



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 10 OF 2020

BERNARD MOMANYI.....APPELLANT

VERSUS

JAMES MICHIEKA MOMANYI

(Suing as the personal representative and administrator of the estate of

THOMAS MICHIEKA (Deceased).....RESPONDENT

{Being an appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 28th day of October 2019 in the original Nyamira Chief Magistrate’s Court Civil Case No. 6 of 2017}

JUDGEMENT

By the Memorandum of Appeal dated 10th July 2020 the appellant sought to set aside the judgement of the lower court on the following grounds:-

- “1. That the learned trial magistrate erred in law and in fact in awarding Kshs. 3,002,600 as general damages for pain and suffering which amount was excessive and unjustified and contrary to the evidence on record.**
- 2. That the learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.**
- 3. That the trial magistrate erred in law and fact by failing to consider the Appellant’s evidence and submissions on record.”**

This court admitted the appeal and directed that the appeal would proceed by way of written submissions. Those of the respondent were duly filed on 4th November 2020 but those of the appellant were not placed on the record reason being that Counsel for the appellant did not pay the requisite filing fee. Be that as it may upon perusing the record of the lower court I noted that on 21st November 2019 which was one month after the Learned trial Magistrate delivered his judgement on 28th October 2019 Counsel for the parties filed a consent which compromised the suit in the following terms: -

“OUR REF: OCH/945/17 DATE: 21ST NOVEMBER, 2019

YOUR REF: T.B.A

THE EXECUTIVE OFFICER

THE CHIEF MAGISTRATE’S COURT

NYAMIRA LAW COURT

NYAMIRA

Dear Sir,

RE: CMCC CIVIL SUIT NO. 6 OF 2017 – NYAMIRA

JAMES MICHIEKA MOMANYI & FRANCISCA KERUBO MICHIEKA (Suing as personal representative and Legal Administrators for the estate of THOMAS MICHIEKA OMWOYO –VS- BENARD MOMANYI

The above matter refers;

We the advocates for the parties herein should be most obliged if you would record the following Order:

BY CONSENT: -

1. Judgement be entered in favour of the Plaintiff against the Defendant for Kenya Shillings Three Million (Kshs. 3,000,000/=) all inclusive.

Dated at KISII this 21st day of November 2019.

OCHOKI & COMPANY KAIRU & McCOURT & COMPANY

ADVOCATES FOR THE PLAINTIFF ADVOCATES FOR THE DEFENDANT”

The consent was filed in court on 2nd March 2020 by the firm of Ochoki & Co. Advocates who appear for the respondent in this appeal. Thereafter on 3rd March 2020 the consent was adopted as a judgement of the court thereby effectively superseding the judgement of the trial Magistrate which as I have stated was delivered on 28th October 2019. That would explain why the formal decree attached to page 57 of the Record of Appeal is for a sum of Kshs. 3,000,000/= only as opposed to the sums in the trial Magistrate’s judgement. It is instructive that neither the consent nor the consent order were included in the record of appeal. Neither were they brought to the attention of this court at the time it was admitting this appeal. This is material because **Section 67 (2) of the Civil Procedure Act** expressly states that an appeal does not lie from a decree flowing from a consent. The **Section** states: -

“(2) No appeal shall lie from a decree passed by the court with the consent of parties.”

Clearly therefore this appeal does not lie and as it was not even prosecuted, Counsel for the appellant having failed to file their submissions, it is struck out with costs to the respondent. It is so ordered.

Signed, dated and delivered electronically at Nyamira this 4th day of February 2021.

E. N. MAINA

JUDGE