



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 123 of 2007

WANAINCHI MARINE PRODUCTS (K) LTD.....APPELLANT

VERSUS

SAMUEL ROGERS OGOLA.....RESPONDENT

Coram:

Mwera, J.
Omwenga for Appellant
Tindika for Respondent

JUDGMENT

This appeal is in respect of the lower court judgment delivered on 8th August, 2007. It followed determination of a claim for damages against the appellant/defendant company by the respondent/plaintiff who pleaded that while on duty to the appellant at its premises, gangsters attacked him at 1.00 p.m. on 19th July, 2001 with guns. They shot the respondent and he sustained gunshot injuries – penetration of the chest, fracture of the left scapula plus collapse and loss of left lung. That the appellant was liable in negligence and various particulars of this were set out. The appellant denied the claim in its defence. After a consent the appellant was on a 60-40 ratio liable and ordered to pay Shs. 1 million in general damages plus other remedies. The only ground of appeal is that that award was excessive taking into account the medical evidence adduced.

Mr. Mogaka for the appellant submitted that considering the medical evidence plus authorities placed before the learned trial magistrate, that award was too high in the circumstances. It should be reduced.

From Mr. Tindika, the learned trial magistrate considered the three medical reports before him plus authorities. He tendered two more authorities before this court to support the contention that the award of general damages was fair and reasonable, and it should not be disturbed.

The focus in this appeal is the quantum of damages. Evidence by the respondent was that when thugs shot three times on him, he was taken to hospital and Doctors Odede and Munyoki prepared medical reports about his state of health (Exhibit P1, 2). He still had breathing and eating problems. The respondent said in cross-examination that notes were made by Doctors Pinto, Shah and Muturi who treated him at Aga Khan Hospital. And that also Dr. Patel saw and examined him.

Dr. Patrice Odede's evidence was contained in his report. That the respondent sustained bullet wounds in

the chest, a fractured scapula and a collapsed lung part of which was removed. The patient remained with chest pains with 20% permanent incapacity, but that he could continue to work as a watchman as he used to. Dr. Munyoki did not testify but his report was produced by the respondent, by consent.

His report, undated, referred to the injuries the respondent sustained, the management thereof and his opinion: physical examination was normal; permanent scars, clear lung fields but with breathlessness.

The appellant did not call evidence but Dr. R. Patel's medical report (Exhibit D1) dated 14th February, 2006 was produced by consent. This doctor too stated the nature and extent of the wounds the respondent sustained and how they were managed. He concluded that he remained with pain in the left chest which could subside with time. Dr. Patel did not foresee any disability at all.

Both sides submitted with authorities which the learned trial magistrate appreciated, accepting some and disregarding others but with reasons. The learned trial magistrate noted the ages of the authorities before him, side by side with the medical evidence. He also considered the proposal by Mr. Tindika for an award of Shs. 2 million against that stated by Mr. Mogaka – Shs. 210,000/= and concluded:

“I think the sum of Kshs. 210,000/= as suggested by Mr. Mogaka for three injuries would be too inadequate as to amount to an injustice in the circumstances of this case.”

And with that the learned trial magistrate made an award of Shs. 1 million considering it sufficient for pain, suffering and loss of amenities.

Having appreciated the medical reports, the authorities placed before the learned trial magistrate, those presented here and the medical reports, it is noted that despite the serious gunshot injuries in the chest sustained by the respondent, he recovered sufficiently well even with prospects to work again as a guard.

In the view of this court, there has been nothing to demonstrate that the learned trial magistrate arrived at a too-high an award one way or the other. He considered the medical reports and the authorities sufficiently and in this court's opinion, properly. There is no reason therefore to disturb the award of Shs. 1 million as pronounced by the learned trial magistrate. To disturb the same required the appellant to show that it was arrived at in error on this or that account. That was not the case here and consequently this appeal is dismissed with costs.

Delivered on 16th October, 2012.

J. W. MWERA

JUDGE