



CIVIL

What circumstance would lead an appellate court to interfere with the trial court's award of general damages.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 148 OF 2010

JACKSON MURERWA.....APPELLANT

VERSUS

JAI-AMBE ENTERPRISES.....RESPONDENT

JUDGEMENT

The appellant filed before the lower court a claim for compensation for injuries suffered at his place of work. It is agreed that the appellant who was a watchman of the respondent slipped on a stair case of the defendant and a piece of timber fell on him. He was injured by that fall. The parties prior to the lower court entered into a consent on liability. They agreed that the appellant would shoulder 30% whilst the respondent 70% liability.

The lower court on hearing the case entered judgment for the appellant for general damages of Ksh. 200,000 and for special damages of Kshs. 1,500. The appellant was aggrieved with that judgment. In a simple ground of appeal, the appellant seeks that the lower court's judgment be set aside on the following grounds:

“That the learned Resident Magistrate erred in law and in fact in making an award of general damages which is manifestly low and not commensurate with the injuries suffered by the appellant.”

This is the first appellate court. As such I am guided by what was stated in the case; **LAKE FLOWERS VS CILA FRANCKLYN ONYANGO NGONGA & ANOR [2008] e KLR** where it was stated:

“being a first appeal, the principle upon which this court acts are well settled, in that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's findings of facts if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. Selle v. Associated Motor Boat Company [1968] EA 123.”

The only material evidence to consider is that adduced by the doctor who examined the appellant and who prepared a report that was presented in the lower court. The doctor in giving his evidence relied entirely on the medical report he prepared. I will therefore reproduce the relevant part of that report in this judgment as follows:

INJURY:

• **Comminuted fracture of the left upper tibia.**

• **Comminuted fracture of the left upper fibula.**

**TREATMENT: He was admitted at Alfarooq Hospital
from 18/05/07 – 25/05/07**

- **X-rays seen shows the above fractures.**
- **Taken to theater and done surgical reconstruction then internal fixation with an angled plate.**
- **Analgesics and antibiotics.**
- **He was re-admitted from 29/09/07 – 11/10/07 for the removal of the plate.**

PRESENT POSITION: pains on the left knee and leg.

EXAMINATION: young man, not pale, not febrile but walks with a limp.

LOCAL EXAMINATION:

- **The left leg is deformed with a postero-lateral angulation.**
- **There is a vertical angled 25cm scar extending from the upper left shin to the lower thigh.**
- **The left leg is shorter than the right by 2cm.**
- **Flexion of the left knee is severely restricted by pain and disability while extension is slightly restricted as well.**
- **Other areas are normal.**

CONCLUSION: These are severe multiple bone and joint injuries.

OPINION: Jackson was injured at work and sustained the above serious injuries, was treated and will benefit from corrective surgery to try to correct or minimize the disabilities. Another review after the surgical correction is recommended.

Having received that evidence, the learned trial magistrate delivered a very short judgment which I will reproduce here in its entirety.

“QUANTUM

The medical report by Dr. Ndegwa say that Plaintiff sustained comminuted fracture of the left upper tibia and comminuted fracture of the upper fibula. Counsel for the Plaintiff submits for the sum of Kshs. 500,000/- as general damages and relied on HCCC NO. 318 OF 1991 and HCCC NO. 925 OF 1991 while counsel for the Defendant on the hand submits for the sum of Kshs. 170,000/-. I have considered the nature of injuries suffered by the Plaintiff submissions by counsels and the authorities cited in support thereof and the time at which the said authorities were decided and the devaluation of the shilling and I would award the sum of Kshs. 200,000/- as general damages.

As regards claims for special damages I would award the sum of Kshs. 1,500/= plus costs and interest.”

This court in considering that judgment, is empowered to interfere with the learned trial magistrate's award of general damages. This power of interference was discussed in the case; **Fakir Mohammed vs. Joseph Mugambi Kiara & others Civil Appeal No. 152 of 2005** where the court of appeal stated as follows:

“In Arrow Car Limited vs. Bimomo & 2 Others [2004] 2 KLR 101 at p. 107 this court said:-

In this appeal we are being urged to interfere with the awards made by the superior court. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia [1982 – 88] 1 KAR 727 AT P. 730 Kneller J.A. said:-

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs. Manyoka [1961] E.A. 705, 709, Lukenya Ranching and Farming Co-operatives Society Ltd vs. Kavoloto [1970] E.A., 414, 418, 419. This court follows the same principles.”

The above stated principles continue to be applied by this court in similar situations.”

The learned trial magistrate as can be seen from the reproduced judgment above did not clearly state what informed his judgment. The learned Magistrate only stated the injury of comminuted fracture of the upper tibia and upper fibula.

The learned trial magistrate did not consider what the doctor's examination revealed of the after effect of the accident of the appellant. One of the most pertinent effect was that the appellant's leg became shorter by two centimeters. The other effect is that the appellant continued to have severe restricted pain to his left knee. Bearing in mind that there are medical conditions that the trial court failed to take into account, I find that I can interfere with the award given.

The learned trial magistrate also failed to award an extra Kshs. 3,000 in special damages which related to the doctor's attendance to give evidence in court and for which he issued a receipt.

I have considered the authorities relied upon by the parties in this matter. All the cases relied upon are of 1990s. However, that as it may be, I am guided by the case; **JACKSON RADOLI VS. SYSTEMATIC SUPPLIES CO. LTD HCCC NO. 925 OF 1991 MOMBASA** where the injuries are comparable to the injuries suffered by the appellant. In that case which was decided on **2nd August, 1995**, the award for general damages was Ksh. 490,000.

Considering the above, the judgment of the court is as follows:

- 1. The judgment in Mombasa RMCC 895 of 2009 is hereby set aside.***
- 2. The appellant is hereby awarded Kshs. 500,000 in general damages which shall be reduced by 30% his contribution of liability.***
- 3. The appellant is awarded special damages of Ksh. 4,500***
- 4. The appellant is awarded costs of the lower court case and of this appeal.***

JUDGMENT BY:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 24th day of November, 2011.

R. MWONGO

JUDGE