



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 12 OF 2017

(Being an appeal arising from Judgement and Decree in Kitale Chief Magistrate's Court CMCC No. 301 of 2015 delivered by V.O. Adet Senior Resident Magistrate on 6/9/2017)

READY CONSULTANCY CO. LIMITED.....APPELLANT

VERSUS

GEOFFREY OMUSE ETIANG.....RESPONDENT

J U D G M E N T

1. This is an appeal resulting from the findings by the trial court in respect to an industrial accident that occurred in 25/8/2015 in which the Appellant sustained the following injuries.

1) Left forearm was crushed and had a degloving wound

2) Sustained traumatic amputation of the left small finger lost two phalanges.

2. The parties agreed on liability and all that the trial court was left to determine was on quantum. The court awarded a sum of Kshs 700,000/- as general damages. This has formed a subject of this appeal. According to the appellant the same was too high in the circumstances and that the trial court in arriving at it applied wrong principles. In essence the award was not commensurate to the injuries sustained by the respondent.

3. Both submission by the parties in support and in opposition to the appeal have been considered by this court. The direction given in the case of *Kemfo Africa Ltd T/A Meru Express & Another Vs A.M. Lubi & Another (No. 2) (1987) KLR* are valid to date, namely

“ The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”

4. The two medical reports by Dr. S.I. Aluda and Dr Z. Gaya agree on the injuries sustained by the respondent. Dr Gaya apotions permanent disability at 35% which shows that the respondent effectively cannot use the hand appropriately. This percentage of disability was not contested.

5. The general trend is to apply comparatives to earlier decided cases although essentially each case is to be treated on its own. The authority relied upon by the appellant, namely *Kennedy Mutinde Nzioka Vs Basco Product (Kenya) Ltd Number 98 of 2011 industrial Court at Nairobi* and *Oluoch Erick Gogo Vs Reversal Corporation Limited* awarded the victim Kshs 200,000/=.

6. The respondent relied on the case of *Pietro Canabbio Vs Joseph Amani Hirizano Malindi HCCA No 48 of 2013* and *Pyramid Pakaging Limited Vs Humphrey W. Wanjala Eldoret HCCA 67 of 2012* in which the court awarded Kshs 750,000/- and Kshs 650,000/= to the claimant respectively.

7. In the Mutinde case the disability was assessed at 2%. In the Oluoch Gogo case he suffered crushed injury to the left thumb with fracture of mid phalanx.

8. Obviously the injuries sustained in the authorities relied on by the appellant were not as serious as the case at hand.

9. I have read the authorities cited by the respondent and I find them relevant to the situation at hand. The award of Kshs 700,000/= was not

excessive taking into consideration the nature of the injuries and the fact that he would never use his hand effectively. The question of whether it was left or right hand in my view does not oust the fact that he cannot use the hand as he ought to. Both hands were created for their noble usage and any interference with the same by whichever means effectively renders one incapacitated.

10. The trial court did not consider irrelevant factors in arriving at the decision. Neither was the award excessive. I am equally mindful of the fact that the said award was subjected to contributory negligence on the part of the respondent.

11. In the premises the appeal is hereby dismissed with costs to the respondent.

Delivered, signed and dated at Kitale on this 17th day of July 2018.

H.K. CHEMITEI

JUDGE

17/7/18

In the presence of:

Njuguna holding brief for Kitiwa for Applicant

Bororio for Omondi for Respondent

Kirong – Court Assistant

Judgement read in open court