



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

Civil Appeal 1045 of 2004

1. KIRU TEA FACTORY

2. SIMON WAMBUGU MURUGURUAPPELLANTS

V E R S U S

PETERSON WATHEKA WANJOHI RESPONDENT

JUDGEMENT

This is an appeal by the defendants in the lower court against the decree of that court by which the Respondent (who was the plaintiff) was awarded damages following an accident at his place of work when a reversing lorry owned by the 1st Appellant crushed him against a wall. The lorry was being driven by the 2nd Appellant, an employee of the 1st Appellant. The Respondent was also an employee of the 1st Appellant on a casual basis.

The Respondent was awarded KShs. 800,000/00 for pain, suffering and loss of amenities, KShs. 288,000/00 for loss of future earnings and KShs. 4,778/00 for special damages. All these awards were reduced by 20%, the court having found 20% contributory negligence against the Respondent and 80% negligence against the Appellants jointly and severally.

Although in her submissions the Appellants' learned counsel also argued against the lower court's findings on liability, the appeal is clearly against quantum only; the memorandum of appeal dated 2nd December 2004 says so. Further, all the grounds of appeal are on the issue of quantum; not a single one of them refers to liability. I will therefore proceed on the basis that the appeal is against quantum only.

It is now well-established that an appellate court will interfere with a trial court's award of damages only where it can be demonstrated that in assessing the same the court took into account a matter that it ought not to have taken into account, or that it failed to take into account a matter that it ought to have, or that the award is so high or so low as to amount to a wholly erroneous estimate of the same. That statement of the law is now notorious enough not to require any authority.

There are seven grounds of appeal. They all disclose two main complaints:-

1. That the award of KShs. 800,000/00 for pain, suffering and loss of amenities was excessive.
2. That the award of KShs. 288,000/00 for loss of future earnings was wrong in law and unsupported by evidence.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the record of the lower court. Two medical reports dated, respectively, the 28th November, 2002 and 10th February, 2004 were produced in evidence. They confirmed that the Respondent suffered the following injuries:-

(i) A degloving injury on the right hand with extensive skin and muscle loss on the forearm. X-rays revealed fractures of the **radius** and **ulna** bones. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating.

(ii) Fracture of the right **iliac** bone in the pelvis.

(iii) Generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries.

The Respondent was hospitalized for about 3½ months. He had to endure a long course of painful treatment. The treatment left the affected arm very stiff and more or less function-less. One doctor assessed the disability at 45% of the total person while the other one assessed it at 15%.

Various cases were cited before the learned trial magistrate. In one of them, **NAIROBI, HCCC NO. 2216 OF 1993, GEORGE MATHENGE MUHINGO -VS- M. D. PATEL** (Unreported), the plaintiff had suffered a compound fracture of the right **radius** and **ultra** bones, fracture of the right thumb and **proximal phalanx**, fracture of the right **tibia** and **fibula**, extensive lacerations on the forearm and other injuries. He was awarded KShs. 600,000/00 on 1st November 2000 for pain, suffering and loss of amenities. In another case, **NAIROBI HCCC NO. 3947 OF 1989, HARRISON MUGO NYINGI – VS- REV. FRANCIS MUTUA NDOLO** (Unreported), the plaintiff had suffered fracture of the pelvis and pubic bones, several ribs, left humerus, rapture of the urethra and multiple abrasions. He was awarded KShs. 800,000/00 on 22nd October 1996 for pain, suffering and loss of amenities.

I am not persuaded that in awarding KShs. 800,000/00 for pain, suffering and loss of amenities the learned magistrate took into account any factor he ought not to have, or that he failed to take into account something that he ought to have. Nor am I persuaded that the award was so high as to amount to a wholly erroneous estimate. It is not sufficient that I probably would have awarded a slightly less amount.

Regarding the award of KShs. 288,000/00 for loss of future earnings, the same is challenged upon the basis that the Respondent was a casual worker without an assured long-term income. However, the evidence before the lower court was that though he was technically employed as a casual, he had been in such employment with the 1st Appellant for many years. He was paid his dues monthly and certain statutory deductions were made from his pay. The evidence indicated that he would very likely have remained in that employment for the rest of his working life. A secure casual job can be as good as a permanent one. In the instant case the 1st Appellant had already retained the Respondent in his job for many years. It was paying him monthly and in some ways treating him as a permanent employee. There was nothing to indicate that he would not have continued to work for some years. The award for loss of future earnings was therefore properly made and assessed.

At the time of the accident he was already 56 years old. The learned trial magistrate assessed that he would have worked for a further 4 years to the age of 60 years; in the circumstances of this case, this was a fair and just assessment.

In the result I do not find any merit in this appeal. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI

THIS 18TH DAY OF JANUARY 2008

H. P. G. WAWERU

JUDGE