

JOHN G. MBUTHIA 1ST APPELLANT

KENYA POWER & LIGHTING CO. LTD 2ND APPELLANT

VERSUS

STEPHEN MUIRURI NJENGA RESPONDENT

(An Appeal from the Judgment of Hon. E. Awino, SRM in Limuru Civil Suit No. 118 of 2002 delivered on 22nd October, 2002)

JUDGMENT

The only issue in this Appeal is quantum of damages. In a brief and completely unreasoned five-line Judgment, the lower court awarded Kshs.300,000/= in general damages to the Respondent, arising out of injuries suffered in a motor vehicle accident. This is what the lower court stated:

“The Plaintiff sustained the following injuries; fracture of 4th and 5th ribs on the right side, fractures right pubic ram, fracture right fibula, cut on forehead – cuts on both legs. Considering the authorities cited and the injuries sustained I would assess general damages at Kshs.300,000/= and Kshs.1,600/= as special damages with costs and interest from the date of this Judgment.”

The Appellants (defendants in the lower court) have argued through their Counsel, Mr Mutua, that the award was excessive considering the evidence before the Court; and that the lower court awarded damages for injuries **not pleaded in the Plaintiff**.

The Respondent, through his Counsel, Mr Njenga, while admitting that the two injuries for which damages were awarded were not pleaded in the Plaintiff, submitted that the overall award of Kshs.300,000/= was fair, and ought not to be disturbed.

This being a first appeal, it is my duty to assess and re-evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the Lower Court.

The evidence that is material to the determination of this appeal, is **not** in dispute. Both Counsels agree that the two injuries in respect of which damages were awarded – namely fracture of right pubic ram and fracture of right fibula – **were not pleaded in the Plaintiff**. Neither the original Plaintiff filed on 14th January, 1998, nor the Amended Plaintiff filed on 16th January, 2002, pleaded these injuries.

Clearly, then, the lower court is in error in taking into account injuries that were not pleaded. Parties are bound by their pleadings, and it is trite law that judgment cannot be given for an item not pleaded. The issue now is whether given the above facts, the award of Kshs.300,000/= was excessive. Unfortunately, the Judgment of the lower court is unhelpful. As I said, it is brief and unreasoned. Mr Mutua relied on the cases of *Bibiana Wambui Mwaura vs Solomon Kiromo Mbugua (Nairobi HCCC No. 30 of 1990)* and *Bramwel Mogo Kimbimbi vs Mary W. Kaigwa (Nairobi HCCC No. 4727 Consolidated with HCCC No.4728)* which were cited to the lower court. In my view, both these cases fairly represent awards in respect of the injuries suffered by the Respondent (excluding the two injuries not pleaded). The Respondent Counsel has not cited any cases to support his claim of Kshs.300,000/=. This is, therefore, a proper case where this Court should intervene to reduce the award made by the lower court. In doing so, I have taken into account the principles laid down by the Court of Appeal when reversing awards.

The Court of Appeal in the case of ***Butler vs Butler C A No 49 of 1983*** laid down the following principles that an appellate court should consider in reversing an award of damages by the lower court.

- “(a) That the court acted on wrong principles;**
- (b) That the court has awarded so excessive or so little damages that no reasonable court would;**
- (c) That the court has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision.”**

Now, taking those principles into account, and having carefully reviewed the medical evidence before the lower court, I am satisfied that the award for general damages is excessive, **and I hereby reduce the same to Kshs.100,000/=**. The award for special damages of Kshs.1,600/= remains unaffected.

Accordingly, this appeal is allowed. The award of general damages in the lower court is set aside, and is substituted with an award of Kshs.100,000/=. All other awards remain unaffected. Each party shall bear their own costs of appeal.

Dated and delivered at Nairobi this 19th day of May, 2008.

ALNASHIR VISRAM

JUDGE