



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R.MWONGO, J)

CIVIL APPEAL NO. 17 OF 2016

SUBATI FLOWERS LIMITED.....APPELLANT

-VS-

WALTER WANYONYI WEKESA.....RESPONDENT

(Being an Appeal from the Judgment of Hon E. Kimilu, CM delivered on 14th March, 2016 in Naivasha CMCC No 492 of 2014)

JUDGMENT

1. This is an appeal on quantum of damages. The lower court made an award as follows:

General Damages - Shs 1,600,000

Less 20% (Contribution) - Shs 320,000

Add Special Damages - Shs 5,000

TOTAL - Shs 1,285,000

Liability had been agreed at 80%:20% in favour of the Respondent/Plaintiff.

2. The two-page judgment pointed out that the Plaintiff had sought an award of Kshs 2.5 Million whilst the Defendant prayed for Kshs 200,000/=. The court, relying on the doctor's report found "that the Plaintiff suffered fracture on the legs and right tibia/fibula, fracture of lumbar vertebrae (2) of the spine, and blunt injuries to the right side of the chest." Harm was assessed as grievous with permanent disability assessed at 40%.

3. The Appellant's complaints are that:-

1. The Learned Magistrate erred in law and in fact by failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for his judgment pronounced on 14th March, 2016.

2. The Learned Magistrate erred in law and fact in disregarding and dismissing the Defendant's Written Submissions filed by the Appellant/Defendant.

3. The Learned Magistrate erred in law and in fact in referring to the authorities relied upon and by the Appellant/Defendant in its written submissions and awarding damages without quoting any authority that he had relied upon and/or followed to award the damages.

4. The Learned Magistrate erred in law and in fact in awarding damages which are excessive and unrealistic.

4. Upon perusal of the lower court's judgment, I have to agree with the Appellant that the learned magistrate did not set out the issues arising out of the contested facts that affected his decision in quantum. As such it is impossible to understand the basis upon which the learned magistrate founded his determination. Accordingly, a full re-assessment of the evidence on injuries is necessary.

5. Accordingly, I have carefully analysed the evidence on quantum and make my determination as follows. The Plaintiff was injured whilst

lawfully on duty on the Defendant's premises and or on the Defendant's instructions. The injuries set out in the plaint as follows:-

1. Fracture of the right tibia and fibula.
2. Fracture of the left tibia and fibula.
3. Fracture L2 of the lumbar spine
4. Blunt injury to the right side of the chest.

The Plaintiff claimed special damages of Shs 5,000/= for the medical report and general damages for pain, suffering, loss of amenities and breach of contract. Special damages are not contested.

6. At the hearing, evidence was adduced by the Plaintiff and Dr. Obed Omuyoma for the Plaintiff. The defence closed its case without calling any witnesses. Parties filed written submissions after close of hearing. Authorities were annexed to submissions.

7. Dr. Omuyoma is a general practitioner. His evidence and report were premised on treatment notes presented to him. His evidence, however, remained unchallenged. The Plaintiff's evidence was also unchallenged.

8. What remains is to assess the quantum of compensation attributable to each of the injuries sustained by the Plaintiff. As is usual in the courts, comparability and uniformity of awards are critical elements and thus authorities showing awards for similar injuries must be relied upon. (**Stanley Maore v. Geoffrey Mwenda [2004] eKLR**). It must be noted that there was no claim in the petition for loss of earning, lost income or other heads of damages.

9. In carrying out this exercise, it must be remembered that the assessment of damages and award of compensation is not an exact science. Further, that an appellate court should be slow to interfere with a lower court's award of compensation unless the lower court took into account irrelevant facts, or mis-applied legal principles, or the award is manifestly higher or lower than a reasonable estimation of the damages. (See *Butt v. Khan [198] KLR 349*).

10. The Appellant submitted that in **Akamba Public Road Services v. Abdikadir Adan Galgalo [2016] eKLR**, the Respondent sustained fracture on right tibia leg bone malleolus and right fibular bone and blunt injury to right ankle. The estimated permanent partial disability was 30%. On appeal, **Kamau J**, reduced the award to Kshs 500,000/= from Kshs 800,000/=.

11. The Appellant also relied on **Sammy Mugo Kinyanjui & Another v. Kairo Thuo [2017] eKLR** where **Kimondo J** on appeal awarded Kshs 600,000/= at 20% contribution for the following injuries: slight tenderness of the forehead, neck, chest abdomen, right knee and both legs; fracture of the right tibia; and fracture of the left tibia and fibula.

12. I note that the Appellant's authorities do not deal with any injury similar to a fracture of L2 of the lower spine which was also suffered by the Plaintiff here.

13. The Respondent's submissions and the cited case of **Erick Muthamia and Mibreo Co. Ltd v. AK suing on behalf of IM [2018] eKLR** centred on the principles applicable to award of damages, which I have already adverted to these in this judgment. In the lower court, the Respondent relied on the cases of **Joseph Malo Kiilu v. Kingsway Tyres & Auto Mart Ltd, HC Nairobi Case No. 1901 of 1997** and **Joseph Mutua Kunuthai V. David Kamande Kunuthai HC Nairobi Case No. 621 of 1998**. These cases were determined 20 years before the suit filed in the lower court now appealed against, and will not avail an accurate estimation of quantum. In particular none of these authorities makes reference to a lumbar spine injury/fracture.

14. With regard to the Respondent's injury of L2 of the lower spine I have researched and found two authorities that deal with, inter alia, lumbar injuries as follows.

15. In **Abdi Haji Gulleid v. Auto Selection (K) Ltd & Another [2015] eKLR** the Plaintiff sustained grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture at the back of L1 spine. The permanent incapacity was assessed at 25% by Nyamweya. J. General damages was assessed and awarded at Shs 925,757/= in place of the Kshs 300,000/= awarded by the lower court.

16. In **Nicholas Njue Njuki v. Eliud Mbugua Kahuro [2014] eKLR**, **Ngaah J** awarded Kshs 3,800,000/= in general damages for pain, suffering and loss of amenity for: unstable fracture dislocation of lumbar vertebrae leading to spinal cord damage; complete paralysis in the lower limbs; incontinence of stool and urine. Permanent incapacity was assessed at 100%. The totality of injuries there are of course far more severe than the present case and disability in the present case was only at 40%

17. I note that the learned trial magistrate did not distinguish awards for the different categories of the injuries. However, it is clear that he considered the authorities submitted to him, relying particularly on those in respect of tibia and fibula injuries which were in issue in the case. He then appears to have increased the amount awarded to cover the lumbar spine injury for which no case law was availed.

18. Looking at the authorities relied on by the lower court; and further considering the authorities availed from this court's research on lumbar spine injuries, my view is that the award by the lower court is neither inordinately high nor low. Further, the trial court did not misapply any principles of law save that, as earlier stated, it did fail to make specific reference to and give reasons for each aspect of the award made.

19. Accordingly, I see no rationale for interfering with the award made by the lower court, and do hereby uphold the same.

20. The Appellant shall bear the costs of the appeal.

21. Orders accordingly.

Dated and Delivered at Naivasha this 9th Day of October, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu holding brief for Maiyo for the Appellant
2. Gathu holding brief for Onyancha for the Respondent
3. Court Clerk - Quinter Ogutu