Sinohydro Tianjin Engineering Co Ltd v Otwori (Civil Appeal E276 of 2020) [2023] KEHC 22463 (KLR) (Civ) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E276 OF 2020

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

SINOHYDRO TIANJIN ENGINEERING CO LTD ..... APPELLANT

AND

BONIFACE SABABU OTWORI ..... RESPONDENT

(Being an appeal from the judgment dated 2nd October, 2020 of Hon. D.O Mbeja Senior Resident Magistrate in Milimani CMCC Case No. 229 of 2017)

JUDGMENT

Introduction

1. This judgment determines the Appellant's appeal filed on April 21, 2022 vide its Memorandum of Appeal dated October 31, 2020.

2. The Respondent (Plaintiff in the lower court) filed a suit in the lower court vide a plaint dated January 19, 2017. He alleged that on or about February 23, 2016, he was injured on site while in the employment of the Appellant (Defendant in the lower court). He stated that the Appellant had failed to provide him with adequate safety gear, and was accordingly responsible for his injuries.

3. The Appellant opposed the suit vide its statement of defence dated March 10, 2017, in which it denied the Respondent's allegations entirely.

4. The parties entered into a consent on the issue of liability in the lower court in the ratio of 70:30 in favour of the Respondent. The parties agreed to dispose of the issue relating to quantum of damages in the lower court by way of submissions. The Trial Magistrate in his judgment awarded the Appellant the following damages together with costs of the suit:-

a. General damages Kshs 600,000/=

b. Special damages Kshs 3000/=

Grand total Kshs 603,000/=

c. Less 30% liability Kshs 442,100/=

5. Aggrieved by the said judgment, the Appellant filed this appeal based on the following grounds:-

i. That the Learned Magistrate erred in law and fact by awarding General damages for Kshs 600,000/= to the Respondent and failed to put into consideration the Defendant submissions on reasonable damages.

ii. That the Learned Magistrate erred in law and fact by awarding a high amount of damages which is not commensurate with the injuries the Respondent sustained.

iii. That the Learned Magistrate erred in law and fact by failing to appreciate the submissions of the Appellant on damages and hence awarded an amount which is very high in the circumstances.

iv. That the Learned Magistrate erred in law and fact and as a result arrived at a wrong decision to prejudice of the Appellant.

6. The parties agreed to dispose of this appeal by way of written submissions. They filed and served their respective submissions dated October 24, 2022, and December 21, 2022.

Appellant's Submissions

7. The Appellant submitted that award of Kshs 600,000/= as general damages was excessive; and that the trial court had applied the wrong principles in the assessment of damages.

8. The Appellant submitted that an award of Kshs 200,000/= was more appropriate in the circumstances. It relied on the decision of the High Court in *Harun Muyoma Boge v Dr Daniel Otieno Agolo* (2015) eKLR, in which the court awarded the sum of Kshs 300,000/= as general damages for the injuries sustained.

9. The Appellant contended that the Trial Magistrate had not cited any authorities to explain how he arrived at the award of Kshs 600,000/=, which in its view, was excessive.

10. The Appellant submitted that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. It relied on the English decision of the court in *H West and Son Ltd v Shepherd* (1964) AC 326, in which the court stated as follows:-

> "…..but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional……"

11. The Appellant further relied on the Court of Appeal decision of *KEMFRO Africa Ltd t/a Meru Express Service, Gathogo Kanini v AMM Lubia & Another* (1998) eKLR as cited in the case of Court

of Appeal *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR, in which the court stated as follows:-

> "…..it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Respondent's Submissions

12. The Respondent submitted that the injury sustained had occasioned permanent incapacity to the Respondent assessed at 5%.

13. He submitted that the principles upon which an appellate court ought to interfere with the discretion of the trial court had not been met. Namely, that the Appellant had not shown that the trial court: misapprehended the evidence, applied incorrect legal principles; and made an award that was either too low or too high; or took into account irrelevant factors; or failed to take into account relevant factors.

14. He relied on the decision of the Court of Appeal in *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR, where the court stated as follows:

> "the context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

15. Additionally, he cited *Halsbury's Laws of England* 4th Edition, Vol 12 (1) page 348-883, relating to the rationale for an award of damages for pain and suffering, captured as follows: -

> "Pain and suffering damages are awarded for the physical and mental distress caused to the Plaintiff, both pretrial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement or suffering caused by anxiety that the Plaintiff's condition may deteriorate."

16. And further relied on decision of the High Court case of *Savana Saw Mills Ltd v Gorge Mwale Mudomo* (2005) eKLR, where the court stated as follows: -

> "it is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance."

17. The Respondent submitted the following authorities, which it stated related to comparable injuries:-

    a. *Njora Samuel v Riachard Nyangau Orechi* (2018) eKLR in which, the court upheld an award of Kshs 500,000/= for a Respondent who had suffered a fracture of one metatarsal with no permanent disability.

    b. *Tarmal Wire Products Ltd v Ramadhan Fondo Ndegwa* (2014) eKLR, in which the court awarded Kshs 500,000/= for a similar injury, which was upheld on appeal.

Analysis and Determination

18. The only issue before this court is whether the award of damages in the lower court was excessive?

19. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR Civil Appeal No 147 of 2020 [2004] eKLR where the Court of Appeal held:-

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

20. Further to the above, in the Court of Appeal decision of *Butt vs Khan* (1977) 1 KAR the court stated that the test on whether or not to interfere with an award of damages, is as follows:

> " An Appellate court will not disturb an award for damages unless it is 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."

21. As this is a first appeal, I have a further duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

22. Looking at the record, the Respondent produced a medical report by Dr GK Mwaura as PEx 6 which confirmed that the injuries suffered by the Respondent were: swelling and deep wound of the right foot; pain and bleeding; and fracture proximal phalanx of the right big toe. The doctor concluded that the Respondent had experienced pain in the right foot on exertion and was unable to walk or stand for a long time.

23. The medical report further indicated the Respondent sustained grievous harm injuries; soft tissue injuries; and concluded that the Respondent had suffered a permanent disability of 5%.

24. I have considered the relevant awards which vary between Kshs 500,000/=- on the high end, and Kshs 300,000 /= on the lower end of similar injuries. I do not think that the award of Kshs 600,000/= was inordinate. I am of the view that assessment of general damages is not an exact science and that a certain amount of discretion ought to be left to the trial court subject to the correct legal principals articulated above.

25. Further, I note that the real difference between what the court awarded, Kshs 600,000/=, and what the Appellant submitted ought to have been awarded, Kshs 350,000/=, is actually only a difference of Kshs 250,000/=. Having reviewed the record, and considered the various authorities, I do not think that a difference of Kshs 250,000/= is so inordinately high to justify interfering with the discretion of the

lower court. I say this considering that over the last year alone, the cost of living has risen substantially and the shilling has depreciated considerably.

26. Finally, I have reviewed the judgment of the lower court, and I am satisfied that contrary to the Appellant's submission, the Magistrate did take into account the applicable principles relating to quantum of damages, and did, in fact, cite a relevant authority. At page 2 of the judgment, the Magistrate clearly refers to the decision of the Court of Appeal in *Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja* [1986] eKLR, which it applied to the facts of the case in arriving at its conclusion on quantum.

27. Based on the reasons above, I find that the appeal is without merit and is dismissed with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent