



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 47 of 2010

SOTIK TEA CO. LTD APPELLANT

-VERSUS-

DAVID KIPKORIR KIMETTO RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Oyugis, Hon. Yalwala in SRMCC No. 6 of 2008 dated 2nd March, 2010)

This appeal arises from the judgment and decree of **Hon. Yalwala**, Resident Magistrate in Oyugis SRMCC No. 6 of 2008 by which the respondent was awarded kshs. 90,000 in general damages and kshs. 6,500/= in special damages. The respondent had sued the appellant in respect of injuries he sustained while working for the appellant at Sotik Tea Company on 29th July 2005. The respondent was said to have been using a tea pruning machine when its belt which was slung over the respondent's shoulder cut with the result that the shaft cut the respondent's left shoulder. The respondent was treated at the Sotik Highlands dispensary at the then Kapkatet District Hospital. He was later examined by one **Dr. Ajuoga** who classified the injuries as soft tissue injury. At the time of examination, the respondent was suffering residual pains on the shoulder.

In the course of the suit before the lower court parties recorded a consent on liability at the ratio of 75:25 in favour of the respondent. The respondent testified before the lower court that on the material day, he was at his place of work pruning tea using the equipment assigned to him by the appellant when the accident occurred. He attributed the accident to the old belt which got cut. He had previously complained to his supervisor regarding the said belt. The respondent called one other witness, one **David Cheruiyot** who told the court that on the 29th July, 2005 he found the respondent injured at the factory although he did not witness the accident.

The appellant did not call any witnesses but subsequently filed submissions urging the trial court to give an award of kshs. 50,000/= less 25% liability. The trial court after considering the case and submissions of both parties on quantum gave an award of kshs. 90,000 for general damages.

The appellant was aggrieved and filed the present appeal. He has dated three grounds that:

1. *The trial magistrate erred in law and fact in assessing general damages in the sum of kshs. 90,000/= which was inordinately high as to present a miscarriage of justice.*

2. *The learned trial magistrate applied wrong principles in law in assessing general damages at kshs. 90,000/= which was inordinately high in circumstances.*

3. *The award of kshs. 90,000 as general damages was an erroneous estimate of the damages noting that the respondent only suffered a deep cut wound on the left should the same being a minor soft tissue injury.*

Parties consented to canvass the appeal by way of written submissions. I have read and considered the same.

An appellate court would not normally disturb an award unless it is satisfied that the court took into account an irrelevant factor or failed to consider a relevant factor or that the award was so inordinately low or high as to be an erroneous estimate of the damage. See **Arrow Car Ltd –vs- Bimomo & 2 others, Civil Appeal No. 344 of 2001.**

I have considered the authorities filed by both parties. I find that the authorities supplied by the appellant in support of a lower award are old and therefore not very helpful. The authorities supplied by the respondent are on the other hand comparative to the present award.

I find that the award was fair taking into consideration the inflationary trends. I have no reason to disturb the same. On special damages, the appellant has objected in his submissions to the medical report produced by the respondent on grounds that it was not produced by a competent witness. I note from the record that no such objection was raised by the appellant in the proceedings in the lower court. I note further that the same is not one of the grounds of the present appeal and therefore merits no further attention.

In sum and for the foregoing reasons, I uphold the judgment and decree of the lower court with the result that the present appeal is dismissed. The decretal sum and interest thereon from the date of judgment in the lower court shall be paid to the respondent.

The respondent shall also have the costs of this appeal.

Orders accordingly.

Judgment dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE