



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL NO.51 OF 2015

(Appeal originating from judgment by Hon. A. M. Obura in Kilifi RM CC NO.424 of 2009)

UMOJA RUBBER PRODUCTS LIMITEDAPPELLANT

VRS

BOBSON RIMBA LEWARESPONDENT

JUDGMENT

The respondent was involved in an industrial accident while working for the appellant on 21/5/2008. He filed Civil Suit No.424 of 2009 and was awarded general damages for pain and suffering totalling ksh.2,200,000/-. The award by the trial court led to the filing of his appeal.

The Memorandum of Appeal dated 20th November, 2013 gives only two grounds of appeal. It is stated that the award of ksh.2,200,000/- as general damages is so excessive as to amount to an erroneous estimate of

the damages payable to the respondent. It is also stated that the trial magistrate failed to consider the medical report of Dr. Udayan Sheth dated 22nd July 2008 relating to the injuries sustained by the respondent.

Parties agreed to determine the appeal by way of written submissions. The appellant reiterates that the damages awarded to the respondent is excessive and that the medical report of Dr. Udayan Sheth tendered as evidence was not considered. The said Doctor examined the respondent two months after the accident and assessed his permanent incapacity at 60%. On the other hand, Dr. Ajoni Adede examined the respondent four years after the accident and assessed his permanent incapacity at 45%. The trial court heavily relied on the Case of **Cosmas Kipkoech Segei v Madrugada Ltd & Another, Nakuru HCCC No.176 'B' of 2005**. The appellant contends that a sum of ksh.180,675/- that had been paid under the Workman's compensation Act also need to be deducted from the decretal sum.

Counsel for the respondent maintains that the award by the trial court is fair. It is not excessive or an erroneous estimate of the damages payable to the appellant. Counsel states that although they submitted for a sum of

ksh.2 million as damages, they requested the trial court to take into account inflation and depreciation of the Kenyan currency since the Cosmas Case was determined in 2010. With regard to the issue of ksh.180,675/- as workman's compensation, it is submitted that the appellant never raised it in its

submissions before the trial court. What was produced was a copy of a receipt for the same amount. The two medical reports produced in court gave similar injuries.

The record of the trial court shows that parties agreed on liability. A consent was recorded whereby liability was apportioned at 40% against the plaintiff and 60% against the defendant. No witness testified. The plaintiff produced a medical report by Dr. Adede dated 8/5/2013 and a receipt for ksh.2,000/- while on its part, the appellant produced a medical report by Dr. Sheth and an official receipt from the labour office dated 19/9/2008 for ksh.180,675/-. Parties proceeded to determine the issue of quantum by way of written submissions.

The respondent suffered amputation of the left hand (below the elbow). There is no dispute on the injuries sustained by the respondent. Before the trial court, counsel for the appellant urged the court to award damages ranging from ksh.650,000/- to ksh.700,000/- on 100% basis.

Counsels relied on the Case of **Saleh Seleman Mwabagura v Narshidas Co. Ltd**, Justice Mbaluto awarded ksh.440,000/- for a crush injury on the left hand resulting to loss of fingers. On 26/7/1993, counsels also cited the Case of **Charles Kabaara Mbughia v Thigiri Farm Ltd. Hccc No.365 of 1994**, Machakos, Justice Mwera awarded ksh.360,000/- for amputation of a hand on 21/1/1998.

The appellant's counsel further relied on the Case of **Harun Habel Mnjau v Ngui Makau & 2 Others, Msa Hccc No.144 of 1996** where P. M. Tutui, Commissioner of Assize awarded ksh.750,000/- as damages for loss of left arm. There is also the Case of **Peter Kamau Mbicho v Kenya bus Services, Msa Hccc No.55 of 1998**. The plaintiff suffered a severe crash injury of the left forearm resulting to amputation. He was awarded ksh.600,000/-.

On their part, counsels for the respondent sought ksh.2,000,000/- as damages for pain and suffering, ksh.750,000/- for lost years and ksh.700,000/- as cost of prosthesis. They relied on the Case of **Cosmas Kipkoech Sigei v Madrugada Ltd & Another, Nakuru Hccc No.176 of 2005**. The plaintiff in that case suffered a traumatic amputation of the left hand at the wrist joint. Permanent incapacity was assessed at 65% by Dr. Ng'etich while Dr. Malik assessed it at 60%. Justice D. K. Maraga awarded ksh.2 million for pain and suffering, ksh.750,000/- for lost years and ksh.700,000/- as costs of prosthesis. This was on 3rd June, 2010.

The main issue for determination is whether the amount of damages awarded to the respondent is excessive.

Dr. Udaya R. Sheth examined the respondent on 22/7/2008. His report indicates the following:

“ Below elbow amputation left forearm. I find below elbow amputation stump is well healed. There is no tenderness. No contracture. Rest of physical examination is normal.”

Dr. Ajoni Adede examined the respondent on 8/5/2013. This was a period of 5 years and 2 weeks from the date of accident. The report indicates as follows:

“Amputation of the left hand.

Complains of pain in the amputation stump and difficulty in performing simple tasks like buttoning the shirt or bathing.”

Doctor Adede concluded that permanent incapacity was 45% due to amputation of the left hand and 1/3rd of the left forearm, reduced capacity for work, increased dependence, cosmetic embarrassment and loss of self esteem. Dr. Udayan Sheth had assessed permanent incapacity at 60%.

This court can only interfere with the damages awarded by the trial court if it can be shown that the trial court took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be wholly erroneous estimate of the damage or that the wrong legal principles were applied [see

Butt v Khan [1981] KLR 349. The appellant contends that the award of ksh.2.2 million as general damages is excessive. The authorities relied upon by counsel for the appellant are quite old. The last two cases were decided on 2002 which is over 10 years now.

The trial court relied upon the Case of Cosmas (Supra). I do find that authority to be directly relevant to this particular case. The plaintiff in that case sustained amputation of the left hand. The respondent herein suffered amputation of the left hand below the elbow. The injuries are more or less similar to those suffered by Cosmas Kipkoech Sigei. The Cosmas Case was decided on 3rd June, 2010. It is a period of over five (5) years by now.

I do not find that the injuries sustained by Cosmas were more severe compared to those suffered by the respondent as alleged. Similarly, Cosmas was awarded ksh.780,000/- for lost years as well as ksh.700,000/- for prothesis(artificial part hand). The respondent herein did not plead for the two types of damages and was not awarded.

Counsel for the appellant contends that the respondent's advocates had only sought ksh.2 million as damages for pain and suffering. That could be the case. However, the trial court is not bound by the submissions of the parties. Those submissions are meant to act as a guide to the court. There is no rule of law stating that the trial court cannot award more damages than the amount sought by the claimant's advocate.

Given the evidence on record, I do find that the award herein is reasonable. The injuries are quite severe. The respondent will never recover from the loss of his hand. The medical report by Dr. Sheth does not give any different findings from that of Dr. Adede. The two reports give similar injuries although the assessment of permanent incapacity is different. The authorities relied upon by the appellant's advocates are quite outdated and cannot be used as the current guide at the moment. The difference of the assessment of incapacity between the report of Dr. Adede and Dr. Sheth does not imply that the respondent is able to utilise his amputated hand.

With regard to the issue of the sum of ksh.180,675/- paid under the Workman's Compensation Act, I do find that, that amount forms part of the damages for pain and suffering and should be deducted from the amount awarded by the court. The receipt proving that the appellant paid that amount was produced in court and the trial court ought to have knocked it off.

In the end, I do find that the appeal on the amount of quantum awarded by the trial court lacks merit and is disallowed. On the issue of workman's compensation, I do find that although it was not pleaded as a ground of appeal, that amount is deductible from the decretal sum. The respondent's award shall be:-

	KSH.
General damages for pain and suffering	2,200,000.00
Special damage	<u>2,000.00</u>
TOTAL	2,202,000.00
Less 40% Contribution	<u>880,000.00</u>
TOTAL	1,321,200.00
Less Ksh.	<u>180,675.00</u>
	<u>1,140,525.00</u>

Since the appeal has succeeded partly, each party shall bear their own costs of the appeal. The respondent shall have the costs of the subordinate court's case.

Dated, signed and delivered at Malindi this 27th day of October, 2015.

SAID J. CHITEMBWE

JUDGE