



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 493 OF 2015

KENYA POWER & LIGHTING CO. LTD.....1ST APPELLANT

BARNG'ETUNY JANE.....2ND APPELLANT

VERSUS

KATHUO MUTHANGYA.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Milimani Commercial Court Nairobi by the Hon. Wachira (Mrs), Senior Principal Magistrate delivered on 25th September 2015 in CMCC No 4421 of 2013)

JUDGMENT

INTRODUCTION

1. In a decision delivered on 25th September 2015 by Hon L. Kassan, Senior Principal Magistrate on behalf of the Learned Trial Magistrate T.S. Nchoe, Resident Magistrate, judgment was entered in favour of the Respondent against the 1st and 2nd Appellants as follows:-

a. General damages Kshs 450,000/=

b. Special damages Kshs 2,500/=

Kshs 452,500/=

plus costs of the suit. Liability had been apportioned at (50%-50%) by consent of the parties herein.

2. Being dissatisfied with the said decision, on 23rd October 2015, the Appellants filed a Memorandum of Appeal of even date. They relied on four (4) Grounds of Appeal.

3. On 29th October 2015, Hon Lilian Arika (Mrs), Senior Principal Magistrate, adopted a consent that was recorded by the parties in the following terms:-

a) By consent, the application dated 23rd October, 2015 be allowed subject to release of Kshs Two hundred and fifteen thousand shillings two hundred and thirty to the Plaintiff's advocates in the next 30 days.

b) The balance of Kshs Two hundred and ninety thousand eight hundred be deposited in a joint interest earning account in the names of the parties advocates firm within the next 30 days as well.

c) In default, execution to issue.

4. The Appellants' Written Submissions were dated 4th June 2018 and filed on 5th June 2018 while those of the Respondent were dated 30th May 2018 and filed on 4th June 2018.

5. When the matter came before the court on 19th June 2018, the parties requested the court to deliver its decisions based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

7. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd[1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the parties' Written Submissions and case law that they each relied upon, it appeared to this court that the only issue that had been placed before it was whether or not the Learned Trial Magistrate awarded damages that were inordinately high or manifestly excessive warranting its interference.

9. The Appellants submitted that the two (2) Medical Reports that were tendered in evidence showed that the injuries that the Respondent sustained would not have hindered his nature of work as he had fully recovered.

10. They pointed out that despite them having recorded a consent on liability at 50%-50% on 8th October 2014, the Trial Court awarded the Respondent a sum of Kshs 900,000/= which did not reflect the recovery he had made.

11. They relied on the cases of Thomas Mwangi Kamau [2012] eKLR, Butt vs Khan [1981] KLR 349 and Sammy Mugo Kinyanjui & Another vs Kairo Thuo [2017] eKLR in support of their case.

12. On his part, the Respondent pointed out that the Learned Trial Magistrate awarded him Kshs 450,000/= after contribution of liability on his part. It was his contention that Mr W M Wokabi assessed the degree of disability that he suffered at ten (10%) per cent and consequently, it was his submission that the Learned Trial Magistrate was justified in having awarded him a sum of Kshs 900,000/= general damages. He therefore urged this court ought not to interfere with the same.

13. He placed reliance on the case of Shabani vs City Council of Kenya [1988] KLR 516 where it was stated as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong legal principle or on a misapprehension of the evidence”.

14. This court carefully perused the Medical Report of Mr W.M Wokabi dated 1st March 2013, which was produced without calling him to tender the same in evidence, and noted that the Respondent herein had sustained a fracture of the left tibia and fracture of left fibula following a road traffic accident that occurred on 14th December 2012. On the material date, he was hit by the 1st Appellant's motor vehicle Registration No KBC 165Z as he was walking along Pangani- Forest Road Flyover- Total Petrol Station.

15. At the time of the medical examination by Mr W.M. Wokabi, he complained of pain in the left leg, inability to run or walk briskly, inability to work or stand for long hours. At the time, he was walking with the aid of crutches. The doctor observed that there was obvious angulation on the fracture site and restrictions on the left ankle joint and that he also had a scar on the right forehead.

