REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 467 OF 2013

ESTHER WANGUI RITHO……...……...…APPELLANT

-VERSUS-

KAKUZI LTD……..1ST RESPONDENT

WASHINGTON ONYANGO BWIRE….....……2ND RESPONDENT

(Being an appeal from the judgment and decree in Chief Magistrates Court Criminal Case No. 1059 of 2009 (D.A. Orimba) on 15th January, 2012)

JUDGMENT

This appeal arises out of a judgment delivered by the subordinate court in a running down case in which the plaintiff was awarded **Kshs.204,000**/= made up of general and special damages as a result of the injuries and losses he is said to have sustained and incurred respectively. The appellant was also awarded costs of the suit.

The appellant was aggrieved by the decision of the learned magistrate and therefore appealed to this court on the grounds that:

1. The learned magistrate erred in law and in fact in awarding an amount which was inordinately low;
2. The learned magistrate erred in fact and in law in ignoring previous decisions (apparently on the same issue);
3. The judgment was unfair in all circumstances.

The appellant sought from this court enhancement of the award and costs of the suit and the appeal.

The record shows that the appellant initially filed a plaint in court on 8th December, 2009; although he asked for special and general damages there were no particulars for injuries in that plaint. In their defence the respondents denied all the allegations in the plaint and in particular denied that the appellant had suffered any loss or damage.

It is also apparent from the record that after evidence had been taken and both parties closed their respective cases, the appellant sought leave to amend his plaint ostensibly to include particulars of injuries that had been omitted from the original plaint. The respondents opposed the application for leave to amend the plaint particularly considering the stage in the proceedings when the application was made.

The trial court's record indicates that the respondents filed a preliminary objection to the application for leave to amend the plaint; this preliminary objection was argued on 10th July, 2012. As at this time the plaintiff had filed his written submissions on the suit based on the plaint on record. The submissions had been filed on 21st June, 2012.

When the learned magistrate delivered his ruling on 11th September, 2012, he not only overruled the respondents' preliminary objection but he also allowed the plaintiff's application to amend the plaint. He ordered that the amended plaint be filed and served within seven days of the date of the ruling. It is obvious here that that the plaintiff's application for amendment of the plaint was allowed without having been heard.

The court stamp on the plaint amended on 18th September, 2012 shows that it was received in court on 18th September, 2010 but paid for on 18th September, 2012. Interestingly the application for amendment was filed in court on 21st June, 2012. It is not clear how the purported amended plaint was filed before even the application for its amendment was filed and heard.

The entire process of amending the plaintiff's plaint appears to have been irregular; however, the respondents did not take any issue with the learned magistrate's decision either on his ruling on the preliminary objection against the application for amendment of the plaint or the judgment that he ultimately delivered on the entire case. They neither filed an appeal nor a cross-appeal to the appellant's appeal. Indeed they confirmed in their submissions that they settled the decretal sum after the appellant attached their property.

In opposing the appellant's appeal the respondents took this point further; they submitted that having taken steps to execute the subordinate court's decree and indeed the respondents having settled it by paying the decretal sums and the auctioneers charges, the appellant cannot turn around and question the judgement from which this decree was obtained.

In my humble view, the respondents have a point because for all intents and purposes, an appeal against a decree or order presupposes that the appellant is aggrieved by the judgment or the ruling, whatever the case may be. The appellant cannot, as it were, enjoy the fruits of his judgment and turn against the same judgment- he has to take it or leave as it is; in this case the appellant opted to take it. On this ground alone this appeal should be allowed.

I must, however, mention something about the grounds of the appellant's appeal; though they were listed as three grounds, they can easily be addressed as one ground because one cannot talk of an award being inordinately high or inordinately low without considering precedents in such cases. By extension, if the court has considered the precedents and made an award that is neither too high nor too low then the issue of whether the judgment is unfair will not arise.

In the submissions filed by the plaintiff's counsel in the subordinate court, which apparently he omitted from his appeal record, he cited several decisions in support of an award of Kshs. 1,500,000/= for general damages; Kshs 600,000/= for pain and suffering and Kshs. 300,000/= for future medical evidence. Assuming that the purported amended plaint was properly on record, the particularised injuries in the plaint were stated to be a fracture of mid-shaft femur on the right side; a cut off the inner side of the upper lip; a bruised forehead and a pressure sore on the right hand due to prolonged bed rest.

I have carefully read the appellant's appeal record and the trial court's record and there is no evidence that the decisions cited by the appellant were ever presented before the learned magistrate. None of those decisions have been produced in this court to determine whether these sums which, on face of it, appear relatively outrageous were justified. What the appellant did in his submissions in this appeal was to cite new decisions that were never considered by the magistrate's court in his bid for what he has described as "enhanced award".

If the learned magistrate was not presented with the cited decisions it is difficult to see how the appellant

can fault him for ignoring precedents and therefore making an inordinately low award. For the same reason without those decisions having been presented before this court, there is no basis for questioning the award made by the learned magistrate.

I would in these circumstances dismiss the appellant's appeal with costs.

Signed, dated and delivered in the open court this 20th June, 2014

Ngaah Jairus

JUDGE