



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 4 OF 2017

(Being an appeal from the Judgment and Decree of Hon. J. Ong'ondo, SRM, in Kakamega

CMC Civil Case No. 161 of 2015 delivered on 20th December, 2016)

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

ISAIAH WAKHUNGU KHARIDA.....RESPONDENT

JUDGMENT

1. The appellant being aggrieved and dissatisfied with the judgment on assessment of general damages delivered vide Kakamega CMCC No. 161 of 2016 on 20th December, 2016 by Hon. J. Ong'ondo, Senior Resident Magistrate lodged the instant appeal against the respondent.

The Background

2. The Appeal originates from the plaint filed in court on 15th May, 2015 in which the respondent prayed for judgment against the appellant for general damages for pain, suffering and loss of amenities, special damages, costs and interests.

3. The brief facts of the case are that on or about 24/2/2015 the plaintiff was in the ordinary course of his employment as a loader arranging sugar bags when due to the defendant's negligence heavy bags of sugar fell on him and in the process the plaintiff suffered severe injury for which he holds the appellant liable.

4. By consent of the parties therein, liability was entered in favour of the respondent in the ratio of 70:30 as against the appellant. The parties then filed their submissions on quantum and consequently the court delivered a judgment in favour of the respondent, awarding the Respondent Shs. 650,000/= in general damages and Shs. 10,000/= special damages. It is that finding on general damages which has prompted this appeal.

The Appeal

5. The Appeal raises the following grounds that: -

1. The learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submission presented and filed by the appellant.

3. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly sustained by the Respondent.

4. The learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously.

6. The Appellant prays that the appeal herein be allowed, and the judgment of the lower court and all subsequent orders be set aside. Further that the court do review the evidence on record and make its own findings on quantum, and that the respondent be condemned to pay the costs of this appeal.

The Response

7. The appeal is opposed by the Respondent.

8. The appeal was heard by way of written submissions.

9. This being the first appeal it is the duty of this Court to re-examine and re-evaluate the evidence tendered in the trial court and to reach its own findings on the issues raised.

10. The issue before the court is on assessing of quantum for general damages. This court must begin from the general principle that the assessment of general damages is at the discretion of the trial court and an appellate court must proceed carefully so as not to substitute its own figure for the sum awarded in the court below merely because it would have awarded a different sum if it had tried the case in the first place. The appellate court can still justifiably interfere with the sum awarded by the trial court if the appellate court is satisfied that the trial court applied the wrong principles in assessing damages, or that the damages given is manifestly excessive or low.

11. The basis upon which damages are awarded in accidental injury claim is the Medical Report. I have looked at the Record of Appeal filed herein on 15.7.2019. It has a copy of the Medical Report dated 16.3.15 by Dr. Andai Charles. It has copies of treatment notes also. According to that Medical Report, and also supported by submissions of both parties, the Respondent suffered the following injuries:-

(a) ***Fracture to the skull***

(b) ***Blunt injury to the neck***

(c) ***Blunt injury to the back***

(d) ***Blunt injury to the chest***

12. From the evidence on record and specifically P.Ex.21, the medical report opines that the Plaintiff/Respondent herein sustained moderately serious soft tissue injuries and bone injuries in the mishap. The doctor further observed that the Plaintiff as at 16/3/2015 was in the process of recovering from the injuries and that he expected complete recovery after a year from 16/3/2015, meaning that by the time the Plaintiff was testifying he had completely recovered.

13. The Plaintiff/Respondent herein also produced the CT Scan as P.Ex.4 and the Radiologist observed that the Plaintiff/Respondent sustained a small depressed left parietal bone fracture and no intracranial bleeding was evident. It suffices to note that the said CT Scan was done on the material date of the accident and the medical report was prepared approximately a month after the occurrence of the accident.

14. I have also considered the Medical Report by Dr. Andai aforesaid. Complete recovery was expected within one year of the said Report.

15. On the basis of that report and judicial authorities the trial Court awarded the respondent Shs. 650,000/=. The respondent states that the award was proper and further that the medical report was not challenged in the trial court and its maker was not cross-examined and that therefore the same cannot be challenged in this appeal by way of submissions.

16. The Appellant submitted that the opinion of Dr. Andai in his aforesaid medical report was exaggerated, and that in any event, the Plaintiff had fully recovered and that an award of Shs. 150,000/= should be adequate compensation for injuries suffered by the Respondent.

17. I have carefully considered the appeal. The quantum to be awarded in cases of injury is always a measure of compensation for the injuries suffered by the Plaintiff. That measure can never be exact. However, the court, based on the medical report and other expert evidence if applicable, would try to as far as possible, reach that measure that satisfies or balances the scale.

18. In this case parties have supplied the court with authorities to help the court to find that balance. I have carefully considered these authorities. The authorities cited all emphasize the fact that:-

(i) A proper balance must be struck to compensate the plaintiff for his injuries.

(ii) The award must be based on comparative analysis and precedent.

(iii) The award should take care of inflation.

(iv) The court should be slow to interfere with an award unless the same was based on wrong principle or is manifestly unjust.

19. In the case of ***Odinga Jactone Ouma –Vs- Moureen Achieng Odere Civil Appeal No. 1 of 2014 Kisumu*** cited by the Appellant, Justice Majanja dealt with a case in which injuries appear closely similar to the one at hand. In that case the Respondent had suffered the following injuries:-

· ***Head injury (concussion)***

· ***Cut wound on the right mandible***

- *Neck muscle contusion*
- *Chest pain on the left side and lacerations*
- *Cut wound on the right shoulder blade region*
- *Multiple lacerations over the left shoulder and upper arm*
- *Cut wounds and lacerations over right forearm*
- *Painful swollen 4th left finger*

For those injuries the Court awarded Shs. 180,000/=.

20. In **Morris Miriti –Vs- Nahashon Muriuki & Another [2018] eKLR**, Majanja J. upheld an award of Shs. 300,000/= where the plaintiff had sustained the following injuries: A tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula.

21. In **Gurdev Engineering & Construction Limited –Vs- Allan Otieno Osula [2019] eKLR**, Thurania J. upheld an award of Shs. 350,000/= for similar injuries.

22. I have taken the above principles in assessing quantum. It is the finding of this court that the injuries suffered by the Respondent were moderately severe, but was expected to heal with no permanent injury. However, for those injuries an award of general damages of Shs. 650,000/= was excessive. It is my view that the trial court applied a wrong principle in assessment of general damages which resulted in an award variance which this court has the authority to interfere with. In my view the award which meets all the criteria cited in this Judgment including inflation is Shs. 450,000/=.

23. The appeal therefore succeeds in part and Judgment entered as follows:-

- (i) Judgment is entered for the Respondent in the sum of Shs. 450,000/= being general damages.
- (ii) Special damages of Shs. 10,000/= is also awarded to the Respondent.
- (iii) Since appeal only succeeded in part, parties shall bear own costs of appeal.

Delivered, dated and signed in open court at Kakamega this 13th day of December, 2019.

E. K. O. OGOLA

JUDGE