



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 353 OF 2012**

**PATRICK MUTIE NDETO.....APPELLANT**

**-VERSUS-**

**DEVKI STEEL MILLS LIMITED.....RESPONDENT**

*(Being an appeal from the judgment and decree delivered by Honourable D.N. Mulekyo (Mrs.) (Senior Principal Magistrate) on 12<sup>th</sup> June, 2012 in CMCC NO. 856 OF 2010)*

**JUDGEMENT**

1. The appellant filed a suit on 17<sup>th</sup> August, 2010 vide CMCC No. 856 OF 2010 against the respondent, seeking for general and special damages for the injuries he allegedly sustained during his employment with the respondent as a machine operator.
2. Through its statement of defence filed on 1<sup>st</sup> October, 2010 the respondent denied the particulars of negligence and/or breach of duty of care, asserting inter alia that it took all reasonable steps to ensuring a safe work environment for all its employees and that it had no prior knowledge of the injuries sustained by the appellant. In the alternative, the respondent also pleaded contributory negligence on the part of the appellant.
3. At the hearing, the parties recorded a consent on liability in the ratio of 75%:25% in favour of the appellant as well as the production of the two (2) medical reports relied upon without calling their makers. The parties further agreed to the filing of written submissions on quantum.
4. The trial court eventually awarded a sum of Kshs.180,000/= in favour of the appellant subject to 25% contribution as per the consent on liability, as well as costs of the suit and interest thereon.
5. The aforesaid decision now forms the subject of this appeal. The appellant's memorandum of appeal dated 11<sup>th</sup> July, 2012 concerns the two (2) grounds hereunder:
  - i. THAT the learned trial magistrate erred in law when she made an award of Kshs.180,000/= which was inordinately low in the circumstances.*
  - ii. THAT the learned trial magistrate erred when she failed to appreciate that the expert medical opinions had designated the injuries suffered by the appellant as grievous bodily harm and consequently, the award of Kshs.180,000/= as general damages fell far below the threshold of awards for injuries of such nature.*
6. This court directed the parties to file written submissions on the appeal. I have re-evaluated the evidence presented before the trial court and considered the submissions alongside the cited authorities.
7. It is clear that the grounds of appeal touch solely on quantum of damages and specifically, the award on general damages.
8. First and foremost, the appellant submits that in awarding the sum of Kshs.180,000/=-, the learned trial magistrate did not consider the sums proposed by either of the parties.
9. He also submits that the learned trial magistrate's finding that the medical report relied upon by the appellant was missing was never brought to the attention of the parties prior to the judgment to enable the appellant avail a fresh copy. As such, the appellant argues that the learned trial magistrate erred in relying solely on the medical report availed by the respondent.
10. The appellant further contends that the said magistrate disregarded the consent entered into between the parties in assessing the damages.

11. On its part, the respondent submitted that there is no reason for this court to interfere with the learned trial magistrate's award since the same was both reasonable and based on comparable awards referenced by the parties.

12. In her judgment, the learned trial Senior Principal Magistrate acknowledged the consent on liability as entered between the parties. However, the learned Senior Principal Magistrate indicated that the appellant had failed to annex the medical report by Dr. Kinuthia, thereby leaving the court to rely solely on the medical report prepared by Dr. Madhiwala.

13. On the issue as to whether the respondent's medical report was considered, it is clear that the trial magistrate did not take into consideration the medical report produced by the appellant. I have perused the court record and it appears that the appellant's medical report is the court. The aforesaid medical report considered alongside that prepared by Dr. Madhiwala reveals that there is no significant difference between the two medical reports. Consequently, I am unable to find that the learned trial magistrate's failure to consider the appellant's medical report had a prejudicial impact on his case.

14. In cross reference to the above, I have reviewed the impugned judgment and find no ground in the argument raised by the appellant that the learned trial magistrate disregarded the consent entered into between the parties. From my reading of the aforesaid judgment, the magistrate acknowledged the validity of the consent and applied the ratio on liability in awarding damages.

15. This brings me to the issue of whether the award made on general damages ought to be interfered with, which forms the crux of the appeal before me.

16. The guiding principles to be considered in deciding whether to interfere with awards made by trial courts were restated in the case of ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*** inter alia as follows:

*i. Whether an irrelevant factor was taken into account.*

*ii. Whether a relevant factor was disregarded*

*iii. Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

17. It is the appellant's argument that the award given was inordinately low. The two (2) medical reports dated 1<sup>st</sup> July, 2010 and 18<sup>th</sup> May, 2011 by Doctors Moses Kinuthia and Ashwin Madhiwala respectively indicate that the appellant sustained a fracture to his right distal radius. The earlier report categorized the injuries as grievous harm.

18. In his submissions before the trial court the appellant on the one hand proposed the sum of Kshs.1,500,000/= though he did not cite any comparable awards. The respondent on the other hand proposed a sum ranging between Kshs.150,000/= and Kshs.200,000/= as an adequate award, citing the case of ***Thomas Ongele Onyango v Michael Kabithi Waweru (Civil Case No. 217 of 1992-Kisumu)*** where an award of Kshs.130,000/= was made.

19. In her judgment the learned Senior Principal Magistrate found the sum of Kshs.180,000/= to be adequate compensation.

20. The above-cited case of ***Thomas Ongele Onyango*** (supra) and relied upon by the respondent constitutes comparable injuries though it was many years ago. I also took note that while the appellant has cited the award made in ***Leonard Kinuthia v William Sirma Kiboros & Another (Civil Suit No. 37 of 1992-Nairobi)*** in his submissions before this court, the said authority was not mentioned in his submissions before the trial court. However, I find the injuries sustained therein to be inapplicable to the case at hand.

21. The medical reports annexed to the record of appeal reveal that the fracture sustained had healed as at the time of examination and that there was no permanent disability.

22. I have also considered comparable awards. In the case of ***Philip Musyoka Mutua v Leonard Kyalo Mutisya [2018] eKLR*** the High Court on appeal substituted an award of Kshs.400,000/= with one of Kshs.300,000/= for comparable injuries. In the cases of ***Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR*** the injuries sustained included but were more severe than those sustained in the present instance and the court interfered with an award of Kshs.1,000,000/= as general damages and substituted it with an award of Kshs.450,000/=.

23. Having taken into account the injuries suffered and the comparable awards I am convinced that the award made in this matter is inordinately low. Therefore, I find the appeal as against quantum to be meritorious. It is allowed. I am satisfied that the award of ksh.300,000/= is reasonable and commensurate with the injuries sustained.

24. In the end, the award of kshs.180,000/= is set aside and is substituted with an award of kssh.300,000/=. The aforesaid amount is to be subjected to the agreed ratio of contribution of 25%. Consequently the amount payable on appeal is ksh.225,000/=. The appellant to have costs of the appeal.

**Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of July, 2019.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....for the Appellant

.....for the Respondent