REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT NAIROBI

CIVIL APPEAL NO. 298 OF 2012

VINCENT OKOSO NYENDE.....APPELLANT

VERSUS

SHENGLE ENGINEERING CONSTRUCTION LIMITED....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mrs. M. W. Mutuku

in Kiambu CMCC No. 563 of 2011 delivered on 21st May, 2012)

JUDGMENT

1. The Appellant herein was an employee of the Respondent as a casual labourer. On 15th May, 2011, he had been asked by the supervisor to wipe the chef trailer which had a bonnet on its rear. While wiping the trailer, the shocks failed and the bonnet hit the Appellant on the head. As a result of the said accident, the Appellant suffered a blunt head injury with nose bleeding. The Appellant then sued the Respondent seeking recovery of damages. The Appellant tendered evidence and laid blame on the Respondent for failure to provide him with protective gears such as a helmet and that the machine was not properly serviced.

2. The trial court heard the matter and found the Respondent 100% liable on the basis of the unchallenged case of the Appellant. Quantum was awarded at KShs. 40,000/= on the basis that there was no evidence of loss of consciousness on the medical documents produced by the Appellant and that the degree of injury was classified as harm.

3. The Appellant took issue with the amount awarded by the trial court terming it as inordinately low and subsequently filed this appeal on the following grounds:-

> *i. That the learned magistrate erred in law when she made an award of KShs. 40,000/= which award was inordinately low in the circumstances of this case.*
>
> *ii. That the learned magistrate gravely erred when she failed to appreciate that expert medical opinion had designated the injuries suffered by the Appellant as serious soft tissue injuries and consequently the award of KShs.40,000/= in general damages fell far below the threshold of awards for injuries designated as serious soft tissue injuries.*

4. In his evidence in court, the Appellant recounted that he was treated at Thika level 5 hospital and later examined by Dr. Moses Kinuthia who prepared a medical report to that effect. He stated that he had not

fully recovered from the injuries as he still experienced dizziness and he could not stand too long and the wound still itched. He stated that he was advised to go for scanning but he did not do so since he had no money. In support of his case to the injury, the Appellant produced treatment chit dated 15thMay,2011 (P. Exhibit 1a) and medical report by Dr. Moses Kinuthia dated 15th June, 2011. The Respondent tendered no evidence.

5. This appeal was canvassed by way of written submissions which were highlighted orally on 11th February, 2015. It was the Appellant's submissions that the opinion advanced by the doctor was that the headaches and dizziness were due to post injury syndrome. That the injury sustained by the Appellant was not trivial considering that he was hospitalized for five (5) days and later put on a bed rest for twenty one (21) days. That the Appellant testified almost one year after the accident but still complained that he experienced dizziness, could not stand for too long, that the wound still itched and that he was advised to go for a scan only that he had no money for it. It was submitted that as per P. Exhibit 1 (c) the Appellant suffered trauma which is defined by the Collins English Dictionary as ***"a powerful shock that may have long-lasting effects."***The Appellant then held the opinion that it was untenable for the trial court to hold that there was no evidence on loss of consciousness yet there was evidence of trauma and the Appellant's evidence that he realized of the accident when he found himself in hospital.

6. Placing reliance in **Nairobi HCCC No. 195 of 1994 John Cheborgei Chuma v. Joseph Onserio and 3 Others** where Ringera J (as he then was) awarded KShs. 120,000/= for a similar injury in the year 1995 and **Kakamega HCCC No. 209 'A' of 1991 Philemona Ingosi Lumula v. Jackton Mwanzia** where G.B.M. Kariuki J opined that awards will always go up as the value of the shilling diminishes, the Appellant submitted that an award of KShs. 800,000/= would have sufficed considering that almost twenty (20) years had lapsed since the awards in the above cited cases were given.

7. On the part of the Respondent, the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** was cited wherein the principles guiding the appellate court in disturbing the trial court's decision were set out. The Respondent submitted that the Appellant did not satisfy the principles therein; that the Appellant had not referred to any irrelevant factor that the trial court took into account or a relevant factor that the trial court failed to take into account. It was argued that the trial court in fact took into consideration the fact that the injury was minor as the Appellant did not produce any document indicating that he was unconscious. The Respondent submitted that the award was sufficient and cited **South Nyanza Sugar Co. Ltd v. Michael Jitoto (2009) e KLR** where a plaintiff who sustained injury on the right arm, chest and back was awarded Kshs. 75,000/= and was reduced to KShs. 50,000/= on appeal and the case of **Kenya Breweries Ltd v. Godfrey Odoyo (2005) eKLR** where Kshs. 70,000/= awarded by court for soft tissue injury was reduced to KShs. 20,000/= on appeal. It was submitted that the award of KShs.40,000/= should not be disturbed.

8. In awarding damages a court exercises discretion and each case must be looked at in its own peculiar circumstances more so in accident cases where it is unlikely for plaintiffs to suffer the same and exact injuries in separate accidents. This court is thereby guided by the holding in **Shabani v. City Council of Nairobi (1985) KLR 516, Paul Kipsang Koech & Another v. Titus Osule Osore (2013) e KLR** and**Kemfro Africa Limited**(supra) where it was held that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong legal principle or on a misapprehension of the evidence.

9. In applying the above principle, I note that the injury sustained by the Appellant was blunt head injury with nose bleeding which injury was not disputed. The Appellant was examined 8th June, 2011 and the doctor made an inference that the injury sustained was harm which occasioned the Appellant pain, suffering and loss of blood. He stated that the headache and dizziness were due to post head injury syndrome and may take several months to fully resolve and the Appellant would require constant analgesics. The treatment chit produced as P. Exhibit 1 (c) dated 15th May, 2011 revealed that the Appellant was treated as an out-patient. I have considered the Appellant's submissions tendered vis a vis the injuries suffered.

10. I have also considered the cases cited in this appeal. The injuries sustained by the Plaintiffs in the authorities relied on by the parties herein seem to be close to those suffered by the Appellant. I am not satisfied that the award was too inordinately low as to amount to a wrong estimate. I will dismiss the appeal.

11. One thing which I noticed while writing this judgment was that the trial court seems to have proceeded by way of formal proof while there was no interlocutory Judgment on record. The judgment applied for by the Plaintiff was rejected on 30th November, 2011. The Plaintiff was ordered to reserve the summons afresh but instead proceeded to list the matter for formal proof. The trial Court did not consider this fact when the matter came up for trial. Since the Appeal was defended and the issue was never raised, I make no finding on the matter. Let the loss lie where it has fallen.

12. The upshot is that I confirm the judgment of the trial court and dismiss the appeal with no order as to costs.

Dated, Signed and **Delivered** at Nairobi this 13th day of March, 2015.

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A MABEYA

JUDGE