REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 12 of 2006

MENENGAI SOAP FACTORY…….....APPELLANT

VERSUS

STEPHEN OLUOCH ONYANGO……..…….....…….REPONDENT

JUDGMENT

This is an appeal from the judgment and decree of Hon. F.N Muchemi (C.M) in ELD CMCC NO.1298 OF 2004 delivered on 30th January, 2006.

Both Counsel for the Appellants and he Respondents opted to put in written submissions.

FACTS.

The facts of this case are that on the 4th October,2000 the Respondent whilst lawfully engaged in his duties at the Appellants premises when due to the negligence of the Appellant ,its agents ,employees and or servants the Respondent slipped on a slippery floor and fell into an underground tank containing corrosive caustic chemical and thereby sustaining the following serious injuries as listed hereunder;

Burn wounds on the neck, face, eyes, mouth, back, chest, arms, right hand and stomach covering an area to the extent of 32% of his body.

The learned trial magistrate awarded the Respondent a total sum of Kshs 1,610,000 made out as follows;

a. General damages……..….750,000

b. Future medical expenses……..……610,000

c. Loss of earnings…….250,000

Total 1,610,000

The Appellant being aggrieved preferred this appeal and relied on the Grounds of Appeal set out in its

Memorandum of Appeal and as listed hereunder;

1) That the learned trial magistrate erred in law and fact in awarding excessive general damages by taking into account irrelevant factors and disregarding settled principles in assessing awards of damages hence arriving at a wholly excessive and erroneous award

2) That the learned trial magistrate erred in law and fact in deciding on unpleased issues.

3) That the learned trial magistrate erred in law and in fact in making an award for future medical expenses whereas the same were not pleaded specifically and strictly proved

4) That the learned trial magistrate erred in law and fact in awarding damages on account of loss of earnings when the same as not specifically pleaded and strictly proved.

5) That the learned trial magistrate erred in law and fact in failing to discount from the general damages granted to the Respondent the sum of kshs 204, 455 paid under hate Workmen Compensation Act.

6) That the trial magistrate erred in law and fact in granting costs of the suit to the Respondent when no demand had preceded the suit and the Appellant had admitted liability in form a consent judgment on the same.

It was the Appellants contention that the general damages awarded were excessive and on the higher side, that the trial magistrate took into account irrelevant factors in assessing the award and that the trial magistrate should have made an award in the sum of Kshs 500, 000/= which would have been sufficient compensation.

The Appellant further submitted that the award made for future medical expenses was not sufficiently proved by the Respondent as required by law.

The Appellant further argued that **"loss of earning"** falls under the head of special damages and that these must be specifically pleaded and proved. That the Respondent did not tender any evidence to prove the sum of Kshs 250,000/=.

Lastly it was argued that the Respondent was not entitled to costs as no demand letter was produced by the Respondent in evidence.

The Appellant therefore prayed that for the aforegoing reasons the appeal be allowed.

Counsel for the Respondents submissions in opposing the appeal were that the award made by the trial magistrate in the sum of Kshs 750,000/= as general damages was proper and that the said magistrate applied proper principles to arrive at the said amount.

The Respondent submitted that the future medical expenses had been specifically pleaded in the plaint and had Dr. Mubisi Swaro had stipulated the amount in his medical report, which medical report had been admitted into evidence **" BY CONSENT"** of both Counsel for the parties.

On the issue relating to **"loss of earnings"** Counsel for the Respondent submitted that this had been specifically pleaded at paragraph 10 of the Plaint and was also specifically prayed for in the last prayers. The age of the Respondent is stated as 41 years in the medical report of Dr. Sirma's and Dr. Swaro's put it at 37 years. The trial magistrate opted to utilise Dr. Sirma's estimate of the Respondent's age when making the award under this head.

The Respondents contention was that the medical reports entered into evidence **"BY CONSENT"** alluded to the fact that the Respondents earnings would be impaired. The Respondent argued that the amount awarded under this head was on the lower side and that the Respondent was earning a monthly salary of Kshs 8,000/= therefore the award made by the trial magistrate of Kshs 250,000/= was on the

lower side and though not unreasonable should have been more.

