



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 637 OF 2012

EMKAY BUILDERS LTD.....APPELLANT

VERSUS

SOSINES ORINDO.....RESPONDENT

(Being an Appeal from the judgment and decree of Hon. Obulutsa delivered in Nairobi CMCC 1937 of 2010 on 15/11/2012)

JUDGEMENT

1. This is an Appeal against the award of damages given by the lower court. By consent, the parties agreed to apportion liability at 90% against the Appellant and 10% against the Respondent. Upon assessing the damages the trial Court awarded the sum of Kshs. 900,000 which is the subject of this Appeal as the Appellant was aggrieved by the said award. From the Memorandum of Appeal dated 22nd November, 2012, it is stated that the learned trial magistrate erred in assessing general damages for pain and suffering which were so high to represent an erroneous estimate of the loss suffered. This appeal is therefore against the award on damages only and therefore, the only issue for determination herein is whether the award was so high to represent an erroneous estimate of the injuries suffered.
2. This being a first appeal, the role of this court is to re-evaluate the evidence that was before the lower court and determine whether that appeal is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.
3. In the case of **Mbogo & Another -v- Shah (1968) EA 93 at 96**, it was stated that *an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.*
4. From the two medical reports prepared by Dr. Wokabi and Dr. Shah, the injuries suffered by the Respondent were loss of three upper teeth, fracture of the right femur and soft tissue injuries to the chest and back. Dr. Wokabi noted that X-ray done to the chest and the back did not reveal any evidence of fracture and ultra sound to the abdomen was normal. He assessed permanent disability at 12 % and opined that the Respondent would incur future medical expenses to remove the nail fixed on the right leg. According to Dr. Shah, other than the 11 inch operation scar, he is able to walk without any limp and it will not be necessary to remove the metal nail unless it is occasions any complications which was not the case herein.
5. The Appeal was canvassed by way of written submissions and the Appellant suggested an amount of Kshs. 400,000/= in general damages. The Appellant supported his estimate by the case of **Francis Maina Kahura V Nahashon Wanjau Muriithi (2015) eKLR** in which the Respondent had suffered segmental fracture of the mid-shaft right femur and a cut wound on the right knee and was admitted for almost three years. In that case the high Court reduced an award of Kshs. 850,000 to 500,000. The Appellant also relied on the case of **Kenyatta University V Isaac Karumba Nyute (2014) eKLR** in which the High Court reduced an award of Kshs. 700,000 to Kshs. 350,000 where the Respondent had suffered fracture of the right femur, soft tissue injuries to the head and bruises on the right knee.
6. The Respondent urged the court to find the award of the lower court within range of current awards and relied on **HCCC 7/1998, Lucas M. Kinoru & Anor V Hakika Transport Limited & Anor** in which the Plaintiff had suffered a broken leg, broken rib and lost six teeth and was awarded Kshs. 950,000. The respondent submitted that an award between Kshs. 700,000 and Kshs. 1,300,000 is reasonable and cited other five authorities.
7. I have considered the submissions of both parties. It is a well-established principle that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. The discretion, will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; **Kanga v Manyoka [1961] EA 705, Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto [1979] E. A. 414, Butt v Khan [1981] KLR 349, Kemfro Africa t/a**

8. The Respondent was examined by two doctors. From the medical reports, the outstanding injuries sustained by the Respondent were the fracture of the right femur and loss of three teeth. The other injuries were soft tissue injuries. The authorities cited by the parties are helpful but not exactly comparable to the injuries. In the case of **Kinoru (supra)** relied on by the Respondent, in which the plaintiff was awarded Kshs, 950,000/= the Plaintiff, in addition to the fractured femur, also suffered a fracture of the 6th rib and lost 6 teeth. In our case the Respondent only lost 3 teeth. The injuries were therefore more severe in that case. On the other hand the authorities cited by the Appellant had lesser injuries. In both authorities the Plaintiff had suffered a fracture of the Femur but the rest were soft tissue injuries. No teeth were lost in those authorities.

9. In line with the above and considering the injuries suffered by the Respondent in comparison with the authorities cited, I find that the award of Kshs. 900,000 was excessive. The Respondent suffered a fracture to the right femur and lost three teeth with soft tissue injuries to chest and back. I find that an award of Kshs. 500,000/- would be appropriate and sufficient in the circumstances and a true estimate of the injuries suffered.

10. In the end the appeal partially succeeds to the extent that the award of general damages is set aside and substituted with the sum of Kshs. 500,000/- subject to contribution as per the consent filed in the lower court.

11. Each party shall bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*