



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 78 OF 2019

VOLCAN HOLDINGS LIMITED.....APPELLANT

VERSUS

FESTUS KAZUNGU MAITA RESPONDENT

(Being an appeal from the decision of Hon. C. A Mayamba (P.M) in Kilungu Principal Magistrate's Court PMCC Case No. 321 of 2018 pronounced on 4th October 2019).

JUDGMENT

1. In a judgment delivered on 5th October 2019, the trial court entered judgment for the respondent (who was plaintiff) against the appellant in the following terms –

“ I do, therefore, make the following order –

- a) Liability 90% to 10%**
- b) General damages Kshs.850,000/=**
- c) Special damages Kshs.53,550/=**
- d) Less 10% (90,355) Kshs.813,195/=**
- e) Costs and interest**

2. Dissatisfied with the decision of the trial court, the appellant (who was defendant in the trial court) has come to this court on appeal on the following grounds –

- 1) That the learned magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the defendant and reached an erroneous conclusion thereby occasioning a miscarriage of justice.***
- 2) The learned trial magistrate erred in law and in fact by awarding general damages to the sum of Kshs.850,000/= that was manifestly high and having disregard of the submissions by the defendant and cited legal authorities.***
- 3) The learned trial magistrate erred in law and in fact by awarding future medical expenses of Kshs.50,000/= when the same was not proved.***
- 4) The learned trial magistrate in assessing quantum of damages took into account irrelevant factors and wrong decision principles and arrived at a wrong decision and excessive award on quantum of damages.***

3. On the basis of the above grounds of appeal, the appellant has asked this court to allow the appeal, and set aside the judgment and orders of the trial court dated 4th October 2019.

4. The appeal proceeded by way of filing written submissions. Thus appellant's counsel S.M Righa & company filed submissions on 8/6/2021 while the respondent's counsel M/s Waiganjo Wachira & company filed their written submissions on same date, 8/6/2021. I have perused and considered the written submissions of both the appellant and the respondent.

5. This being an appeal on quantum, I have to start by reminding myself the principles on which an appellate court will consider a request for review of the quantum of damages. Many cases have dealt with this subject and it will suffice if I cite the case of **Butt –vs- Khan (1981) KLR 349** wherein the court stated 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.

6. At the trial, none of the parties tendered evidence through witnesses. What was recorded was that a consent entered in civil case No. 318 of 2018 was recorded in this case by agreement of parties’ counsel. No formal proof proceedings were conducted, and instead parties counsel agreed to proceed by filing written submissions, which they did by filing written submissions.

7. I note that in the written submissions at the trial, Ms. Waiganjo Wachira for the respondent (plaintiff) relied on a case of **Teresiah Ngugi & Another –vs- Michael Masia Kimende (2018) eKLR** wherein general damages of kshs.1,500,000/= was awarded, and the case of **Mworia M’Nabea–vs- David Gikunda 2017 (eKLR** in which general damages of Kshs.800,000/= was awarded. Counsel did not ask for any specific figure for general damages, but asked for Kshs.180,000/= for future medical expenses, and special damages of Kshs.3,550/=.

8. The appellant counsel Ms. Righa & co., on the other hand, relied on the case of **Harun Muyoma Boge –vs- Daniel Otieno Agulo (2015) eKLR** in which general damages of Kshs.250,000/= was awarded. Counsel asked the trial court to award Kshs.250,000/= as general damages. Counsel did not address the other awards claimed by the respondent.

9. I note that, other than the medical reports filed, none of the counsel explained to the trial court the injuries suffered in their submissions. I note also that in the medial examination report (P3 form), the injury suffered is described as “*grievous harm*”. In the report of Dr. G.K Mwaura which was not challenged, the injuries suffered by the respondent were described as blunt injury occipital (head) region, blunt injury left knee, swollen, tender, painful right leg, fracture right fibular. Degree of incapacity was given in that report dated 28/9/2018 as 5%, and future costs for removal of implants given as Kshs.180,000/=.

10. Parties’ counsel have now come to this court, relying on other case authorities, which in my view, is not right as they did not put these authorities on quantum for the consideration by the trial court.

11. Having perused and considered the judgment of the trial court, it cannot be said that the magistrate did not consider the facts and evidence and submissions placed before him. Little evidence was placed before him, and he was duty bound to rely on only that which was placed before him. I thus find that the figure on general damages of Kshs.850,000/= less 10% was not an unreasonable figure.

12. I also find that, the award of Kshs.50,000/= for future medical services was reasonable given that the doctor had suggested a much higher figure. The special damages have not been contested, and I will say no more on the same.

13. In view of my above findings, I find no merits in the appeal. I dismiss the appeal with costs to the respondents.

DELIVERED, SIGNED & DATED THIS 9TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE