



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 17 OF 2005

ELDORET STEEL MILLS LIMITED.....APPELLANT

VERSUS

JOTHAM WEKESA WANAMI.....DEFENDANT

**(Being an appeal from Judgment and decree of Hon. W.N. Njage Principal Magistrate in Eldoret
CMCC 1275 OF 2003 delivered on 11th day of February, 2005)**

JUDGMENT

The Respondent presented a civil suit to the Chief Magistrate Eldoret seeking general damages for pain and suffering and loss of amenities. The claim was in respect of an accident that occurred on 26th July 2003 at the Appellant's work place. The Respondent averred that while engaged in his duties he was injured as a result of negligence and or breach of statutory duty of care on the part of the Appellant or its employees or agents. The Defendant was served and filed a defence denying liability and also alleged contributory negligence on the part of the Respondent. The case was heard by W.N. Njage who in a considered judgment delivered on 11th February 2005 entered judgment for the Respondent in the sum of Kshs. 200,000/= general damages and special damages of Kshs. 1,500/= subject to apportionment of liability in the ration of 35:65 against the Appellant. The Appellant was aggrieved and lodged a Memorandum of appeal on 23rd February 2005 contending that:

- 1. The learned trial magistrate erred in law and in fact in awarding the plaintiff general damages which was quite high in the circumstances of the case.**
- 2. The learned trial magistrate erred in law and in fact in disregarding the Defendant's submissions and the authorities in support thereof without any reasonable cause to do so.**
- 3. The learned trial magistrate erred in law and in fact in awarding general damages without giving any reason and/or saying the basis of the award**
- 4. The learned trial magistrate erred in law and in fact in using wrong principles in assessing the general damages.**

The Appellant prays that the judgment on quantum be set aside and this court substitute reasonable award on quantum. The appeal was admitted to hearing and after directions it was fixed for hearing on 17/2/2009. Both parties were represented by counsel. Counsel for the Appellant argued grounds 1, 2, 3 and 4 combined. The gist of the appeal was that the sum of Kshs. 200,000/= was manifestly excessive. Counsel referred to the injuries as contained in Dr. Aluda's report. Counsel also referred to the report of Dr. Gaya. The injuries had healed. Counsel was of the view that an award of Kshs. 70,000/= would have

been appropriate for the nature of injuries. Counsel referred to the case of **Stephen Kinuthia Kariuki v Wakangu Tumuti, HCCC 1319 OF 1990** which was a judgment of Justice Mwera dated 24th March 1993 where the plaintiff suffered a lacerated wound to his left foot resulting in Oedema. The injury took about 6 months to treat. The skin was infected and it required at least shs. 15,000 to correct it to other parts of the body. The judge awarded shs. 50,000/= for pain and suffering and loss of amenities. Counsel also referred to the case of **Wanjiru vs Hussein Mohamed Yussuf & Ano. HCCC 1629 OF 1991 (Nairobi)** where Justice Mwera awarded Kshs. 60,000/= for cut wounds right hand index finger and face. The judgment was delivered on 4th May 1993. Counsel submitted that the case of **Agnes Okoth and 30 others v Nyabichukuku Farm & Anor, HCCC No. 1 1540 of 1988** relied upon by the Respondent was not applicable as it involves fracture of the right femur. Counsel submitted that by awarding Kshs.200,000 the trial magistrate had inflated the shilling by 1333%. That Kshs.1 in 1993 has become Kshs. 1000/=. Relied on wrong principles.

Counsel for the Respondent opposed the appeal. Counsel contended that the appeal was fatally defective. There was no decree forming part of the record of appeal. Counsel relied on **Pyramid Packaging Ltd v Wesley Gesanda Omwenga High Court Civil Appeal No. 11 of 2004 and Kigaragari v Aya [1985] KLR 273**. Counsel urged the court to consider the principles in **Butt v. Khan (1982-88) 1 KAR 1**. Counsel submitted that the trial court considered all submissions. It considered both medical reports. Counsel referred to the definition of haematoma in the Oxford Dictionary, 5th ed. where haematoma is defined as tumour of extravasated blood. That the trial magistrate properly applied the principle of inflation in adjusting the awards proposed by the Appellant. That the Respondent had proposed an award of Kshs. 300,000/= and only Kshs. 200,000/= was allowed.

I have considered the submissions of counsel and the record of appeal. The appeal touches on quantum only. The principles upon which this court will proceed were set out in the case of **Butt v. Khan** where it was held that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle/or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

In awarding general damages it is necessary that trial magistrate tried as much as possible to be within the reach of comparable awards. The Court of Appeal stated the position as follows in the case of **Chege v Vesters (1982-88) 1 KAR** that:

“It is trite law that in awarding damages, the court has to take into consideration comparable awards. The awards should not be too high or too low so as not to reasonably provide the injured with something for pain and suffering and loss of amenities. It is impossible to compensate such pains and suffering in monetary form”

Before interfering with an award of general damages it must be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was manifestly excessive or inadequate that a wrong principle may be inferred (**Kigaragari v Aya [1985] KLR 273**). To demonstrate that there was a wrong principle counsel for Appellant submitted that by awarding Kshs. 200,000/= the trial magistrate wrongly assumed that inflation had changed value of the shilling by 1333%. (200,000/15,000)%. Counsel for the Respondent submitted that the calculation was wrong because the general damages awarded by Justice Mwera were Kshs. 50,000 which would have given a value of 400%. It is very clear that the trial magistrate was not influenced by the **Agnes Okoth** case. Trial magistrate stated as follows: -

“I have looked at the medical report and the authorities referred to me by counsels in this case the injuries suffered by the plaintiff were less severe than those suffered by the plaintiff in the Agnes Okoth case. However the said case was decided in 1988 more than 15 years ago. Considering the rate of inflation the injuries sustained by the plaintiff and doing the best that I can in the circumstances, I do assess Kshs. 200,000 as reasonable compensation for the plaintiff.”

It is not clear when the decision in the case of **Agnes Okoth** was made. The finding that it was made in the year 1988 is not based on the record. The assessment of 15 years inflation has no basis as a result. By taking into account the year 1988 the trial magistrate must have made an erroneous estimate of the general damages. Having found that the injuries in the case were not comparable the trial court would not have been persuaded by the case. I am persuaded that there is basis to interfere with the quantum of general damages. Taking into account the time lapse of 12 years from when Justice Mwera made the decision in **Stephen Kinuthia** I am persuaded that an award of Kshs. 150,000 general damages for pain and suffering would have been sufficient to compensate the Respondent. For these reasons the appeal succeeds and the judgment of the trial court on quantum is set aside and substituted with an award of Kshs. 150,000/= general damages for pain and suffering. The rest of the judgment remains undisturbed. It is so ordered.

Dated and delivered at Nairobi on this 22ND day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 19TH day of SEPTEMBER 2012.

F. AZANGALALA

Judge

In the presence of: Mr. Kiplimo holding for the Okoth for the appellant.