



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 243 OF 2010

TARMAL WIRE PRODUCTS LTDAPPELLANT

-V E R S U S-

RAMADHAN FONDO NDEGWA RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court R. Kirui at Mombasa on 4th November, 2010)

JUDGMENT

1. The Respondent's claim in **Mbsa RMCCC NO. 2776 of 2009** was for compensation special and general damages resulting from injuries suffered by him whilst in the course of his employment with the Appellant.
2. After hearing the case the Learned Principal Magistrate by his considered judgment of 4th November 2010 awarded Respondent Kshs. 500,000/- in general damages and Kshs. 1,500/- in special damages.
3. The judgment aggrieved Appellant who has filed this appeal. The appeal is only directed towards the award of general damages. Appellant by its 3 grounds attacks that judgment by stating that the Learned Principal Magistrate erred in Law in making the award; that the award was excessive in the circumstances; and that the Learned Principal Magistrate assessed the damages without regard to known precedents.
4. The duty of the first Appellant Court that shall guide me as I consider this appeal were discussed in the case **SELLE –Vs- ASSOCIATED MOTOR BOAT COMP [1968] E.A. 123**. That duty is to evaluate the trial Court's evidence, analyze it and come to my own conclusion but in so doing I must give allowance of that I neither saw nor heard the witnesses.
5. The Respondent testified at the trial that on 3rd August 2009 three of his fingers on the left hand were cut and fractured as he operated Appellant's machine in the course of his employment. He was treated at Mariakani Hospital. He then stated in chief-

“I have not fully recovered. I cannot carry heavy things. I cannot do the work I used to do. I was a labourer.”

On being cross examined he stated that he was working in a shop.

6. Appellant did not call any evidence.
7. Parties by consent submitted two reports by Dr. S. K. Ndegwa and one by Dr. Udayan. Those reports record that Respondent suffered fracture on the left hand; the bone of the index finger. Respondent also suffered three lacerations on the left hand of 10cm; 5cm deep cut wound on the base of the left index finger; and two cut wounds on the left thumb each 3cm. Respondent was noted by both doctors to suffer with stiffness of the left index finger and hence Dr. Ndegwa assessed permanent incapacity at 10% and Dr. Udayan assessed it at 7%. In this regard I wish to state that the Learned Magistrate did not mistake Dr. Udayan assessment of permanent incapacity because I have looked at the lower Court's record and have noted the Learned Magistrate noted it as 7% and not 70% as seen in the typed proceedings.
8. Respondent in submissions before the lower Court relied on the award made in the case of **PATRICK ODHIAMBO OBIRO -Vs- CATHOLIC DIOCESE OF NAKURU HCCC No. 177 of 1995 NAKURU.** In that case which was decided on 15th December 1997 the injuries were-

“The Plaintiff suffered fracture of the left thumb and cut wound over the 3rd and 4th fingers the injuries made it necessary for the partial imputation of the left 3rd, 4th fingers and the thumb. The wounds healed leaving scar. The injuries healed with a permanent residual disability assessed at 14%.”

The award made in the case was of Kshs. 400,000/- in general damages.

9. Appellant in its submissions relied on the case that was not attached to its submissions in the lower Court and must have been of no assistance to that Court as it is not to this Court.
10. The Learned Magistrate in his judgment in regard to general damages

stated thus-

“I have considered the said authorities together with the nature of the Plaintiff's injuries herein and award general damages of Kshs. 500,000/- for pain, suffering and loss of amenities.”

11. Appellant in this appeal has relied on the case of **MBSA HCCA No. 53**

of 2008 MATANO MBITI NGATI & ANOTHER -Vs- ALI RAJAB BINDO. That authority was not cited to the Learned Magistrate. The injuries in that case as stated by the Plaintiff was-

“Fracture in the Plaintiff's tibia and fibula, a compound fracture occasioning fragments which took a long time to be held together.”

The Judge in the above case noted however that the Plaintiff had fully recovered. That is unlike the present appeal because as stated before both doctors for the Appellant and the Respondent noted that Respondent continued to suffer stiffness in the left hand and Respondent himself stated that he could, after the accident, resume his normal duties as a labourer.

12. The test to be applied by an Appellant Court on an appeal against an

award of damages was considered in the case **JOSEPH HENRY RUHUI -Vs- ATTORNEY GENERAL HCCA CASE No. 701 OF 2001.** It was stated in that case as follows-

“The test as to whether an appellate Court may interfere with an award of damages was stated by Law, J.A in Butt V. Khan [1977]1 KAR as follows-

An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high low.”

The test was also considered in the case MBOGO & ANOTHER –Vs- SHAH (1968) E.A. 93 where it was stated-

“I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

13. In my judgment I do not find that the award by the Learned Magistrate was inordinately high or low to lead me to interfere with it. The Respondent provided an authority which had been decided some 13 years previously and an award of Kshs. 400,000/- was made. For the Learned Magistrate to have awarded Respondent with an award of Kshs. 500,000/- in the year 2010 it cannot be said to be inordinately high. It certainly does not attract interference by this Court. In this regard I am guided by the case H. WEST & SONS LTD –Vs- SHEPHARD (1964) AC. 326 where Lord Morris stated-

“The difficult task of awarding money compensated in a case of this kind is essentially a matter of opinion of judgment and experience. In a sphere in which no one can predict with complete assurance that the award made by another is wrong the best that can be done is pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitable differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

14. In view of the above findings the appeal is hereby dismissed with costs

to the Respondent.

DATED and DELIVERED at MOMBASA this 26TH day of JUNE, 2014.

MARY KASANGO

JUDGE