



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Appeal 56 of 2007**

**DHARA WHOLESALER LTD .....APPELLANT**

**VS**

**GODFREY MUTWIRI MUTHURI.....RESPONDENT**

*(Appeal from the judgment and decree of the Senior resident Magistrate at Meru (Hon. J. Omburah) on 24<sup>th</sup> April 2004 in Meru CMCC No. 24 of 2003)*

Appeal – principles upon which the High Court will set aside an award by lower court.

:application of wrong principles of law or misdirection on a point of law or principle,

:failure to consider some material fact in evidence before him.

**JUDGMENT**

This judgment relates to an appeal dated and filed on 28<sup>th</sup> May 2007 against the judgment and decree of the Senior Resident Magistrate Meru (Hon. J. Omburah) delivered on 24<sup>th</sup> April 2007 in Meru CMCCC No. 249 of 2003 between Geoffrey Mutwiri – Plaintiff/Respondent) Vs. Dhara Wholesalers Ltd (The Defendant/Appellant). The grounds of appeal are that –

- 1. the learned Magistrate reached a wrong decision in law and fact, contrary to the weight of the evidence before him;**
- 2. the learned Magistrate gravely erred in making a speculative award without regard to injuries, allegedly sustained by the respondent;**
- 3. the learned magistrate erred in law and fact and particularly misdirected himself on the quantum that should have been awarded to the (Plaintiff) Respondent, and**
- 4. the learned magistrate erred in law and practice in relying upon the evidence tendered by the Respondent which was totally contradictory and which was challenged by the defence in cross-**

**examination, and thus disregarded the evidence that challenged the evidence of the Respondent (Plaintiff)** and invited the Court to quash the judgment appealed from and prayed for the same to be set aside, and substitute therefor a fair sum on quantum with costs to the applicant.

The appeal was argued before me by Mrs. Narangwi learned Counsel for the Appellant, whereas, Mr. Kiogora opposed the appeal on behalf of the Respondent.

In her submissions Mrs Naragwi urged that although there were four grounds of appeal, the only argument was really about quantum. In her submissions, the learned trial magistrate applied the wrong principles in making the award in that the court made an award contrary to the Plaintiff (Respondent's) prayers in the Plaint, for instance, a claim for loss of amenities, and consequently the award of Kshs.603,957/= inclusive of special damages was without basis. Counsel therefore prayed that the award be set aside, and that a fairer sum be assessed by the Court.

In reply, Mr. Kiogora, learned Counsel for the Respondent submitted that the appeal was not merited both on issues of fact, liability, and quantum. Counsel submitted firstly that liability in this matter was not in issue, the same having been settled in a test case in Meru CMCC No.250 of 2003, to which the learned Senior Resident Magistrate addressed his mind. The Appellant was found 95% to blame, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, 5% to blame.

On the question of quantum, page 5 of the Record of Appeal sets out and enumerates the injuries suffered by the Respondent, and these injuries are reiterated at pages 25 of the Record of Appeal clearly showing that the Respondent suffered serious injuries and was in a coma for two days during which period he had lost consciousness with a foreign body lodged in his brain as shown by the CT Scan. This was the evidence of PW2, Dr. John Macharia then of Nkubu Consolata Hospital. The Respondent also suffered a fracture of the right femur and multiple tissue injuries.

Counsel submitted that given these severe injuries the sum of Kshs.640,000/= for injuries was fair and reasonable in the circumstances which again counsel submitted, the trial Court addressed, and cannot be said to have relied on wrong principles of law and that the award was proper and should be allowed to stand, and that the appeal be dismissed with costs.

From the submissions from the Appellant's and Respondent's Counsel, the issue for this Court to determine is whether the learned Senior Resident Magistrate took into account wrong principles of law in determining the award, or put differently whether there are any grounds of law or fact upon which this Court may interfere with the award by the lower court.

As stated before, a superior Court may also interfere with an award of the lower court if the award was excessive. The award was in my view not excessive. The authorities cited by both parties were comparative. This is what the learned Senior Resident Magistrate said in his judgment at p. 28 of the Record of Appeal –

“I have carefully considered the submissions on record together with the authorities cited, I have also thoroughly considered the nature of the injuries the plaintiff suffered and compared the same with those suffered by the various plaintiffs in the cases cited. The authorities cited by the plaintiff's counsel suffered more serious injuries than the present plaintiff while those cited by the Defence suffered less serious injuries.....”

The learned trial magistrate then continued to say –

“I consider that the Plaintiff was admitted in a coma and he underwent an operation to remove the foreign particle from his brain, and stayed in hospital for almost a month,”

and in his considered view, an award of Kshs.540,000/= would be adequate and fair in compensating the Plaintiff, and awarded the Plaintiff the said sum as general damages for pain and suffering and not for loss of amenities. He also awarded the Plaintiff the pleaded and proven special damages of Kshs.63,951

in hospital expenses and medical report. The learned Senior Resident Magistrate then entered judgment against the Defendant's jointly and severally in the sum of Kshs.603,951/= together with costs of the suit, and that the same to be subjected to the liability ratio aforesaid – 95% liability to the 3<sup>rd</sup> Respondent and 1<sup>st</sup> and 2<sup>nd</sup> Defendants – 5% jointly.

It was the contention of Mrs Narangwi learned counsel for the Appellants that there was no plea for an award for pain and suffering or loss of amenities in the Plaint.

This is clearly not so. The Plaint included specific prayer for general damages for pain and suffering and loss of amenities. It also includes a prayer for special damages, costs and interest at Court rates. As stated before there was no evidence of loss of amenities and no damages were awarded on that prayer. In my view, therefore there is no basis for the Appellants submission that the learned trial magistrate did not take into account correct principles of law or that he did arrive not at a proper award, or that the award was excessive. I find that there is absolutely no merit at all in the Appellants' case, and its appeal dated and filed on 28<sup>th</sup> May 2007 is without foundation.

I affirm the judgment, award and orders of the lower court, and dismiss with costs to the Respondent the Appellant's Appeal dated and filed on 28<sup>th</sup> May 2007.

There shall be orders accordingly.

Dated delivered and signed at Meru this 22<sup>nd</sup> day of May 2009.

M. J. ANYARA EMUKULE

(JUDGE)