



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 759 of 2006

**SHREEJ ENTERPRISES (K) LTD.....1ST APPELLANT
KIBET SUGUT KIMTAI.....2ND APPELLANT**

VERSUS

PETER NDIRANGU KARIUKI.....RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate's Court at Nairobi before E.C. Cherono S.R.M delivered on the 9th October, 2006 in Nairobi CCNo.2708 of 2004)

J U D G M E N T

1. This is an appeal arising from a personal accident injury claim lodged by Peter Ndirangu Kariuki (hereinafter referred to as the respondent) against Shreej Enterprises (K) Ltd and Kibet Sugut Kimtai (hereinafter referred to as the 1st and 2nd appellants). Liability was apportioned by consent at 85-15% in favour of the respondent against the appellants. Special damages were also agreed at Kshs.19,900/=. Parties further agreed to have the medical reports prepared by Dr. Wokabi and Dr. Modi produced in evidence without calling the makers, and written submissions filed to enable the court assess quantum of damages.

2. In his submissions, the respondent relied on the following cases:

- ***HCCC No.898 of 1991, Mombasa, Bessie Nazi Mjuta vs Samji Halji Nagan & another***
- ***HCCC No.9191 of 1993 Mombasa, Mshambi Onde Gona vs Associated Vehicles Assemblies Ltd and another,***

The respondent urged the trial court to award a sum of Kshs.600,000/= as general damages for pain and suffering.

The appellant on his part cited the following cases:

- ***HCCC No.472 of 1998 Star transport Company & another vs Foundation Skanska Joint Venture Kimko***
- ***HCCC No.888 of 1987 Edward Amatha vs Samuel Otieno Joel and another.***
- ***Civil appeal No.203 of 2001 Court of Appeal at Nairobi Kimatu Mbuvi t/a Kimatu Mbuvi & Brothers vs Augustine Munyao Kioko.***

It was submitted that a sum of Kshs.200,000/= would be adequate as general damages.

3. In his judgment, the trial magistrate assessed general damages at Kshs.500,000/= and entered judgment for the respondent for the global sum of Kshs.441,915/= in respect of special and general damages having taken into account the element of contribution.

4. Being aggrieved by that judgment the appellants have lodged this appeal raising 4 grounds as follows:

- (i) The learned magistrate erred in assessing general damages in the sum of Kshs.500,000/= for the injuries suffered by the plaintiff/respondent.
- (ii) The said assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.
- (iii) The said assessment and award is out of keeping with other Kenyan awards for comparable injuries.
- (iv) There was no good or proper basis for the said assessment of damages.

5. Following a consent recorded by the parties, written submissions were duly filed. For the appellants, it was submitted

that the trial court's assessment and award of Kshs.500,000/= in general damages was manifestly excessive and inordinately high so as to amount to a miscarriage of justice and not in keeping with other Kenyan awards for comparable injuries. It was further submitted that the court did not properly consider the authorities cited or clearly misconstrued them.

6. It was contended that the trial magistrate failed to comply with Order XX Rule 4 of the Civil Procedure Rules as he did not give reasons for his decisions and there was no proper basis for the assessment. It was maintained that the cases which were cited to the trial magistrate by the appellants were not distinguishable or irrelevant in the assessment of damages. The court was urged to reassess the general damages downwards.

7. For the respondent the case of *Shaban vs the City Council of Nairobi [1985] KLR 716* was cited for the proposition that an appellate court will not disturb damages awarded unless it is so inordinately high or low as to present an entirely erroneous estimate based on a wrong principle or a misapprehension of the evidence. *Butt vs Khan Civil Appeal No.40 of 1977* was also relied upon for the proposition that it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, so arrived at a figure which was either inordinately high or low. It was submitted that in this case, the trial magistrate awarded a sum of Kshs.500,000/= as general damages for "comminuted fracture of the right radius and ulna, fracture of the scapula and the soft tissues injury to the right shin. It was noted that the award of *Bessie Nazi Mjuta vs Samji H. Nagan* (supra), which was relied upon by the respondent was for similar injuries i.e. compound comminuted fracture of right radius and ulna and multiple lacerations. It was noted that in that authority an award of Kshs.430,000/= was made 12 years ago. It was maintained that the trial magistrate was aware of the nature and trends in assessing damages for awarding cases of personal injuries and was mindful of the authorities cited. The court was therefore urged to dismiss the appeal as having no merit.

8. I have carefully perused the proceedings of the lower court. I have also given due consideration to the submissions filed by each party and the authorities which were cited. The award of general damages made by the trial magistrate was based on the two medical reports which were admitted by consent. The two medical reports were in agreement that the respondent suffered a comminuted fracture of the right radius and ulna, a fracture of the right scapula/shoulder blade and soft tissue injury to the right leg and scalp. The appellant's right forearm was plastered and he stayed with the plaster for about 3 months. The trial magistrate rightly considered these injuries as well as the medical reports and the authorities cited.

9. The trial magistrate rejected the authorities cited by the appellant contending that they were distinguishable, and also that they were on the lower side. I do note that two of the authorities i.e. *Star transport Company & another vs Foundation Skanska Joint Venture Kimko* (supra) and *Edward Amatha vs Samuel Otieno Joel and another* (supra) were very old cases in respect of which awards were made about 13½ years before the award of the trial magistrate. Secondly, only digest copies of the judgment were available to the court, and it was not therefore possible for the court to fully appreciate the judgment. I cannot blame the trial magistrate for finding these authorities less than helpful.

10. As regards *Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers vs Augustine Munyao Kioko* (supra), that was a very recent case, having been delivered only a few months before the judgment of the trial magistrate. The trial magistrate also had the benefit of having the full judgment of the Court of Appeal which was available to him. The injuries sustained by the plaintiff in *Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers vs Augustine Munyao Kioko* (supra), were fractures of the left forearm bones (radius and ulna) and cuts and lacerations. Although the injuries appeared similar to those suffered by the respondent, the residual effects were much more extensive than suffered by the respondent. This resulted in the award of further damages for future treatment and general damages for loss of earning capacity. Nonetheless, I do note that the Court of Appeal upheld the award of Kshs.300,000/= which was awarded in the superior court as general damages for pain and suffering. The trial magistrate therefore ought not to have rejected this particular authority. Indeed, in awarding the sum of Kshs.500,000/= the trial magistrate did not identify which comparable authority he was relying upon.

11. Having also only available digest copies of the authorities relied upon, the respondent did not do any better job in assisting the trial magistrate. Moreover the injuries in the authorities relied upon by the respondent, were also not only old but appeared to have much more serious injuries. I find that given what was before the trial magistrate, the trial magistrate ought to have used the case of *Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers vs Augustine Munyao Kioko* (supra) as a comparable guide. By ignoring that authority, the trial magistrate arrived at an assessment of Kshs.500,000/= which was excessive and not based on any comparable case.

12. I am satisfied that this is an appropriate case in which this court ought to intervene. Accordingly, I set aside the assessment of the trial magistrate of Kshs.500,000/= and substitute thereof an assessment of Kshs.300,000/= in respect of the respondent's injuries as general damages for pain and suffering. Accordingly, I allow this appeal, set aside the judgment of the lower court, and substitute thereof a judgment in favour of the respondent for the sum of Kshs.255,000/= as general damages and Kshs.16,915/= as special damages. This judgment has taken into account the agreed contribution. The appellant having partly succeeded in this appeal, I order that each party shall bear their own costs in the appeal. Those shall be the orders of this court.

Dated and delivered this 14th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Wambua H/B for Mwaniki for the appellant

Menye for the respondent

Eric - Court clerk