



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 493 OF 1999**

ANTHONY MAINA MWANIKI .....APPELLANT

VERSUS

MUNYARA ESTATE .....RESPONDENT

**J U D G M E N T**

On 15th May 1996 the appellant was working at the respondent's coffee pulping machine when it caught his overcoat and threw him against it and that it ripped the hand, the head and neck as a result of which he was seriously injured.

He filed a suit against the respondent on 2nd March 1996 at Thika Principal magistrate's Court to claim from them both general and special damages plus costs of the suit blaming the said respondent for negligence particulars of which were stated in paragraph 5 of the plaint.

Neither appearance nor defence were filed to this suit and an interlocutory judgment was entered for the appellant on 29th April 1998.

The case was fixed for hearing by way of formal proof on 26th May 1999 wherein the plaintiff testified on the basis of paragraph 4 of the plaint and then filed written submissions on quantum. Judgment was delivered on 9th June 1999 wherein the appellant was awarded Kshs.10,000/= as general damages and Kshs.6,635/= as special damages.

The appellant was unhappy with this decision and he lodged an appeal in this court on 12th November 1999 in a memorandum of appeal which listed 6 grounds of appeal. They were that:-

- (1) The learned magistrate erred in law and in fact in awarding the plaintiff general damages that were inordinately and manifestly low taking into account the severity and effect of the injuries sustained by the appellant herein;
- (2) The learned magistrate erred in law and fact in failing to consider in her judgment the medical evidence submitted in court,
- (3) The learned magistrate erred in law and in fact in failing to appreciate the real extent of injuries and damages sustained by the appellant herein;
- (4) The learned magistrate erred in law and in fact by failing to write her judgment as required by law;
- (5) The learned magistrate erred in law and in fact in holding that the case law cited by the appellant's advocates were not applicable in the case.

(6) The learned magistrate erred in awarding the appellant only Kshs.10,000/= on general damages considering that special damages were Kshs.6,635/=.

This court heard the appeal on 6th November 2002 wherein counsel for the parties appeared and submitted thereon.

Counsel for the appellant submitted that damages awarded were too low considering the injuries sustained. That the judgment was not written as required by law and that the case law submitted by the counsel was not considered though the injuries sustained in those cases were similar to the ones subject to this appeal; and that the magistrate was wrong in not awarding the appellant special damages.

The counsel prayed that this appeal be allowed and the judgment of the lower court set aside and the court do enhance the award.

Counsel for the respondent opposed the appeal and stated that the injuries sustained were very minor and had completely healed by the time the appellant was examined by the doctor.

That the amount awarded was commensurate with the injuries sustained.

Counsel stated that the purpose of civil suits is to compensate the victim for loss incurred and not to make money.

That form LD 104 filled by the doctor was for the purposes of workmens compensation at the labour office and not relevant to the case subject to this appeal.

According to counsel, the magistrate considered the demeanor of the appellant during trial to arrive at the award she made to him.

That the magistrate wrote a good judgment and said why she could not rely on the authorities cited.

Counsel prayed that this court do uphold the lower court judgment and dismiss this appeal with costs.

This appeal is all to do with the inadequacy of the damages awarded to the appellant.

There were a number of shortcomings here. Firstly, though the plaintiff alleged he was injured on 15th May 1996, he was not seen or admitted at any hospital until either 15th or 16th June 1996. No explanation was given for the one month's delay in attending hospital.

However, when the appellant was seen at Thika District Hospital on 15th June 1996 there was probable fracture of the left humerus and POP was applied to reduce swelling and pain. The patient complained of pain at that area and headache.

CT scan was even taken on 9th August, 1996 but there was no abnormality detected.

Dr. Wangwe examined the appellant on 17th February 1997 and observed two scars on the left upper arm but its movement was normal.

In the doctor's opinion, the appellant suffered pain from the injury and that there was a permanent scar formation from the injury.

The learned Resident Magistrate considered this a minor or soft tissue injury and awarded the appellant Kshs.10,000/= as general damages.

The appellant considers this award too low and not commensurate with the injury sustained.

This court is simply being called upon to interfere with this award because it is inordinately low,

The principles on which an appellant court will interfere with the lower court's assessment of damages are now well settled in Kenya. Kneller J.A, as he was then, said in **Robert Msioki Kitavi Vs Coastal Bottlers Ltd. [1985]1 K.A.R. 981 at 895 ([1982 -88])1 KAR 891 at P.895).**

***“The court of Appeal in Kenya, then should as its fore runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so low or so high that it amounts to an erroneous estimate. Singh Vs Singh and Honda (1955)22 EACA 125, 129, Butt V Khan [1977]KARI read ([1982 -1988]1 KARI.)***

On the same issue, Hancox J.A. as he was, said this in **Ayub Omari Shabani** (an infant suing by his friend) and **Yusuf Shabani Vs City Council of Nairobi and Daniel Nachela Kahungu [1985] KAR 681 Read [1982 -88]1 KAR 681.**

***“The test as to when an appellate court may interfere with an award of damages was stated by Law J.A. in Butt Vs Khan (1977)1 KAR 1 (Read [1982 -88] 1 KARI ) (a case referred to in another context by the learned judge) as follows: -***

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”***

***This direction has since been followed frequently by this court ”.***

Admittedly the judgment the learned magistrate delivered was not written in accordance with order XX Rule 4 of the Civil Procedure Rules. It did not set out the case for the appellant full or set out points for determination. She only considered the authorities cited and said comparatively the injuries sustained in those cases were more severe than those sustained by the appellant.

She did not consider that when the appellant went to hospital initially he complained of headache, and pain in the left upper arm.

That CT scan was ordered and also POP applied on the left upper arm for a detected fracture at that site (see exhibit 1).

Of course when the doctor who examined the appellant on 17th February 1997 only observed two scars on the left upper arm or that there was a permanent scar formation from the injury he did not rule out the fact that the appellant suffered much pain at the initial stage of injury.

And that in awarding general damages the learned magistrate overlooked the fact that some are usually awarded for pain and suffering and that inflation also plays a part in the value of our shilling.

In the circumstances, this is one case where this court should interfere with the award of damages of Kshs.10,000/= which is inordinately so low as to represent an erroneous estimate.

The magistrate did not also realize that the cases cited were decided much earlier than the case subject to this appeal. I allow this appeal, set aside the award of Kshs.10,000/= and enhance it to Kshs.60,000/= plus Kshs.6,635/=. Special damages, making a total of Kshs.66,635/= for which judgment is entered for the appellant plus costs of the suit and of this appeal and interest at court rates.

Delivered this 13th day of November, 2002.

**D.K.S. AGANYANYA**

**JUDGE**