



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 561 OF 2015

LANDMARK HOLDINGS LTD.....APPELLANT

- V E R S U S -

LINCH OMONDI OKETCH.....RESPONDENT

(Being an appeal from the judgement of Hon. E. K. Usui, delivered

on 2nd November 2015 in Nairobi CMCC No. 5411 of 2014)

JUDGEMENT

1) Linch Omondi Oketch, the responded herein, filed an action against Landmark Holdings Ltd, the appellant herein, for injuries he sustained while employed by the appellant. The respondent vide his plaint dated 8th august, 2014 alleged that on 3rd January 2014, while in the course of his duties as a general worker at the appellants construction site at Kasarani Sports Academy, fell through an open space and sustained injuries. The appellant filed its defence dated 29th October, 2014 and admitted the accident having occurred but blamed the respondent for negligence. On 25th August, 2015 the parties recorded a consent order on liability in the ratio of 80% : 20% against the appellant. The medical reports of Dr. Ashwin Madhiwalla and Dr. Wokabi were admitted in evidence by consent of the parties. Parties filed written submission on quantum. Hon. C. K. Usui, assessed quantum and gave judgement in favour of the respondent and against the appellant in the following terms:

(i) General Damages ksh.1,300,000/=

(ii) Future medical expenses Ksh. 80,000/=

(iii) Special damages ksh. 2,000/=

Total Ksh.1,382,000/=

Less 20% contribution ksh.376,400/=

Total payable ksh.1,105,600/=

2) Being aggrieved, the appellant preferred this appeal and raised the following grounds in its memorandum.

1. That the learned magistrate erred in law and in fact and ended up misdirecting himself in awarding exorbitant quantum damages by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the plaintiff herein.

2. That the learned magistrate erred in law and making such a high award as to show that the magistrate acted on a wrong principle of law.

3. That the learned magistrate's award on damages was so high as to be entirely erroneous.

4. That the learned magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and

hence ended up making an excessive award in view of the medical evidence presented before the court.

5. That the assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.

6. That the whole judgement on quantum was against the weight of evidence before the court.

3) The aforesaid grounds basically challenge the award on general damages made by the trial court. When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

4) It is the appellant's submission that the award of ksh.1,300,000/= was unfair, unreasonable and not commensurate with nature of injuries and therefore inordinately high and ought to be disturbed. The appellant states that it had submitted for an award of ksh.450,000/= in the trial court, which amount is commensurate with the nature of injuries suffered by the respondent. The respondent submits that the award of damages was not excessive, nor inordinately high so as to amount to a miscarriage of justice.

5) The appellant is challenging the award on damages. The medical report of Dr. Ashwin Madhiwala confirmed that the respondent suffered the following injuries:

(i) Comminuted fracture left proximal tibia

(ii) Comminuted fracture right 5th metatarsal and fracture 2nd, 3rd and 4th metatarsal right foot.

(iii) Comminuted fracture right radius and ulna styloid process with dislocation of right wrist. The doctor stated in summary that:

“The above named suffered from multiple fractures which has healed well now, left with mild tenderness over the fractured site. We can consider permanent disability of 6 months. He will require to remove implant in future.”

6) The respondent was also examined by Dr. W. M. Wokabi stated that:

“the metal plate could be removed later at an estimated cost of ksh.80,000/= all in all, he will end up with a total sum of permanent disability of 20%.”

7) This being the 1st appeal, the appellate court is mandated to reconsider and re-evaluate the evidence adduced before the trial court so as to reach at its own independent decision. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses who testified before the trial court.

8) The law on circumstances under which an appellate court would interfere with an award on damages has been reiterated in numerous authorities. The general principles are that the award could be disturbed when (a) the trial court acted under a mistake of law, or (b) the trial court acted in disregard of principles, or (c) the trial court took into account irrelevant matters or failed to take into account relevant matters; or (d) the trial court acted under a misapprehension of facts; or (e) where injustice would result if the appellate court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been an erroneous estimate of the damage.

9) It is not in dispute that the respondent suffered multiple fractures as shown in the medical reports admitted as exhibits in evidence by consent. Two authorities were cited by the respondent in support of a proposal to be awarded a sum of ksh.5,000,00/=. In the case of **Joseph Kithaka vs= Stephen Mathuku Pius H.C.C.C no. 1750 of 1999** this court awarded a sum of ksh.980,000/= for near similar injuries. The decision was made in the year 2001.

In the second case of **Dorcias Wanjiru Nderi vs= Samuel Kiburi Mwaura and another C.A no. 58 of 2013**, the Court of Appeal awarded ksh.2,000,000/= for near similar injuries.

10) The learned Senior Principal Magistrate took into account the aforesaid authorities and came to the conclusion that an award of ksh.1,300,00/= was adequate for pain and suffering. I am convinced that the award is fair, reasonable and commensurate with the injuries suffered.

11) In the end, I find no merit in the appeal. The appeal is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents