



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 84 OF 2017

EQUATOR BOTTLERS & ANOTHER.....APPELLANT

JOSEPH OMONDI OUDA..... RESPONDENT

[An appeal from the judgment in original Kisumu Chief Magistrate's Court Civil Case Number 362 of 2015]

JUDGMENT

1. This is an appeal in relation to the quantum of General Damages which the trial court awarded to the respondent, **JOSEPH OMONDI OUDA**.

2. The record of the proceedings before the trial court shows that on 12th September 2017, the parties recorded a consent on the issue of liability. Pursuant to the said consent the defendants conceded 80% liability. In effect, the defendants conceded that they would settle 80% of the compensation awarded to the plaintiff.

3. Having given due consideration to the evidence tendered, the learned trial magistrate awarded compensation in the sum of Kshs 800,000/=.

4. The defendants felt aggrieved by the award, hence this appeal to the High court.

5. The defendants said that the sum awarded was manifestly excessive, as it was not comparable to awards made in cases which were similar to this one.

6. The appellant invited this court to refrain from endorsement of extravagant damages, because;

“.....inordinately high awards will lead to monstrously high premiums for Insurance of all sorts, and it is to be avoided for the sake of everyone in the country”.

Per Court of Appeal in HASSAN VS NATHAN MWANGI KAMAU TRANSPORTERS AND 5 OTHERS NBI CACA NO. 123 OF 1985.

7. When a court awards damages which were excessive, it means that the said court failed to exercise its discretion judiciously.

8. If courts consciously awarded damages that were in tandem with the principles applicable in the assessment of appropriate compensation, in all probability such awards would be adequate to compensate for the injury or the loss suffered. It would be a fair and just award in the circumstances of the person being compensated.

9. At the other end of the scales of justice, it can be said that an award which was insufficient was neither fair nor just.

10. In this case, the appellants submitted that the trial court had erred by placing reliance upon the Medical Report signed by Dr. MANASSEH O. ONYIMBI.

11. As far as the appellants were concerned, Dr. Onyimbi had, inexplicably, introduced into his report, particulars of injuries which the respondent had not suffered.

12. It was the submission of the appellants that the respondent had sustained only one injury, and that that fact was very clear from the DISCHARGE SUMMARY. The said single injury was cited in the Discharge Summary as being a bilateral fracture.

13. The appellants also drew my attention to the P3 Form, which mentioned the injury as being a bilateral fracture of the femur.

14. In respect to that single injury, the appellants submitted that the award of Kshs 800,000/= was manifestly excessive. Their contention was that an award of a sum between Kshs 300,000/= and Kshs 400,000/= was adequate compensation.

15. In support of their submissions, the appellants cited the decision of **Wakiaga J. in ZACHARIAH MWANGI NJERU VS JOSEPH WACHIRA KANOGA, (NYERI) CIVIL APPEAL NO. 9 OF 2012.** In that case, the learned judge reduced the quantum of damages from Kshs 800,000/= to kshs 400,000/=.

16. The reason for that reduction was that the learned trial magistrate had erred, by taking into account irrelevant material. The trial court had relied on an authority in which the injuries suffered by the plaintiff were much more serious than those which the plaintiff in the case before it.

17. In this case the respondent has submitted that the learned trial magistrate did not take into account any irrelevant material. Indeed, the respondent's view was that it is the appellants who were now asking the court to disregard evidence which the appellants had adduced in court.

18. In its judgment, the trial court said that the plaintiff had suffered the following injuries;

1. "Head injury with cut wounds on right scalp.
2. Blunt chest injury with damage to rib cage;
3. Dislocation of both shoulder joints;
4. Bilateral fracture of both right and left femur;
5. Soft tissue injury on right foot."

19. According to the learned trial magistrate, the extent of the injuries sustained by the plaintiff were discernable from the Discharge Summary, together with the medical reports of Dr. Onyimbi and Dr. Olima, respectively.

20. I have verified from the record of the proceedings that the medical report by Dr. Olima was adduced in evidence by the defendants. Therefore, the appellants were wrong to have asked this court to only rely upon the discharge summary.

21. Secondly, I note that on 13th June 2017, the medical report by Dr. Manasseh O. Onyimbi was admitted into evidence, by consent of the parties. Accordingly, the trial court had an obligation to take into account the contents of the medical report of Dr. Onyimbi.

22. The record of the proceedings shows that the defendants cross-examined the plaintiff in a manner suggesting that Dr. Onyimbi may not have examined the plaintiff.

23. If, as the appellants submitted, they seriously doubted that the respondent ever visited Dr. Onyimbi, the said appellants should not have consented to admission of Dr. Onyimbi's medical report. They would then have had the opportunity of questioning the doctor concerning the contents of his medical report.

24. It was not the obligation of the plaintiff to tender an explanation about how Dr. Onyimbi arrived at the alleged extra injuries. It is only the doctor who could have given the requisite explanation.

25. But when the appellants consented to the admission of the medical report, without reserving their right to cross-examine him, the appellants are deemed to have made a conscious decision to forego their right to cross-examine the doctor. Therefore, the appellants cannot now replace the process of cross-examination, by submissions which appear to question the contents of a medical report which they had already consented to being admitted in evidence.

26. Most significantly, I note that it is the appellants who exhibited the medical report of Dr. D.O Olima. The said report indicated that the respondent had sustained the following injuries;

(a) **"Head and neck**

- o Lacerations of the right temporal region.

(b) **Chest and Abdomen**

- o blunt chest injuries.

(c) **Musculoskeletal System**

- o Fracture middle 1/3 right femur

- o Fracture middle 1/3 left femur
- o Fracture of 2nd metatarsal of right foot.
- o Lacerations dorsum of right hand.”

27. It therefore follows that the medical doctor whom the appellants had assigned the role of examining the respondent, did not say that the respondent had suffered only one injury. If anything, the doctor’s medical report bore a close resemblance to the report by Dr. Onyimbi.

28. Accordingly, I find that the appellants were wrong to have submitted that the learned trial court should have only been guided by the discharge summary. The court was very right to have made reference to the medical reports by Dr. Onyimbi and Dr. Olima. Therefore, the factual basis upon which the appeal was founded, has collapsed totally.

29. I find that the learned trial magistrate applied the correct legal approach in the assessment of the damages awardable to the plaintiff. He did not take into account any irrelevant factors, nor did he fail to take into account any relevant factors.

30. Accordingly, this court would not be justified in substituting the figure awarded by the trial court simply because I could possibly have awarded a different figure if I had been the trial court.

31. In the result I find no basis in law for interfering with the damages awarded by the trial court.

32. The appeal is therefore dismissed, with costs to the respondent.

DATED, SIGNED and DELIVERED at KISUMU this 5th day of July 2018.

FRED A. OCHIENG

JUDGE