



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

AT ELDORET

CIVIL APPEAL 110 OF 2000

WIYUMIRIRIE SAW MILLS APPELLANT

-VERSUS

PAUL KARIUKI RESPONDENT

**(Being an Appeal from the decision of Mary J. Kiptoo Esq. Resident Magistrate on
28th August 2000 Eldoret Senior Principal Magistrate's Court Civil Case No. 554 of 1999)**

JUDGEMENT

This is an appeal from the judgement of Mary J. Kiptoo Resident Magistrate, delivered on 28th August 2000. The appeal is against quantum of damages awarded and is on two grounds that –

- 1. The learned magistrate erred in law and in fact in awarding general damages of kshs.230,000/= which award is inordinately high.**
- 2. The learned magistrate erred in law and in fact in misapprehending the evidence of the degree of the injuries suffered by the respondent.**

At the hearing of the appeal Mr. Kigamwa for the appellant submitted that the award of the learned trial magistrate of Kshs.200,000/= for general damages was inordinately high and departed from contemporary case decisions for similar injuries. Therefore there was good reason for the High Court to interfere with the award of damages. Secondly that the learned trial magistrate misapprehended the injuries by describing them as serious, while the plaintiff's evidence was only that he was cut on the right hand and lost blood. The doctor confirmed the cut injury, but did not confirm the dimension of the cut. He also submitted that there was no blood transfusion. Therefore, in his view, the injuries could not amount to severe injuries. He sought to rely on section 12 of the Evidence Act (Cap.80).

Mr. Chemwok for the respondent opposed the appeal. He submitted that the general damages award was for Kshs.207,000/= not Kshs.200,000/=. He submitted that the amount of general damages awarded by the learned magistrate was not inordinately high, considering the type of injuries suffered by the plaintiff as well as the case authorities cited at the hearing. He also submitted that the injuries were severe. According to the medical evidence which was produced at the hearing, the respondent had a big healed scar. He also lost a lot of blood. The fact that there was no blood transfusion did not mean that the injuries were not serious.

I have considered the submissions of both counsel in this appeal. I have also evaluated the evidence on record, as I am required to do in a first appeal. At the hearing before the learned magistrate

the respondent testified and called one witness, Dr. Samuel Aluda. The appellant did not call any witness in defence.

The respondent testified that he was injured on duty while he was working for the appellant as a carpenter. He was injured on duty at Timboroa on 2nd December 1998. He was injured on the right hand and was admitted at Mercy Hospital for 5 days. He later went to Dr. Aluda for medical examination and a medical report was prepared. He was cross-examined by counsel for the appellant. From the record, I find that that cross-examination was on negligence in the occurrence of the accident rather than the severity of the injuries suffered.

Dr. Samuel Aluda testified as PW2 on behalf of the respondent. He testified that he medically examined the respondent on 6th April 1999. He found a massive healed wound on the right hand, and concluded that there was massive loss of blood. He prepared a medical report. The findings were that the respondent had a large scar on the right hand, which was growing keloid. He also found that there was further tenderness on the right hand. He produced the medical report. He was not cross-examined on his evidence or on the medical report. The prognosis and opinion in the medical report dated 6th April 1999 was that –

1. The injuries sustained were very severe and have healed but for the pains in the right hand which subside with the use of analgesic.

2. The scar on the right hand is growing into a keloid and this will remain a permanent feature of his body.

As I have stated earlier, the defendant who is now the appellant, did not cross-examine Dr. Aluda though his counsel was present in court. He also did not call any defence witness. Instead he entered into a consent admitting 90% liability while 10% liability was taken by the respondent herein.

Submissions on damages were then made by both counsel for the parties in written form.

The respondent relied on **Nakuru HCCC. No. 177 of 1995 Patrick Odhiambo Obiro – vs- Catholic Diocese of Nakuru (unreported)**. In that case the plaintiff was said to have suffered a cut on the left thumb, a cut on the 3rd and 4th finger of the left hand and a fracture of the middle phalanx finger. He was awarded Kshs.200,000/= as general damages for pain, suffering and loss of amenities. He also relied on the case of **Margaret Waithera –vs- Timothy Keiga Mwihi & Another (unreported)**. The plaintiff in that case was said to have suffered a cut wound over the dorsum of the right hand and other soft tissue injuries. She is said to have been awarded Kshs.150,000.00 as general damages for pain, suffering and loss of amenities.

The respondent's counsel therefore asked the trial magistrate to award general damages of Kshs.300,000/= in our present case.

Counsel for the appellant also made written submissions before the learned magistrate. He relied on the case of **James Kevogio Mole & Another -v- Kenya Bus Service**

Limited Nairobi HCCC. No.2163 of 1991(unreported). In that case the plaintiff suffered a cut wound over the left hand, a soft tissue injury to his chest, a deep abrasion over the left hand and soft tissue injury to the right flank. The award of damages was kshs.30,850/= awarded on 25th June 1992. Now, did the learned magistrate misapprehend the injuries suffered in our present case? I find no basis for that. The learned magistrate in her judgement found that – It is the court's opinion that the plaintiff indeed sustained very serious injury which has left a permanent scar on the hand.

From the doctor's evidence, which was not controverted, I am of the view that the learned magistrate was justified in coming to that conclusion. Doctor Aluda had stated in his medical examination report that the injuries sustained on the right hand of the plaintiff were very severe, but had healed. He also stated that the scar to the right hand was growing into a keloid and that it would remain a permanent

feature of the respondent's body. The appellant never tried to challenge that evidence. In those circumstances, I do not find any misapprehension of the injuries by the learned magistrate. The learned magistrate was correct in coming to the conclusion that the injuries suffered by the respondent on the hand were serious.

On the quantum of damages the learned magistrate awarded general damages of Kshs.230,000/= less 10% contribution. She relied mainly on the case of Margaret Waithera –vs- Timothy Keiga Mwihiya, HCC. No.498 of 1990.

The award of general damages is a discretion of a trial court. For an appellate court to interfere with that exercise of discretion, it must be satisfied that either the trial court took into account an irrelevant factor or failed to take into account a relevant factor in assessing the damages, or that the damages are so inordinately high or low as to result to a miscarriage of justice see Stanely Maore –vs- Geoffrey Mwanda – Nyeri Civil Appeal No.147 of 2002 (unreported).

I have perused the record of proceedings and judgement. I find no irrelevant factor that the magistrate took into account, or a relevant factor that the learned magistrate failed to take into account in assessing damages. I have also not been referred to any.

In my view, the award of Kshs.230,000/= as general damages for (for 100% liability) for the injuries suffered by the respondent was not inordinately high. The case of James Kevogio Mole & Another –vs- Kenya Bus Services Limited, Nairobi HCCC. No.2163 of 1991 was a case where the injuries were much less severe. That case was also decided in June 1992. This ground of appeal is therefore also not sustainable. I therefore have to dismiss the appeal.

For the above reasons, I dismiss the appeal and uphold the judgement of the learned magistrate. I award costs of the appeal to the respondent.

Dated and delivered at Eldoret this 21st Day of June 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Kigamwa for the appellant

Mr. Chemoyai for for respondent