The Respondent urged this Honourable court to dismiss the appeal with costs to the Respondents

ISSUES FOR DETERMINATION:

Upon reading the submissions of both Counsel for the Appellant and Respondent the court finds that the only issues for determination relates to Costs and Quantum of damages which has several sub-headings as listed hereunder;

1. Quantum of damages:

(a) General damages

(b) Future medical expenses

(c) Loss of earnings.

2. costs

It is the duty of this appellate court, this being a first appeal, to re-evaluate the evidence and make an independent conclusion keeping in mind that the court did not have an opportunity to see nor hear the witnesses. Refer to the authority of **ARROW CAR LTD –VS- BIMOMO & 2 OTHERS C.A344 OF 2001.** The same authority also sets down the principles upon which an appellate court can interfere with an award for general damages which are set out hereunder;

".....an appellate court should only disturb an award for damages when the trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low, it amounts to an erroneous estimate....."

On the issue of the award for general damages, the medical reports prepared by Dr. Swaro and Dr. Sirma were put in by both Counsel **"BY CONSENT."** The medical reports were supportive evidence of the injuries sustained by the Respondent. I find that the trial magistrate made an award that was reasonable and not excessive and that the award was based on the injuries sustained and the evidence contained in the medical reports and that the magistrate referred to comparable awards from authorities supplied by both Counsel. Refer to **MACHOKA –VS- KPL HCC NO. 52 OF 2003** Where Justice Lessit awarded damages of Kshs 800,000/=. **BONIFACE MUSYOKA NDOLO –VS- PAULINE KATONGE MUSAU C.A NO. 34 OF 1996** Gicheru, Lakha Bosire JJA's awarded damages of Kshs 600,000/=.

The Appellants authorities were for the periods 1988 and were on the lower side. All these authorities are annexed to the written submissions of the Counsel for the Appellant & Respondent and are found in the Record of Appeal from pages 1 to 22.

As for the sum of Kshs 204,455/= the sum relates to a medical bill paid by the Appellant on the Respondents behalf. The Respondent did not make a claim in the plaint for the medical expenses and the same is therefore not part of the judgment .

The Appellant is not entitled to a refund and therefore the same shall not be discounted from the award for general damages.

For the reasons stated above I find no reason to interfere with this part of the award.

The next issue relates to **future medical expenses**, I find that the Respondent had pleaded the same specifically in his plaint at paragraph 10. Found on page 4 of the Record of Appeal.

Again the court reiterates that the medical report prepared by Dr. Swaro was admitted into evidence **"BY**

CONSENT". The medical report put in as evidence was sufficient proof and the Doctor gave a breakdown of the cost amounting to Kshs 610,000/= (refer to page 27 of the Record of Appeal)

This court finds that the trial magistrate did not apply wrong principles at arriving at this amount.

I find no reason to interfere with this amount as the same was specifically pleaded in the Plaint and proved by the medical report.

On the issue of the award made by the trial magistrate for **loss of earnings** in the sum of Kshs 250,000/= I concur with the Appellants arguments that loss of earning capacity falls under the head of general damages and that loss of future earnings falls under the heading of special damages and that under the second head the same must be pleaded and specifically proved.

The trial magistrate correctly considered loss of earnings under the head of general damages. The trial magistrate states in the Judgment that no evidence was tendered by the Respondent in support of this head. The evidence the trial magistrate refers to can only relate to the Respondent's payslip which was not tendered as proof of income.

In the absence of the above the trial magistrate erred by not using the minimum government wage as a guideline for computation purposes.

I find that the amount awarded under this head was negligible and had the Respondent cross- appealed this court would have enhanced the amount.

This court reiterates the fact that the amount awarded was reasonable but on the lower side but will not interfere with the same.

On the issue of costs, I concur with the Appellant arguments on this issue. I find no demand letter in the Record of Appeal nevertheless taking into account, the severe nature of the injuries and also the fact that the court is unable to enhance the award allowing this ground of appeal would have the effect of reducing the Respondent's award, substantially.

Therefore in the interest of justice I am disinclined to allow this ground of appeal.

CONCLUSION:

The result is that I find no merit in the appeal and the same is dismissed with costs to the Respondent.

Dated and delivered at Eldoret this 4th day of May 2012.

A.MSHILA
JUDGE

Coram: Before Hon. Mshila J

CC: Andrew

Counsel for Appellant Barasa holding brief for Songok

Counsel for Respondent Aseso for Respondent.

A.MSHILA
JUDGE