996 Cecilia Mwangi & Another vs Ruth W. Mwangi (unreported)** where the Court in dealing with an appeal against quantum of damages had this to say:-

*“Money cannot renew a physical frame that has been battered. All that Judges and courts can do is to reward sums which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore it is desirable that so far as possible by comparable injuries should be compensated by comparable awards....*

*It has been quite often pointed out that award for damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed of on to members of the public the vast majority whom cannot afford the burden in the form of increased costs of insurance cover or increased fees.”*

8. The Respondent/Original Plaintiff underwent two medical examinations by two different Doctors. The said Doctors prepared Medical reports which were produced as exhibits by the consent of parties and submissions on quantum tendered.

The first medical report is by Dr. Charles M. Andai dated 03/06/2007. The second one is by Dr. P.W Oketch dated 25/11/2009.

The first Medical Report revealed the following injuries:-

- 1. He had blunt injury to the neck;**
- 2. He had blunt injury to the occipital region of the head;**
- 3. He had blunt injury to the right shoulder;**
- 4. Complaints of neck pain on and off with backache.**

The Doctor was of the opinion that the Respondent suffered serious soft tissue injuries with a high possibility of post traumatic osteoarthritis complication which could be confirmed on taking X-Rays.

The second Medical report revealed the following injuries:-

- 1. Blunt injury to the head and neck**

## **2. Blunt injury to the right should**

## **3. Blunt injury to the back**

The Doctor was of the opinion that the Respondent suffered moderately severe soft issues and he had completely healed with no resultant permanent incapacitation.

9. The Respondent herein in the lower Court submitted for an award of Kshs. 250,000/= on general damages on the above injuries. He relied on the **NBI HCC No. 642 of 1990** (unreported) where the Court on 29/10/1993 awarded the sum of Kshs. 150,000/= on general damages for pain, suffering and loss of amenities to a Plaintiff who had sustained cuts on the left wrist, left upper arm, left knee, right arm and injury to the right ankle. He also relied on the case of **BUNGOMA HCCA NO. 62 of 2008** where on 12/10/2010 Hon. Muchemi, J awarded Kshs. 250,000/- for general damages for pain, suffering and loss of amenities where the Plaintiff had sustained blunt injuries to the head, bruises on both lower limb and the left knee.

10. The Appellant herein instead submitted for an award of Kshs. 40,000/= on general damages for pain, suffering and loss of amenities in the lower Court. It relied on the case of **Pamela Ombiyo Okunda vs Kenya Bus Service Ltd NBI HCCC No. 1309 of 2002** where Hon. Ang'awa, J on 11/02/2004 awarded Kshs. 50,000/= for blunt head injury with loss of consciousness, deep cut on the forehead and both legs, soft tissue injury to neck and blunt trauma to hip and right eye. It also relied on the cases of **NBI HCCC No. 2001 of 1992** and **Nakuru HCC Civil Appeal No. 99 of 2003**.

11. It is on the said background that the judgment was delivered on 01/07/2011. I have had a careful analysis of the judgment and noted that the Learned Magistrate referred to the two medical reports and found that the Plaintiff/Respondent herein had suffered moderately severe soft tissue injuries with no resultant complication. To that end, I fully agree with the Magistrate's analysis and reconciliation of the injuries sustained by the Respondent.

The Learned Magistrate then went on to say that:-

***“ I have also considered the submissions of the parties and authorities cited which are otherwise not binding and comparable case and I find that taking into account the current inflationary trends on award of Kshs. 200,000/= being 100% will adequately compensate the plaintiff...”***

I do not agree with the Learned Magistrate that the authorities cited were not binding on him. Going by the doctrine of *stare decisis* the authorities cited were all binding on that Court. The only point of departure however would be when the injuries are incomparable to those sustained by the Respondent in which case the Court would accordingly distinguish the authorities. The position taken by the Learned Magistrate in his said finding explains why he did not even analyse the said authorities and to that extent this Court is justified to intervene and interfere with the discretion of the Learned Magistrate. Suffice to say had the Court considered the authorities cited thereto and the injuries therein he would have been properly guided and would have come up with a fairer and reasonable assessment of the damages. The award of Kshs. 200,000/= on General damages is hereby set-aside.

12. I have intently looked into all the judicial authorities referred to by the parties herein both at the lower Court and before this Court and I am of the view that case of **Pamela Ombiyo Okunda vs Kenya Bus Service Ltd (supra)** was more relevant and had comparable injuries to those sustained by the Respondent and that the Learned Magistrate ought to have been guided by that case. The Court on 11/02/2004 awarded General damages at Kshs. 50,000/-. By taking into account the incidence of inflation thereto an award of Kshs. 100,000/= on General Damages would suffice.

13. In the premises therefore the appeal by the Appellant is allowed in the following terms:-

*a. The award of Kshs. 200,000/- on General damages is hereby set-aside and an award of Kshs. 100,000/= on General damages for pain, suffering and loss of amenities made which shall be subject to the agreed contribution on liability.*

*b. The Appellant shall have the costs of this appeal whereas the Respondent shall have the costs of the suit in the lower Court.*

*c. Interest on the said General damages shall run from the date of the judgment of the trial Magistrate, that is on 01/07/2011.*

**DATED AND SIGNED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF FEBRUARY 2015.**

**A. C MRIMA**

**JUDGE**

**DATED, DELIVERED AND SINGED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF FEBRUARY 2015.**

**RUTH N. SITATI**

**JUDGE**