REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 173 OF 2009

H. YOUNG CONSTRUCTION COMPANY LTD. ……..… APPELLANT

VERSUS

RICHARD KYULE NDOLO ……..……...……. RESPONDENT

(Being an appeal from the Judgment and Decree of the Resident Magistrate's Court at Taws of Hon B.M. Mararo (R.M) Civil Case No. 163 of 2008 dated 30th September 2009)

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(Before B. Thuranira Jaden J)

J U D G M E N T

1. The Respondent who was the Plaintiff in the lower court had sued the Defendant, **H. Young Construction Company Ltd** for damages suffered when the Respondent was involved in road traffic accident.
2. The parties entered a consent on liability at 65% against the Appellant and 35% against the Respondent. The Medical Report by **Dr. Ndambuki** dated 20/11/2008 and the medical report by **Dr. Wambugu PM** dated 22/5/2008 were produced as exhibits to be relied on in the assessment of General Damages. The parties then filed written submissions.
3. The medical report by **Dr. Ndambuki** dated 20/11/2008 described the Respondent's injuries as follows:-

- Degloving injury to the left leg with loss of skin over the calf muscles.
- Blunt injury to the left ankle joint.

The treatment included admission in hospital for three months when necrosectomy was done, surgical toilet, cleaning and dressing and skin graft on the left thigh.

According to the said report, the Respondent still suffered pain on the left ankle joint when walking, remained with scars on the left leg and thigh was at risk of post-traumatic osteoarthritis of the left ankle joint.

4. The medical report by **Dr. Wambugu PM** dated 22/5/2009 describes the Respondent's injuries as "**Degloving would left calf region**". It further indicated that the Respondent was managed as an inpatient for three months when surgical toilet was done and later skin grafting of the wound carried out. The doctor's opinion was that the Respondent sustained soft tissue injuries which occasioned him pain and morbidity. That the remnant wound scars are permanent but no total permanent incapacitation occurred. It further stated that although the Respondent had suffered a

stroke on 13/04/2008 with left side hemiparesis, the same was not related to the accident.

5. In their submissions before the lower court, the Respondent submitted for Kshs.700,000/= award of General Damages while the Appellant's side submitted for Kshs.60,000/=. The trial magistrate in his judgment made an award of General Damages at Kshs.350,000/= on a 100% basis. There was no award of Special Damages.
6. The Appellant was aggrieved by the assessment of General Damages and appealed to this court on the following grounds:-

1. "**The learned trial magistrate misdirected himself and grossly erred in awarding an inordinately high award for general damages for pain, suffering and loss of amenities viz a viz the injuries sustained by the Respondent which were soft tissue in nature.**
2. **The learned trial magistrate erred in law and in fact in ignoring medical evidence placed before him which clearly indicated that the Respondent's injuries were soft tissue in nature and did not result into any permanent incapacitation.**
3. **The learned trial magistrate erred in law in totally ignoring the Appellant's Counsel's submissions on issues of law and evidence and thereby arrived at an erroneous assessment.**
4. **The learned trial magistrate erred in failing to apply relevant and pertinent judicial comparables, precedents and trends regarding similar soft tissue injuries.**
5. **The learned trial magistrate misapprehended the medical evidence in material respects thus arriving at a wrong assessment of general damages."**

