



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 152 OF 2016**

**BETWEEN**

**SHENGLI ENGINEERING CONSTRUCTION LIMITED.....APPELLANT**

**AND**

**KITHEKA MUTUA.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. Cheruiyot (RM) in Thika CMCC NO.438 of 2012 on 14<sup>th</sup> February, 2013)*

**JUDGMENT**

1. KITHEKA MUTUA (*hereinafter referred to as Respondent*) sued SHENGLI ENGINEERING CONSTRUCTION LIMITED (*hereinafter referred to as Appellant*) in the lower court claiming damages for injuries allegedly suffered on 10<sup>th</sup> February, 2012 while working for the respondent allegedly due to the negligence of the respondent.

2. The Appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on 14<sup>th</sup> February, 2013 the learned trial Magistrate found that the Respondent had proved his case on a balance of probability, apportioned liability at 100% as against the Appellant and awarded the Respondent general damages in the sum of Kshs. 300,000/-.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 16<sup>th</sup> January, 2015 filed the Memorandum of Appeal dated 07<sup>th</sup> February, 2013 which set out 4 grounds of appeal which I have summarized into 3 grounds to wit:

*1. The learned trial magistrate erred in law and in fact in finding the Appellant liable at 100%*

*2. The learned trial magistrate erred in law and in fact in disregarding the defence case*

*3. The learned trial magistrate erred in law and in awarding the Respondent Kshs. 300,000/- which is excessive and an erroneous estimate in disregard of the weight of precedents in similar circumstances*

**SUBMISSIONS BY THE PARTIES**

5. When the appeal came up for mention on 09<sup>th</sup> September, 2019, both parties had dutifully filed their written submissions.

**Appellant's submissions**

6. Appellant holds the view that his evidence that the sum awarded was excessive in comparison to precedents in similar circumstances.

7. The appellant placed reliance on the following authorities:

1. **Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi [2013] eKLR** where the court on appeal reduced the sum of Kshs. 150,000/- to Kshs. 70,000/- for a pricked wound on the left foot (dorsal aspect) which was tender with severe pains incurred during and after the injury.

2. **Sokoro Saw Mills Limited v Grace Nduta Ndungu[2006] eKLR**

where the court on appeal reduced the sum of Kshs. 80,000/- to Kshs. 30,000/- for soft tissue injuries.

### **Respondent's submissions**

8. Respondent holds the view that he suffered more serious injuries than the ones in the cases cited by the Appellant and that the sum of Kshs. 300,000/- was not excessive.

### **Analysis and Determination**

9. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

10. This court has considered the parties' pleadings evidence on record and the submissions. A reading of Appellant's submissions reveal that the appeal is only on quantum.

11. Respondent suffered the following injuries

**i. Degloving injury on right foot**

**ii. Soft tissue injuries and bruises on right leg**

**iii. Soft tissue injuries on left ankle**

12. At the time of Respondent's examination by Dr. Ikonya a month after he was injured, the doctor noted that he was expected to recover with no permanent incapacity within two months' time.

13. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

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

14. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered. The respondent's advocate did not cite any authorities before the trial court. **James Kevogio Mole & Another -vs- Kenya Bus Services Ltd Nbi HCCC 2163 of 1991** was cited by the Appellant where the Plaintiff's injuries were described as cut wound over the left eyebrow, soft tissue injury to the chest, deep abrasion over the left hand and soft tissue injury to the right flack. The award of damages made therein in 1992 was Kshs. 30,850/=.

15. The injuries suffered in the above authority cited by the Appellant are comparable to those suffered by the Respondent in this case except that the cited authority is quite old.

16 The Court of Appeal in **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) KAR 727** at page 703 stated that: -

***"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."***

***The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."***

17. In the case at hand, the judgment of the trial court does not justify the award for Kshs. 300,000/-. From the evidence on record, I am persuaded by the Appellant's counsel's submissions that the trial court made an award which is excessive and an erroneous estimate compared to the weight of precedents in similar circumstances.

### **Disposition**

18. In consideration of the submissions made before me and the medical report produced before the trial court, it is my considered view that an award of Ksh. 100,000/= would adequately compensated the Respondent.

19. In the result I allow the appeal, set aside the judgment of the learned Magistrate by substituting the awarded sum of Ksh. 300,000/- with Ksh. 100,000/- as general damages. Special damages in the sum of Kshs. 9,000/- remain as awarded.

20. Since this appeal has partially succeeded, I order that each party bears its own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 12TH DAY OF SEPTEMBER, 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistants - Nancy & Morris

For the Appellant -Mr. Kimaru hb Mr. Kioko

For the Respondent -Ms. Mbirwe hb for Mr. Muturi