



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Appeal 215 of 2004**

**SHABANA HARDWARE & GENERAL STORES LTD.....APPELLANT**

**VERSUS**

**SAMWEL OKUMU.....RESPONDENT**

**JUDGMENT**

The respondent was employed by the appellant as a loader. On 2<sup>nd</sup> September 2002, he was discharging his duties, in particular changing a vehicle tyre, when the jerk slipped and crushed his left thumb which was later amputated. He filed a suit against his employer seeking compensation. The trial court found the appellant fully liable for the accident and awarded the respondent general damages in the sum of Kshs. 300,000/=.

The appellant was dissatisfied with the assessment of damages and preferred an appeal to this court. The memorandum of appeal contains two grounds which are as follows:

**“1. The learned magistrate erred in law by awarding a sum in general damages far in excess of the amount the plaintiff’s injuries ought to have attracted considering the past decisions of the court and the current trends of awards.**

**2. The award of Kshs. 300,000/= considering the nature of the plaintiff’s injuries is in the circumstances excessive.”**

The court was urged to vary the trial court’s judgment by reducing the award of Kshs. 300,000/=.

The parties filed their respective submissions and it was by consent agreed that the court will peruse the same and deliver its judgment. The appellant’s advocates, M/s Nyaundi Tuiyot & Company, submitted that an award of Kshs. 100,000/= was reasonable for the nature of injuries sustained by the respondent. They cited **FESTUS NGEI MUNYWOKI –VS- MOHAMMED H.P. KADUARA TRANSPORT**, HCCC No. 400 of 1992 where the plaintiff suffered crush injuries to his right limb and middle fingers resulting in the fracture of the two fingers. The fractures healed with a restrictive movement of the fingers. The court assessed general damages for pain suffering and loss of amenities at Kshs. 50,000/=. The judgment was delivered in 1993.

Mr. Ogwen for the respondent submitted that the appellant was represented by the firm of Behan & Okero Advocates until the finalization of the matter before the trial court. It is the same firm of advocates who filed the memorandum of appeal on 16<sup>th</sup> August 2004. It was not therefore clear how the firm of M/s Nyaundi & Tuiyot Advocates came on record for the appellant. Their appearance was without leave of the court. That was contrary to the provisions of **order III rule 9A** of the **Civil Procedure Rules**. He urged the court to find that M/s

Nyaundi & Tuiyot Advocates are strangers and strike out the entire appeal.

Mr. Ogwenyo was doubtful whether the appellant was still capable of sustaining this appeal, a winding up order having been made against her by the High Court of Kenya at Kisumu on 10<sup>th</sup> March, 2008, in winding up cause No. 1 of 2007. He cited the provisions of **section 228** of the **Companies Act** which provides as follows:

**“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”**

Counsel further submitted that the appellant’s appeal abated on 10<sup>th</sup> March, 2008 when the winding-up order was issued and the official receiver appointed as the liquidator of the appellant.

However, the decretal sum had been deposited in a joint interest earning account at Co-operative Bank of Kenya Limited, Kisii, in the names of Khan & Katiku Advocates and Behan & Okero Advocates. The court was urged to order that the said sums together with the interest accrued thereon be released to the respondent forthwith.

No response was made by the appellant to the aforesaid submissions by the respondent’s counsel.

I have perused the record of appeal and it shows that M/s Nyaundi Tuiyot & Company Advocates filed a notice of change of advocates on 8<sup>th</sup> December 2006. They took over the conduct of the appeal from M/s Behan & Okero advocates. Leave of the court was not sought before the notice of change of advocates was filed. If such leave was sought there is nothing in the record to show the same. In the circumstances, M/s Nyaundi Tuiyot & Company Advocates are strangers in this appeal and that in itself renders the appeal incompetent.

Secondly, even assuming the appeal was competent, it was not demonstrated that the appellant was granted leave by the court to proceed with the appeal after the winding-up order was made on 10<sup>th</sup> March, 2008. To proceed with the appeal without such leave is contrary to the provisions of **section 228** of the **Companies Act**.

Thirdly, even if there was a competent appeal before this court, I do not think that the damages of Kshs. 300,000/= that were awarded by the trial court can be said to be so excessive that no reasonable court would, in the circumstances of the case, have awarded the same. It is trite law that assessment of damages is more like an exercise of discretion by a trial court and an appellate court will be slow to reverse the trial court’s judgment unless it is demonstrated that the trial court acted on wrong principles or awarded so excessive or so little damages that no reasonable court would, or that the trial court took into consideration matters that it ought not to have considered, or failed to take into consideration matters it ought to have considered and by so doing arrived at a wrong decision. See **BUTLER –VS- BUTLER**[1984] KLR 225.

In view of the foregoing, this appeal is dismissed with costs to the respondent. The decretal sum held at the Co-operative Bank of Kenya Limited, Kisii Branch, in the joint names of Khan & Katiku Advocates and Behan & Okero Advocates together with the interest thereon should be released to the respondent. This judgment shall also apply to **HCCA No. 216 of 2004, Shabana Hardware & General Stores Limited –vs- Samwel Onyango Olal**.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18<sup>TH</sup> DAY OF JUNE, 2010.**

**D. MUSINGA**  
**JUDGE.**

**Mr. Nyachiro:** I pray for certified copies of the ruling and temporary stay of release of the money for 7 days to enable the firm of Nyaundi

Tuiyot get further instructions from their clients. This to apply to HCCA No. 216 of 2004.

**D. MUSINGA  
JUDGE.**

**Mr. Ogweno:** I have no objection.

**D. MUSINGA  
JUDGE.**

**COURT:** Certified copy of this ruling to issue to the appellant's advocates upon payment of the requisite fees. Stay of release of the funds is ordered for a period of 7 days from the date hereof. These orders shall also apply to HCCA No. 216 of 2004.

**D. MUSINGA  
JUDGE.**