



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL 21 OF 2008

*(Appeal from the judgment and decree of HON. ELIJA OBAGA, SENIOR RESIDENT MAGISTRATE
in Kakamega Chief Magistrate's court Civil Case No. 738 of 2006 delivered on 11th March, 2008)*

WEST KENYA SUGAR LTD.
PLAINTIFF

VERSUS

ZABLON NDULA KAYUGIRA DEFENDANT

JUDGMENT

This appeal is on the quantum of damages. The grounds of appeal are that:-

- “1. The learned magistrate erred in law and in fact in making an award in general damages that was so excessive as to amount to an erroneous estimate of the damages suffered.
2. The learned magistrate erred in law and in fact in misapprehending the injuries suffered by the respondent and therefore took into account irrelevant facts in assessing damages.
3. The learned Principal magistrate erred in law and in fact in failing to address the evidence and submissions tendered by the appellant and therefore failed to take into account relevant facts while deciding Kakamega CMCC No.738 of 2006.”

In the case before the subordinate court, on 6.9.07 the parties agreed on liability at 20% against the plaintiff and 80% against the defendant. Dr. V. V. Lodhia's medical reports dated 27.2.02 were produced as defence exhibits and parties filed written submissions.

The respondents injuries according to the Plaintiff were as follows:-

“- Head injury;

- Scalp swollen and tender;

- Left cheek swollen and tender;
- A depressed fracture of the left temporal bone of the skull;
- Right forearm swollen and tender;
- A fracture dislocation of the right wrist;
- Right hip swollen and tender;
- A dislocation of the right hip joint;
- A fracture of the right iliac crest;
- A fracture of the right acetabulum;
- Right leg is ½ cm shorter.”

The trial magistrate made an award of Kshs.500,000/= as general damages.

Mr. Akanga Advocate appeared for the appellant and Mr. Wanyonyi advocate appeared for the respondent.

Mr. Akanga advocate for the appellant in his submissions stated that the trial magistrate did not take into account the evidence and the submissions and asked this court to make its own assessment of the damages. He referred the court to the following authorities:

- **ARROW CAR LTD. VS BIMOMO & 2 OTHERS [2004] 2 KLR** wherein award of general damages for ELIJAH S. BIMOMO was reduced from Kshs.350,000/= to Kshs.150,000/= for multiple soft tissue injuries. The award of general damages for 2nd respondent DISHON MMBALI, was reduced from Kshs.980,000/= to Kshs.500,000/= for injuries which included a ruptured diaphragm, spleen and cut wound on forehead, multiple bruises on the face and hands and broken teeth and lack of consciousness for six days. The award of Kshs.380,000/= as general damages for the 3rd respondent, Dr. Stephano Maleche was reduced to Kshs.150,000/= for injuries which included a cut wound on the face, bruises on the arm and leg and blunt injury to the head.
- **JOSHUA MWANIKI NDUATI V SAMUEL MUCHIRI NJUGUNA [2005] e KLR** – wherein an award of Kshs.250,000/= was made for a fracture of pelvis and 3 ribs.

Mr. Wanyonyi advocate for the respondent supported the decision of the trial magistrate. He relied on the following authorities:-

- **STEPHEN W. KAMAU & ANO. VS GLADYS WANJIKU KUNGU – HCCC NAKURU CIVIL APPEAL NO. 81/05** wherein an award of Kshs.600,000/= general damages was made in the year 2006 for compound fractures of extensive skin loss from the knee downwards leaving the plaintiff therein with a disfigured and ugly left leg. The left leg was shorter by 2cm than the right leg and the degree of permanent disability was assessed at 20%.

The injuries sustained by the plaintiff in the instant case as pleaded in the Plaintiff are the same ones set out in the medical report by Dr. S. I. Aluda dated 19.10.99. There are also treatment notes on record from Nala Maternity and Nursing Home.

The consent order recorded before the trial magistrate refers to the medical report by **Dr. V. V. Lodhia** as a defence exhibit. However, no such exhibit seems to be on the record. The said medical report by **Dr. V. V. Lodhia** does not form part of the record of appeal herein. The trial magistrate in assessing damages relied on the medical report by Dr. S. I. Aluda and treatment notes from Nala Maternity and Nursing

Home that were produced during the trial at the High Court before the case was transferred to the lower court. These are however technicalities of procedure that don't seem to have been raised by any of the parties.

This court will therefore proceed to evaluate the assessment of general damages based on the medical report by Dr. Aluda. The said medical report reflects more severe injuries in the instant case than those in the authorities cited by the appellant's counsel. However, the injuries sustained by the respondent in the instant case are less severe than in the case of **Stephen W. Makau** (supra) cited by the respondent.

Although the injuries sustained by the respondent healed, according to the medical report by Dr. Aluda, the fracture healed with permanent deformity which limited movements in the right wrist and right hip joints with the joints already developing traumatic osteoarthritis. The right leg was also shorter by ½ cm.

Having re-evaluated the evidence on record, my conclusion is that the trial magistrate did not give an award that was higher than the generally accepted range of damages payable for similar injuries.

As stated by the Court of Appeal in the case of **ALI VS NYAMBU t/a SISERA STORE [1990] KLR 538**;

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

The award that was made by the trial magistrate was in accordance with the law based on the evidence on record. The appeal therefore fails with costs to the respondent.

Delivered, dated and signed at Kakamega this 28th day of June, 2012

B. THURANIRA JADEN
J U D G E