



REPUBLIC OF KENYA

N THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 17 of 2008

KIWANJANI HARDWARE LTD. 1ST APPELLANT

NGWILI NZIOKI 2ND APPELLANT

VERSUS

LABAN KIILU MUTHOKA RESPONDENT

RULING

1. This Appeal is related to H.C.C.A 16/2008 (Machakos) because the circumstances in which the original actions were initiated are the same. In any event, in this case, the only issue for me to address is the quantum of damages payable because liability at 90% in favour of the Appellant was agreed upon in the subordinate court.
2. In his submissions, Mr A.B. Shah, lead counsel for the Appellants, urged me to find that the award of Kshs.250,000/= was inordinately high because the injuries suffered were minor soft tissue injuries that should attract, at most, an award of Ksh.125,000/=. That the learned trial magistrate misdirected himself when he took into account an alleged fracture to the Respondent's wrist which may in fact have been inflicted prior to the accident in issue thus his erroneous finding in damages.
3. Mr Wambua, learned counsel for the Respondent was of the view that the award was proper in the circumstances and the fracture to the wrist occurred as a result of the accident and that comparable authorities would show that the award of Kshs.250,000/= was neither too high nor unreasonable.
4. I will return to the authorities cited in support of the rival contentions shortly but from the Plaint dated 17/7/2007, the injuries allegedly suffered by the Respondent were listed at paragraph 5 thereof as:
 - a. Blunt injury to the right eye with subconjunctival haemorrhage;
 - b. Cut wound on the left jaw;
 - c. Blunt injury to the mouth with loss of the upper incisor tooth;
 - d. Blunt injury to the neck;
 - e. Blunt injury to the right side of the chest;

- f. Colles fracture of the right arm; and
- g. A cut wound on the right wrist over the fractured bones.

5. The relevant documents produced to prove the injuries were a P3 form issued on 11/7/2007 and in it all the injuries in the Plaintiff were listed including specifically “**colles fracture right arm at the wrist.**” There is also a general out-patient record from Machakos General Hospital issued on 21/10/2005 when the Respondent was said to have attended “**ophthalmic review**”. In it there is an entry dated 28/11/2005 where it is noted that “**#-ed, site healed.**” I take it that “**#-ed**” means “**fractured.**” That document however has an entry dated 28/2/2005 and a cross-entry, “**charge – 150/= for ROP**”. I understand “**ROP**” to mean “**Removal of plaster.**” Those two entries are important because the fracture to the wrist is contested. The primary document to show injury is not the P3 form issued 1½ years after the accident but the out-patient card. The accident occurred on 10/10/2005 and it cannot be that the primary document would show injuries prior to the accident as having been inflicted during the accident. In any event the relevant entry of 21/10/2005 only shows the ophthalmic injury as the one reviewed on that date while the fracture was reviewed on 28/11/2005 when it was shown to have healed. The removal of the plaster on 28/2/2005 shows without doubt that the wrist fracture occurred prior to the accident in issue.

6. My findings are supported and informed by the more professional comments of DR. R.P. Shah who examined the Respondent on 29/8/2007. The doctor concluded as follows:-

“In the absence of hospital discharge summary and since right wrist fracture was first mentioned in February 2005 which is about 8 months before the accident, it seems that if he sustained any fracture of right wrist then that occurred 8 months before the accident of 10/10/2005.”

7. One Dr. M.N. Kuria examined the Respondent on 11/7/2007 and the doctor refers to a “**colles fracture right arm**” and “**a cut wound on the right wrist over the fractures (sic) bones**” and adds as follows:-

“X-rays done revealed a pop fracture was applied. He was put on a neck collar. He received stitches, antibiotics and analgesics. He was later followed up in the ophthalmology clinic for a month for the injury to the eye.”

8. He also concluded that “**the fractured arm had healed.**” Sadly, that report cannot help the Respondent to prove the fracture to the wrist because the examination by Dr. Kuria was done close to 1½ years later and clearly based on the statements of the Respondent but the good doctor failed to resolve the issue of the fracture unlike Dr. Shah. In any event I hold the firm view that all the evidence before me points to the irresistible conclusion that the Respondent’s duty to prove all injuries pleaded in the Plaintiff was not fulfilled in respect of the fracture to the wrist which I believe occurred before the accident, subject of this appeal.

9. Having resolved that contested issue, I should now turn to the quantum of damages awardable. Having removed the fracture and cuts to the right wrist from the list of injuries allegedly suffered, then my duty as regards the award in damages is that set out in Peter Kahungu vs Sarah Ongaro, C.A. 676/2000 where it was held that: an appellate court can only disturb an award of damages;-

“when the trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate;” See also Kivati vs Coastal Bottlers Ltd. C.A. 69/1984.

10. I have been referred to the following decisions to guide me in fulfilling the above duty:-

- i. Donald Mwangi vs Alice Wanjiku Waweru C.A 903/2003 where Kshs.100,000/= was awarded for soft tissue injuries generally.

- ii. Beatrice Kaweru vs Eliud Njuguna H.C.C.C.4348/1988 where Kshs.250,000/= was

awarded for injuries that included loss of 2 upper teeth, fracture of the left radius, left femur and acetabulum.

iii. Ruma Muindi vs Kenya Beach Hotel H.C.C.C. 801/1991 where Kshs.225,000/= was awarded for a fracture of the hand, injuries to the eye with 15% loss to the right eye sight, inter-alia.

11. I have taken the injuries herein into account and the authorities cited as well as those cited in H.C.C.A 16/2007 (Machakos) and I am convinced that the award of Kshs.250,000/= was slightly excessive in this case once I removed the issue of the alleged fracture of the wrist from the list of injuries. Once I have so found, it means that I must interfere with the final award in general damages and in my view a sum of Kshs.175,000/= is reasonable and fair in the circumstances and is adequate compensation to the Respondent.

12. In the event, I will set aside the judgment in the lower court and enter judgment for Ksh.175,000/= as general damages plus Kshs.3,000/= as special damages. Since liability was agreed at 90% in favour of the plaintiff, the judgment sum in damages shall be Kshs. 160,500/=.

13. The Appeal is allowed to that extent and as regards costs, the Appellant will have only $\frac{1}{4}$ of the costs of the Appeal but will pay the costs in the subordinate court.

14. Orders accordingly.

Dated and delivered at Machakos this 25th day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Miss Katunga holding brief for Mr Wambua**

For Respondent

N/A for Appellant

ISAAC LENAOLA

JUDGE