



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 139 OF 2010

ATHI RIVER STEEL PLANT LTD.....APPELLANT

VERSUS

PETER MUTHOKA NDAMBUKI.....RESPONDENT

(Being an appeal from the judgement of Honourable Mungai (Senior Principal Magistrate) delivered on 10th September, 2010 in the Chief Magistrate's Court at Machakos in CMCC No.264 of 2008 Peter Muthoka Ndambuki =Vs= Athi River Plant Ltd)

JUDGEMENT

1. The Appeal arises from the judgement of Hon. Mungai SPM in **Machakos CMCC No. 264 of 2008** dated 10/09/2010 wherein the Respondent was awarded general damages in the sum of Kshs.800,000/=.

2. The Appellant was aggrieved by the judgement on quantum of damages and raised two grounds of appeal namely:-

(i) The learned Senior Principal Magistrate erred in law is making an award that is manifestly excessive given the nature of injuries sustained by the Respondent.

(ii) The learned Senior Principal Magistrate erred in law and in fact by considering matters that he ought not to have considered and applied the wrong principles in law and assessing the general damages.

3. This being a first appeal, the court's duty is to re-assess the evidence afresh and come to its own independent conclusion. (see **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123**). However, it is noted that there was no trial in the matter before the trial court since the parties recorded a consent on the 23/07/2010 as follows:-

“By Consent’

(1) Liability be and is hereby agreed and entered at the ratio of 70:30 in favour of the plaintiff.

(2) Supporting documents namely the plaintiffs bundle of documents No.1 to 5 be admitted without calling the makers.

(3) Defendant's supporting documents the medical report dated 31/07/2009 be also admitted.....”

Upon the entry of the aforesaid consent, parties proceeded to file written submissions. It had been submitted for the Respondent that the sum of Kshs. 1,099,000/= was adequate as general damages. Several cases were relied upon. It was submitted for the Appellant that the sum of Kshs.600,000/= as general damages would be adequate. The trial court in its judgment dated 10/09/2010 awarded the respondent the sum of Kshs. 800,000/= as general damages which sum was to be subjected to the agreed 30% contribution on liability.

4. The Respondent had been examined by two doctors namely Dr. Makau and Dr. Madhiwala who prepared medical reports which were duly admitted by the parties by consent. Both the two doctors in their reports were in agreement that there was a total loss of vision in the Respondent's left eye and that the permanent disability was established at 30%. It had been pleaded in the Respondent's plaint that the injuries were sustained while working at the Appellant's furnace department when the furnace exploded and that metallic pieces injured his eyes. The particular injuries were a ruptured globe left eye, blunt trauma nose with epistaxis and cut wound left upper and lower lips.

5. The appeal herein was canvassed by way of written submissions. It was submitted by Appellant's counsel that the trial magistrate failed to take into account the fact that despite the Respondent suffering a permanent disability of 30% he still had 70% ability to see and therefore there was no basis for the award of Kshs.800,000/= yet there was no total blindness suffered by Respondent. Learned counsel submitted that general damages of Kshs.600,000/= should be adequate for the Respondents injuries. The cases of **DEVKI STEEL MILLS LTD =VS=**

FRANCIS MUSYOKI NGUMBI HCCA NO.375 OF 2006 where a sum of Kshs.500,000/= was awarded for loss of left eye vision with a permanent disability assessed at 30%. **WANDI LTD =VS= CHARLES ADWOGO KEDAGA NBI HCCA. 68 of 2010** where an award of Kshs. 400,000/= as general damages was upheld for a plaintiff who had loss of vision of the left eye with a disability of 33%.

Learned Counsel for the Respondent submitted that the award by the trial court of Kshs.800,000/= was proper in that the case of **KITAVI =VS= COASTAL BOTTLERS LTD [1985] eKLR** was relied upon as the issue of inflation on an earlier award of Kshs. 450,000/= for over twenty years had been factored into account. It was finally submitted that the trial court had applied the correct principles when assessing the award of damages and therefore the appeal should be dismissed with costs to the Respondent.

6. I have considered the submissions of learned counsel for the parties herein as well as the cases cited. I find the following issues necessary for determination namely:-

(i) Whether the award of damages by the trial court was manifestly excessive.

(ii) Whether the trial court's award of damages should be set aside.

7. As regards the first issue, it is noted that the trial court awarded the sum of Kshs.800,000/= as general damages for pain and suffering and loss of amenities. It is trite law that the award of damages is always an exercise of discretion by a trial court. However, the appellate courts at times may be compelled to interfere with award of damages by trial courts if certain factors are evident namely that the sum was inordinately high or low, the trial judge/magistrate proceeded on wrong principles and lastly that the trial court misapprehended the evidence (see **BUTT =VS= KHAN [1978] eKLR**. Again in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES (1976) & ANOTHER =VS= LUBIA & ANOTHER [1985] eKLR** the court of appeal stated as follows :-

“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 were held by the former court of Appeal of Eastern Africa to be 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 a wholly erroneous estimate of the damage.”

This court has now been requested by the Appellant to interfere with the trial court's award of Kshs. 800,000/= and bring it down to Kshs.600,000/=. I have perused the judgment of the trial magistrate dated 10/09/2010 and note that he appears to have been persuaded by the Respondent's counsel's submissions who had cited the case of **KITAVI =VS= COASTAL BOTTLERS LTD CA NO. 69 OF 1984** where the sum of Kshs.475,000/= was awarded for loss of one eye in 1985 and that the learned counsel appeared to have persuaded the trial court to take into consideration the aspect of inflation for a period of over 20 years. However I find even with effects of inflation, the amount ought not to have doubled. The two authorities cited by the learned counsel for the Appellant in this appeal namely **DEVKI STEEL MILLS LTD =VS= FRANCIS MUSYOKI NGUMBI HCCA NO. 68 OF 2010 WANDI LTD =VS= CHARLES ADWOGO KIDABA** had award of damages ranging between Kshs.400,000/= and Kshs.500,000/=. These decisions were made in the year 2010 and therefore they were quite recent and the injuries sustained by the Plaintiffs in those cases involve loss of one eye with a permanent disability of about 30% just like the Respondents circumstances. Hence the award of Kshs.600,000/= proposed by the Appellant's learned counsel at the trial court and this court appear to me to be quite appropriate in the circumstances and the trial court ought to have accepted the same as the award of damages due to the Respondents loss of one eye. Consequently I find that the award of damages by the trial court was manifestly excessive. The trial court obviously had taken into account an irrelevant factor and thus arrived at the award which was inordinately high in the circumstances.

8. As regards the second issue and in view of the observations noted in (7) above, I find that the trial court's award of damages in the sum of Kshs.800,000/= must be set aside and substituted with an award of Kshs.600,000/=. As the claim for special damages had not been specifically pleaded, I find there shall be no award in that regard.

9. In the result the Appellant's appeal succeeds. The lower court's award of Kshs.800,000/= is hereby set aside and substituted with an award of Kshs.600,000/= which shall of course attract the agreed contribution of 30% liability. Each party to meet their costs of this appeal.

Orders accordingly.

Dated and delivered at MACHAKOS this 16th day of October, 2018.

D.K.KEMEI

JUDGE