7. The appeal was canvassed by way of written submissions which I have duly considered.
8. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See* **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**
9. No evidence was recorded in this suit. The court's assessment of General Damages was based on the two medical reports aforestated. The two medical reports give similar injuries that were sustained by the Respondent, that is, a degloving injury on the left calf region. Both reports also refer to the ankle joint pains. The report by **Dr. Ndambuki** states that the Respondent sustained a blunt injury to the left ankle joint. The report by **Dr. Wambugu** reflects that "**ankle joint movements are within normal range**". The report by **Dr. Wambugu** further reflects that the Respondent had complained of pains in the left ankle joint. Both reports reflect that the Respondent was managed as an inpatient up to 18/09/2007. Both reports do not reflect whether the treatment notes were availed to the said doctors or not. The contents of the medical reports generally reflect similar injuries.
10. The report by **Dr. Wambugu** who was the Appellant's doctor thus essentially agrees with the report by **Dr. Ndambuki** who was the Respondent's doctor. With the parties having by consent produced medical reports as the only evidence upon which the court was to assess General Damages, the Appellant cannot now turn back to state that there are no treatment notes produced to back up the entries made in the medical reports.
11. The trial magistrate in his judgment referred to the injuries sustained by the Respondent as "**grievous harm**". These words "**grievous harm**" appear to have been lifted by the trial magistrate from a P3 form which seems to have been annexed to the Plaintiff's submissions. It is observed that the consent entered into by the parties was for the court to rely on **Dr. Ndambuki's** and **Dr. Wambugu's** report. It was therefore erroneous for the trial magistrate to rely on the contents of the P3 form.
12. The trial magistrate's observation that the Respondent took about 18 months to recover appear to be based on the contents of the two medical reports which reflect that the Respondent was complaining of pains in the ankle joint at the time the medical examinations were carried out. Be as it may, the entries in the said P3 form are the same ones described in the two medical reports. None of the parties therefore suffered any prejudice because of the use of the term "**grievous harm**" by the trial magistrate.
13. The injuries sustained by the Respondent were described by the Appellant as "**merely soft tissue in nature**". The two medical reports however reflect serious soft injuries that necessitated admission for about three months. Even the Appellant's doctor described the injuries as having occasioned to Respondent "**pains and morbidity**" with "**remnant wound scars**" that are permanent.

14. The Respondent referred the court to the following two decisions in support of the claim for General Damages:-

- In **John King'ara Nderi v Gachini Kagwe NBI HCCC 475 of 1993**, the Plaintiff therein was awarded Kshs.450,000/= in the year 1997 for a crushed injury to the left leg with compound fractures of the tibia and fibula with extensive skin loss and required skin grafting, bone grafting, surgical toilet and external fixation.
- In **Wamunyu Children's Development Fund –vs- Michael Mutuku, Mks HCCA 125'B'/2001**, an award of General Damages of Kshs.420,000/= was upheld in the year 2007 for injuries that included a compound fracture of the left femur shaft, lacerations of the left knee, several bruises and a cut wound in the forehead.

It is however noteworthy that although the passage of time and inflation must be taken into account, the injuries in the cited authorities were more severe than the injuries herein.

15. On the other hand, the Appellant relied on the following decisions:-

- **Francis Mwai Kahuthu & Another –vs- Daniel Munene Njoroge NBI HCCC No. 6 of 1999** where an award of Kshs.50,000/= was made in the year 2001 for bruises to the chest, right hip and face.
- **Francis Munyao –vs- Machakos Ranching Company Limited – Mks HCCC 311/94** where in the year 1997, the sum of Kshs.60,000/= was awarded for bruises to the mouth, left hand and both legs.

16. It is noted that these authorities are rather old and that the injuries therein are minor and not comparable with the injuries in the case herein.
17. On my part, I have considered two more authorities as follows:-

- **Kiptagich Tea Estates Ltd. –vs- Christopher Kibet Koskey (2009) e KLR** where in the year 2009 the High Court refused to interfere with an award of Kshs.400,000/= as General Damages for a degloving injury of the right hand and fracture of the ulna styloid of the right hand and skin grafting was done with 20% permanent disability.

- **Kiru Tea Factory & Another –vs- Peterson Watheka Wanjohi (2008) e KLR** where in a year 2008 judgment, the High Court confirmed an award of Kshs.800,000/= for a degloving injury to the right hand with extensive skin and muscle loss of the forearm occasioning 45% permanent disability.

There is no doubt that the injuries in these authorities are also far more serious than the injuries in the case at hand. The ages of the judgments in the **Kiptagich Tea Estates Ltd** (supra) and the **Kiru Tea Factory case** (supra) are however the same as the case herein.

18. Taking guidance from all the aforestated authorities, I find the award of General Damages made to the Respondent was inordinately high in the circumstances. I reduce the same to Kshs.250,000/= (subject to apportionment of liability).
19. In arriving at the decision to reduce the amount of General Damages, I have considered the purpose for award of General Damages as stated in the following passage in the case of **West H. & Son Ltd. –vs- Shephard (1964) AC 326**:

"But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is award sums which must be regarded as giving reasonable compensation. In the process there must be the 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 eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

20. This court has also been guided by the principles set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

21. For the aforestated reasons, I substitute the judgment of the lower court on the award of General Damages with that of Kshs.250,000/=. Since the appeal has only been partially successful, each party to bear their own costs of the appeal.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **18th** day of **July** 20**14**.

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B. THURANIRA JADEN

JUDGE