



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 163 OF 2016**

**MADJAH CONSTRUCTION.....APPELLANT**

**VERSUS**

**FREDRICK AKIMAYA MUKANJI.....RESPONDENT**

**JUDGMENT**

1. The appellant, MADJAH CONSTRUCTION CO. LTD, was the original Defendant in Civil Case No 1201 of 2012 at MOMBASA CHIEF MAGISTRATE'S COURT, where the Respondent, FREDICK MUKANJI has instituted a suit in the lower court by filing a plaint dated 14<sup>th</sup> June, 2012 seeking to be paid damages on account of injuries he alleged to have sustained in the course of duty with the Defendant as a plumber fixing water pipes into the wash basin at Greef company at Shimazi – Mombasa.

2. The Respondent averred that the accident occurred by the negligence of the appellant and breach of statutory duty of care owed to him. The Respondent particularized the particulars of breach of statutory duty being building a stone wall that was structurally defective, failing to take any or any adequate precautions for his safety while he was engaged upon his said work, and exposing him to the risk of damages or injury of which they knew or ought to have known.

3. The appellant filed a defence in which he denies that the respondent was employed by it as a casual but admitted that he was involved in an accident on or about the date mentioned therein. It admitted that while it has a duty to take all reasonable precautions on the safety of the Respondent, the respondent also had the duty to take all reasonable precaution for his on safety while at work. It further denied that the accident was caused by any negligence and or breach of duty on its part. It averred that if the Respondent suffered any injuries, loss and damages, then it was due to his own negligence. It denied every particulars of negligence attributed to it and particularized the particulars of negligence on the part of the Respondents. He urged that the court dismisses the Respondent's suit with costs.

4. The parties entered into a consent on liability at the ratio of 75% against the Appellant and 25% against the Respondent on 2.3.2015. They were to negotiate with regard to quantum but the matter proceeded to trial to determine the same.

5. After hearing the case, the trial magistrate awarded the Respondent Kshs 800,00/= as general damages, Kshs 2000 and Kshs 49,413/- as special damages, bringing the total sum of damages to kshs 851,413/= less the Appellant's 25% contribution, hence the Respondent was therefore awarded Kshs 638,559.75 plus costs and interest.

6. The Appellant was aggrieved by the said decision of the trial magistrate and vide a memorandum of appeal dated 21<sup>st</sup> November, 2016, filed an appeal on 23<sup>rd</sup> November, 2016 wherein he has raised the following grounds of appeal;

**(1) That the learned resident magistrate erred in law in awarding to the plaintiff Kshs 800,000/= for general damages in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the plaintiff.**

**(2) That the learned resident magistrate erred in failing to consider or adequately consider the medical reports of Dr Ronald F Kaale dated 24<sup>th</sup> April, 2015 on the injuries sustained by the plaintiff which was tendered in evidence and marked DEX1 and that of Dr. Maurice Peter Siminyu dated 14<sup>th</sup> April 2012 which was tendered in evidence and marked PEX4.**

**(3) That the learned resident magistrate erred in law in holding that the plaintiff in Mombasa HCC NO. 319 RD of 2001 Ahmed Mohamed vrs Abdulhafidh Mohamed Banragah (hereinafter called the Ahmed case) suffered comparable injuries to the plaintiff in this case when it is clear upon reading the authority that the injuries sustained by Mr Ahmed Mohamed and its after effects were far more severe than the injuries sustained by the plaintiff in this case in the case below.**

**(4) That the learned resident magistrate erred in law in being guided by Ahmed case whilst awarding general damages of the 800,000/= to the plaintiff.**

(5) That the learned resident magistrate erred in fact and in law in not holding that the injuries sustained in Ahmed case were so severe that it could not be used as a comparable in this case in determining the general damages payable to the plaintiff in the case below.

(6) The learned resident magistrate failed to give any or any adequate reason or reasons of how he arrived at the figure of Sh 800,000/= general damages which he awarded to the plaintiff

(7) That the learned resident magistrate erred in failing;

(a) To appreciate the significance of the various facts that emerged from the evidence of the plaintiff's witnesses.

(b) To consider or properly consider all the evidence before him and/or

(c) To make any or any proper findings on the aspect of quantum of damages on the evidence before him.

(8) That the learned resident magistrate erred in failing to consider or adequately consider all the evidence before him and the written submissions filed by counsel for the Appellant.

#### **DETERMINATION**

7. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions. (See the case of SELLE VRS ASSOCIATED MOTOR BOAT COMPANY LIMITED (1968) E A 123; PETERS VRS SUNDAY POST (1958) E A 424 and JABANE VRS OLENJA (1986) KLR 661)

8. This Honourable court has not been called upon to determine the issue of liability as this was agreed upon by consent of the parties, which was accordingly recorded in court on 2<sup>nd</sup> March, 2015. The appellants, it was agreed that they should bear 75% while the Respondent was apportioned 25% liability.

9. As the first appellate court in this case, its duty is therefore to examine and re-evaluate the evidence and findings of the trial court, and reach its own independent conclusion as to whether or not the findings of the court with regard to quantum of damages should stand.

10. The test as to whether an appellate court may interfere with an award of damages was stated by the court of appeal in the case of MBOGO AND ANOTHER VRS SHAH, (1968) E A 93 in the following words.

**“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matter which it should have taken into account and consideration and doing so arrived at a wrong conclusion”**

11. And in the case of H. WEST & SON LTD VRS SHEPHARD (1964) A C 326, Lord Morris stated at page 353 that;

**“ The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which none can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so and remembering that in this sphere there are inevitable differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment”**

12. Counsel for both parties filed their written submissions with regard to assessment of damages based on the injuries the plaintiff pleaded.

According to the Respondent's counsel, the Respondent pleaded that he suffered compound fracture of the left tibia /fibula, soft tissue injuries to the right knee, degloving injury of the left leg, and chest injuries. The Respondent underwent surgery to fix the metal plates and screws and another to remove the implants after he developed a bone infection and discharging wound. The doctor noted that the Respondent had developed arthritis and restricted movement of the left ankle.

13. The Respondent filed written submission in which he proposed an award of Kshs 1,000,000/= for general damages and cited the case of AHMED MOHAMED VERSUS ABDULHAFIDH BANGRAGAH HCC NO. 319 RD OF 2001 and MWAURA MUIRURI VRS SUERA FLOWERS LTD & ANOTHER (2014) in support of the said proposal.

14. To distinguish authorities that the Respondent cited, the Appellant proposed an award of between Kshs 300,000/= and Kshs 325, 000/- and cited the case of PETER MWINZI MBOO VRS ISAAC MWANGI KARUIKI HCC NO 267 OF 1995 in support of this.

15. I have considered the Appellants' and the Respondents' submissions and cited authorities by each one of them in light of the injuries the Respondent suffered. According to the medical reports submitted by Dr KAALE and Dr. SIMINYU, the Respondent was not fully recovered and needed to undergo a prolonged antibiotic therapy and surgical debridement of dead bone and removal of the metal implants that were still in situ.

16. I also find the following case bear close resemblance in terms of the injuries sustained as well as the awards made.

**(a) In the case of FLORENCE NJOKIMWANGI VRS CHEGE MBITIRU ( 2014) e KLR , Justice Wakiaga on appeal allowed a sum of Kshs 700,000/ as general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screws”**

**(b) DICKSON KARUIKI NYAGA & ANOTHER VRS EMMA MBANDI NYAGA, 2015) e KLR, wherein on appeal an award of Kshs 400,000/= for general damages was made where the plaintiff suffered a fracture of the right fibula and multiple soft tissue injuries with the likelihood of developing osteoarthritis and osteomyelitis in future . In that case it was opined that the fracture and soft tissue injuries had healed without any complications”.**

17. In this case, the injuries sustained by the respondent were less severe than the ones in the instant appeal. From the foregoing, similar injuries have attracted an award of between Kshs 100,000/= and Kshs 406,000/=. In considering the gravity of the injuries the respondent in this case suffered and the rate of inflation, an award on the upper limit would be justified . And although no injuries are exactly the same, as in the other cases, courts should try and keep damages within the limits which has found expression and favour in decided cases.

18. I am also persuaded by the case of ALPHONCE MULINZUKI VRS BRIAN CHARLES OCHUODHO ( 2014) e KLR, where the High court upheld the sum of Kshs 800,000/= as the general damages. In the case of KIGARAGARI VRS AYA ( 1982-88) IKAR 768, where it was stated as follows:

**“ Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased income tax and increased fees.”**

19. The court, in the case of DANIEL KOSGEI NGELECHI VRS CATHOLIC TRUSTEE REGISTERED DIOCESE OF ELDORET & ANOTHER (2013) e KLR, cited with approval the case of KIGARAGARI VRS AYA (1982-88) IKAR 768:

**“I state this so as to remove the misapprehension so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law. She is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.”**

20. It is therefore my finding that the trial court was right and it cannot be faulted for having made the award it made because the authorities of the Respondent bore some injuries which the respondent suffered. To say that a court cannot rely on an authority because the injuries in that authority do not exactly compare to the case before the court would be in error.

21. There cannot always be a case that matches another exactly in terms of injuries suffered. Authorities are used by court as a guide in the awards to make. The trial court rightly used the above-cited authorities as a guide. There is therefore, no basis for this court to interfere with the lower court's award.

22. Accordingly, I uphold the award by the trial court on quantum and dismiss the appeal with costs.

**Judgment delivered, dated and signed this 14<sup>th</sup> day of February, 2019 at Mombasa.**

**LADY JUSTICE D. O. CHEPKWONY**