



*Civil; damages for bodily injuries; testis damaged resulting in impotence; award of Kshs 200,000 by P.M Court enhanced to Kshs 1,000,000; duty of the High Court to correct awards that are inordinately low or are based on wrong principle;*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL APPEAL NO. 32 OF 2005**

**J.M.L. ....APPELLANT**

**VERSUS**

**THE AFRICAN HIGHLANDS PRODUCE CO. LTD.....RESPONDENT**

*(From the judgment of the Senior Resident Magistrate, Hon. K. Mogambi, delivered on 19<sup>th</sup> July, 2005 in PMCC NO. 127 of 2003 between Joseph Merian Lowoto versus African Highlands Produce Co. Ltd)*

**JUDGMENT**

The Appellant, **J.M.L.**, was employed in December 1998 by the Respondent, Africa Highlands Produce Limited. His work entailed spreading green tea leaves. In August 2000, while working for the Respondent, he slipped and fell a stride on the edge of the 3<sup>rd</sup> floor in the Respondent's premises and sustained serious injuries to his genitals as a result of which he became impotent and consequently could not procreate or engage in intimacy with his wife. He sued the Respondent, his employer, in 2001 in the High Court at Kisii in Suit No. 205 of 2001 seeking special damages and general damages and costs of the suit. The suit was transferred to the Principal Magistrate Court at Kericho for hearing and final disposal. It was given a new suit number at Kericho as P M Court Civil Case No.127 of 2003. The Respondent had prior to the transfer of the suit filed appearance and defence in the suit denying liability and refuting the allegations of negligence attributed to it by the appellant which were alleged to be the cause of the accident in which the Appellant suffered the bodily injury.

The suit came up for hearing before Hon. K. Mogambi, Senior Resident Magistrate at Kericho. The Plaintiff turned up for the hearing and testified but the Respondent offered no evidence. On 19<sup>th</sup> July 2005, the trial Magistrate delivered judgment in which he apportioned liability at 80% and 20%, the Respondent taking the bigger blame. An award of damages of Kshs. 200,000/= was made which, after deduction of the Appellant's contributory negligence, stood at Kshs. 160,000. Special damages amounting to Kshs.4,500 was also awarded. A decree was extracted. It was dated 19<sup>th</sup> July 2005 and was issued on 16/8/2005.

On the same date that the decree was issued (i.e. 16/8/2005), the Appellant lodged the appeal herein through his advocates, Messrs Ochillo & Company of Old Sansora House, Kisii. The Appellant put

forward 4 grounds of appeal thus.

- 1. The Learned trial Magistrate erred in law and fact in assessing damages at Kshs 200,000/= less 20% which was inordinately low as to present a miscarriage of justice.**
- 2. The Learned trial Magistrate applied wrong principles of Law in assessing general damages at Kshs 200,000/= less 20/= which was inordinately low.**
- 3. The award of Kshs 200,000/= less 20% as general damages was an erroneous estimate of the damages and injuries suffered by the Appellant.**
- 4. The award of Kshs 200,000/= less 20% as general damages was inordinately low as to present a miscarriage of justice.**

As can be discerned from the above grounds of appeal, the appellant sought an order that the judgment delivered on 19/7/2005 by Hon. K. Mogambi in Kericho SPM Civil Suit No. 127 of 2003 be set aside and that this court be pleased to assess general damages due to the Appellant again.

When this appeal came up for directions before me on 10<sup>th</sup> November 2010, **Mr. J.O. Bunde**, Advocate, appeared for the Appellant while **Mr. R.K Langat**, Advocate, appeared for **Advocate Bw'Omote** for the Respondent. Both Counsel intimated to the Court that they wished to file written submissions and leave the Court to give judgment on the basis of the record and the material before the court. This was sanctioned by the Court and directions were given to that effect. On 24/11/2010, the court gave 2/2/2011 as the date for this judgment.

I have perused the record and the written submissions by the Appellant and the Respondent. In summary, the Appellant's contention was that the award of damages of Kshs. 200,000 was inordinately low and that the evidence adduced at the trial Court justified a higher award.

On its part, the Respondent through its counsel expressed the view that the Appellant was not entitled to a penny more by way of damages having accepted the decretal sum. In any case, the Respondent contended that the amount awarded was generous and that the Respondent was not entitled to enhancement of the damages.

On the issue of liability, the trial Court's decision seems to have been accepted by both parties. Neither the Appellant nor the Respondent was aggrieved by it. The contest was only on the quantum of damages.

Though the Respondent had filed defence, it did not offer any evidence. Consequently, the evidence adduced by the Appellant on the injuries was not controverted. The only issue in this appeal is whether the appellant is entitled to enhancement of the damages and if so, to what extent.

The appeal was lodged on 18/8/2005, the same day the decree was issued. At that point in time, the decree had not been satisfied and the appellant was at liberty to appeal. The fact of filing the appeal did not preclude the appellant from receiving later without prejudice to the appeal the decretal dues before the appeal was heard and disposed of. However, if the damages are enhanced, the Respondent would be called upon to pay the shortfall but if the appeal is dismissed, the Appellant may be liable to pay costs.

The injury sustained by the appellant was to his testis which gave rise to psychogeneses impotence. This was not controverted. The appellant can neither procreate nor enjoy intimacy with his spouse. This was not disputed. The trial Court did not indicate the basis on which it granted Kshs. 200,000 and it seems the court gave scanty attention to the need to give the basis for the award and/or to compare authorities on compensation of similar injuries. It is not unlikely that the trial Magistrate did not have available to him facilities to access authorities. It is not lost on me that judicial officers in the provinces work in difficult conditions and with scanty resources and facilities and for no fault of their own are often unable to access law books on the internet from where they can peruse case law.

The Appellant's advocate had cited the case of **Washington Awuor Vs. Twaha Rayab & Another (MSA H.C.C.C. No.452 of 1988 (unreported))** in which the plaintiff sustained injuries that impaired his ability to erect and hence to have sexual intercourse. The court awarded Kshs. 500,000/= general damages in November 1993.

Advocate Onyancha Bw'Omote, for the Respondent through Advocate R.K. Langat referred the Court to the case of **Isaac Kefa Luabaya Vs. Moris & Co. Ltd (Nbi H.C.C.C. No. 3904 of 1989)** in which the Plaintiff was awarded Kshs. 450,000 for injuries to the left tibia, compound fracture of left fibula, muscle waste on left leg and lost of right testis. I have perused it. It is patent that the claimant in that case had injuries that were more severe than the injury sustained by the Appellant in this case.

It is the duty of this court to reconsider the evidence and re-evaluate it and draw its own inferences and conclusions. Where it appears that the award of damages is inordinately low and presents an erroneous estimate, this court is entitled to interfere. And conversely, if the award is so inordinately high as to present an erroneous estimate, this court will also interfere. At any rate, this court is enjoined to correct decisions of the lower Court that are incorrect or that present in cases of damages, the wrong estimate or principles. This court did point out in the case of **Swaleh Sifuna Ali –vs- Evans Maina & 2 others (KAKAMEGA HCCC.NO. 83 OF 2003)** that ***“... in personal injury cases, compensation is never for each individual injury to the body. It is on the basis of the heads of damages such as pain and suffering and loss of expectation of life, or diminution of income or earnings e.t.c. In assessing damages, the court looks at the cumulative effect of the injuries suffered and awards what it considers a fair compensation bearing in mind that the Plaintiff cannot be returned to the position he was in before the injuries were suffered and that damages are intended to compensate the Plaintiff. In so doing, it should be realized that no two cases are the same or identical nor do individual Plaintiffs respond the same way to treatment and the effects vary even where the injuries are not dissimilar. This court has also pointed out in the past that there is need for consistency in awarding damages for injuries that are not dissimilar and the current value of the shilling and the economy have to be considered. But it would be pointless to give astronomical awards which in the end would be impossible to pay. Nevertheless, awards must make sense and measly sums for severe injuries would make nonsense of the law. A balance must therefore be struck in which tortuous wrongs result in fair compensation”***.

It is my finding in this case that the award was inordinately low and presented an erroneous estimate having regard to the nature and severity of the injury sustained. I have reached this conclusion on the basis of my knowledge of the law and notwithstanding that I have not managed to cite more authorities. In the lamentable conditions in which I and other judicial officers in the provinces work, without computers or decent library facilities, it is difficult to access case law. In the end, one has to rely on one's knowledge and meager law reports and case law at their finger tips. This is not satisfactory. It is a regrettable state of affairs not least because sometimes it may compromise the quality of the judgments and rulings given by the court. Time has come for a proper focus on the working conditions of the judicial officers in the provinces who continue to partly under-right the cost of service delivery to the public. This is not acceptable.

Doing the best I can and after carefully examining the evidence in this case on the injury, and having regard to the two authorities, and taking into account the escalating cost of standard of life and loss of value of the shilling, and after weighing one thing with another, it is my considered view that an award of Kshs. 1,000,000 would be a fair compensation. Damages must never be too high as to make it impossible for those liable to pay, nor should damages be too low or fail to fairly compensate the claimant for the injury suffered. It is not lost on me that awards of damages need to be consistent. It is the duty of the courts to ensure this consistency and to periodically re-evaluate awards so as to keep pace with changes in the economy.

In the result, I allow the appeal as regards the award of damages. The award of damages of Kshs. 200,000 is set aside and is replaced with an award of Kshs. 1,000,000. This award shall be reduced by 20% contributory negligence on the part of the appellant. The Respondent shall bear the costs of this appeal

and of the Lower Court but if any money has so far been paid to the Appellant, credit shall be given to the Respondent for such payment. It is so ordered.

**DATED** at **KERICHO** this 23<sup>RD</sup> day of March 2011.

**G.B.M. KARIUKI, SC**  
**RESIDENCE JUDGE**

**COUNSEL APPEARING**

Mr. Ngetich, Advocate for Mr. Ochillo Ayako, for the Appellant

Mr. R.K. Langat, for Mr. Onyancha Bw'Omote, Advocate, for the Respondent

Mr. R. Koech, Court Clerk