

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 9 of 2004

SPIN KNIT LIMITED.....APPELLANT

VERSUS

JOHNSTONE OTARA.....RESPONDENT

JUDGMENT

The respondent, Johnstone Otara filed suit against the appellant Spin Knit Limited seeking to be paid damages on account of the injuries he alleged to have suffered while he was working at the appellant's premises in Nakuru. The respondent pleaded that the said injuries that he sustained were caused by the negligence of the appellant who breached the statutory duty of care owed to him by the appellant failing to provide him with a safe working environment. The appellant upon being served with the plaint, filed a defence denying that it was negligent. It pleaded that the injuries, if any, which was sustained by the respondent was caused by the respondent's own negligence who failed to adhere to the established procedures laid down by the appellant for the safe operation of its machinery. It denied that the respondent had suffered any injuries while working in its premises. The case was heard by the Senior Resident Magistrate who apportioned liability between the appellant and the respondent equally. She awarded general damages of Kshs 300,000/= to the respondent and Kshs 9,500/= special damages. The said award was reduced by 50% in view of the finding by the court that liability was to be apportioned equally between the appellant and the respondent. The respondent was therefore to be paid a sum of Kshs 154,750/= plus costs and interest.

The appellant was aggrieved by the decision of the trial magistrate as regard the assessment of general damages to be paid to the respondent. It filed an appeal raising only one ground of appeal, namely that the trial magistrate had erred and misdirected herself in law in her assessment of damages awardable to the respondent by awarding damages which were far more excessive in the circumstances and which were manifestly incomparable to the current trends of judicial awards for analogous injuries. It prayed that the appeal be allowed and the said judgment be set aside and appropriately reviewed with costs.

At the hearing of the appeal, Mr. Murimi Learned counsel for the appellant submitted that there was no legal basis for the award of general damages of Kshs 300,000/= which was made by the trial magistrate. He submitted that the trial magistrate had solely relied on the medical report of Dr. Omuyoma to the exclusion of the one prepared by Dr. Malik, the doctor to whom the respondent had been referred to by the appellant. He argued that the respondent had only sustained soft tissue injuries as a result of the accident since no fractures were seen when the respondent's hand was x-rayed. He submitted that the award made by the trial magistrate was therefore excessive in the circumstances and this court should interfere with the said award and make an appropriate award according to the law. It was his contention that the trial magistrate had not considered comparable awards before she assessed the said award. He urged this court to allow the appeal.

Mr. Ogoda Learned Counsel for the respondent opposed the appeal. He submitted that the trial magistrate had considered the medical reports prepared by Dr. Omuyoma and Dr. Malik. He submitted that both reports confirmed that the respondent had been injured to the extent that he was unable to use his right hand. He argued that the finding of the trial magistrate should not be disturbed because she had the advantage of seeing the nature of the injury that was sustained by the respondent. He submitted that

the respondent had sustained a permanent incapacity of between 10-20%. It was his further argument that the trial magistrate had considered the applicable principles of the law in making the said award. He therefore submitted that the award made by the trial magistrate was fair in the circumstances.

The issue for determination by this court in this appeal is whether the assessment of damages by the trial magistrate was so excessive as to warrant interference by this appellate court. The Court of Appeal in Ali –vs- Nyambu t/a Sisera Store [1990] KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in Nance –vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601 at page 613 where it held that:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collieries Ltd. [1941]AC 601.”

In the instant appeal, the appellant complains that the trial magistrate applied the wrong principles of the law in awarding the respondent the sum of Kshs 300,000/= for the injuries that he sustained in the industrial accident. In its view, the said award was inordinately high and should therefore be reassessed by this court. On the other hand the respondent has submitted that the said award was fair taking into account the nature of the injuries that the respondent had sustained. In the discharge summary from Provincial General Hospital Nakuru which was produced as *plaintiff’s exhibit No. 2* the respondent sustained a degloving injury of the hand. According to Dr. Omuyoma whose medical report was produced as *plaintiff’s exhibit No. 4* the respondent sustained a crush injury of the right hand and also dislocation and cracks of the right hand. He observed that the respondent had sustained permanent scars on the right hand with contractures of the five fingers. He assessed the degree of permanent disability to be 20%.

The respondent was also examined by Dr. Malik who prepared a medical report which was produced as *plaintiff’s exhibit No. 6*. He observed that the respondent at the time of examination complained of inability to flex and extend his fingers fully and also inability to do precision work with the right hand. He was of the opinion that the respondent had sustained a degloving injury to his right hand as a result of the industrial accident. He observed that although the wounds had fully healed, the respondent had developed soft tissue contractures which had rendered his fingers to be stiff in a flexed position. He recommended that the respondent undergoes active and passive physiotherapy in order to stretch the scarred skin and therefore to mobilise his fingers. He was of the opinion that the capacity by the respondent to use his four fingers could be improved although the stiffness had resulted in the respondent sustaining a degree of permanent disability of 10%.

It is therefore clear that the respondent sustained an injury which resulted in a permanent disability. The said injury affected all the fingers of his right hand. Although there was a possibility that the functions of the said could be improved by physiotherapy, it is clear that the respondent would be unable to have the functions of the said right hand restored to its full capacity. Taking into consideration that the respondent is right handed, it is my considered opinion that the assessment of damages payable to the respondent by the trial magistrate was fair in the circumstances of this case. I have perused the authorities which the appellant has sought to rely on this appeal in support of its submission that the award made was inordinately high. The injuries suffered by the plaintiffs in the said decided cases are not comparable with the injuries sustained by the respondent in this case. Whereas the injuries of the respondent can be classified as soft tissue injury, the effect on the respondent’s hand is such that it has resulted in the respondent losing the functions of his right hand. Even the doctor who the respondent was referred to by the appellant acknowledged the serious nature of the injuries sustained by the respondent.

In the circumstances therefore, having carefully considered the submissions made in this appeal, and re-evaluated the evidence adduced in the proceedings before the trial magistrate, I am not inclined to agree with the submissions made by the appellant that the award made by the trial magistrate was inordinately high as to attract the sanctions of this court. The trial magistrate correctly applied the applicable principles of the law in assessing the said damages payable to the respondent. I therefore find no merit in the appeal filed by the appellant herein and consequently dismiss it with costs. The judgment of the subordinate court is therefore upheld.

DATED at NAKURU this 23rd day of June 2006.

L. KIMARU

JUDGE