16. In his prognosis, the doctor found that the fractures had united but with bony angulation but that he had fully recovered from the injuries. He conferred permanent disability at ten (10%) per cent.

17. In the Medical Report of Mr Yusuf Kodwawwala dated 26th November 2013 which was also produced as evidence without calling the maker, the doctor confirmed that the fractures had united with some angulations and overlap. At the time, the Respondent was walking without crutches and his ankle was no longer stiff. Mr Yusuf Kodwawwala assessed his permanent disability at five (5%) per cent.

18. The Appellants did not refer this court to any decisions to justify why the Respondent should be awarded lower general damages. In their Written Submissions in the lower court, they had opined that a sum of Kshs 350,000/= general would be adequate compensation. On his part, the Respondent had sought general damages in the sum of Kshs 1,000,000/=.

19. A perusal of Mr W.M. Wokabi's Medical Report and the Complaint dated 18th July 2013 shows that the Respondent sustained a fracture to the left tibia and fracture to the left fibula. Mr Yusuf Kodwawwala referred to the injury as an open fracture in the left lower leg. The two (2) Medical Reports were basically saying the same thing; that the Respondent suffered a fracture to his left lower leg.

20. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

21. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by

precedents.

22. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

23. Remaining faithful to the doctrine of *stare decisis*, this court therefore looked at recent cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein. It found it necessary to look at several cases dealing with different injuries to give the parties a sense of awards that are been given by the courts in the recent past as it has noted that there is a tendency by advocates dealing with injury claims to rely on very old cases and propose outrageous figures.

24. This is despite there being a dearth of recent jurisprudence in this area. Reliance on such obsolete cases does little in the development of jurisprudence. It is highly recommended that parties try as much as possible to submit on comparable cases to avoid the courts wasting time doing research for them.

25. In the case of Zachary Kariithi v Jashon Otieno Ochola [2016] eKLR, the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th 5th ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. In 2016, Majanja J awarded a sum of Kshs 1,500,000/= general damages, pain and suffering and loss of amenities.

26. In the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2001] eKLR the plaintiff therein had sustained ruptured urinary bladder, fracture of the fibula and superficial injuries to the right axle, left hand and both knees. In that case, the trial court therein had awarded a sum of Kshs 450,000/= which on appeal was reduced to Kshs 300,000/= as the appellate court had found the sum of Kshs 450,000/= to have been excessive.

27. This court agreed with the Appellants that a sum of Kshs 900,000/= general damages was too excessive in the circumstances of the case because by the time the Respondent was re-examined by Mr Yusuf Kodwawwala on 26th November 2013, he had fully recovered. Permanent disability had gone down to five (5%) per cent from the ten (10%) per cent permanent disability that had been assessed by Mr W M Wokabi.

28. Doing the best that it could and taking into consideration the inflationary trends, this court came to the firm conclusion that a sum of Kshs 600,000/= general damages would be adequate compensation for the injuries that he sustained.

DISPOSITION

29. In the premises foregoing, the upshot of this court’s decision was that the Appellants’ Appeal that was lodged on 23rd October 2015 was successful. Judgment for the sum of Kshs 900,000/= general damages, pain and suffering and loss of amenities is therefore hereby set aside and/or vacated and replaced with the sum of Kshs 600,000/= general damages and costs plus interest thereon at court rates.

30. As the apportionment of liability at 50%-50% remained undisturbed, the computation of the Respondent’s claim was as follows:-

General damages	Kshs 600,000/=
Special damages	<u>Kshs 2,500/=</u>
	Kshs 602,500/=
Less 50% contribution	<u>Kshs 301,250/=</u>
	Kshs 301,250/=
Less paid as per consent of 29/10/15	<u>Kshs 215,230/=</u>
	Kshs 107,615/=

31. It is hereby directed that the balance of Kshs 183,185/= being part of the sum of Kshs 290,800/= that was deposited in a joint interest earning account in the names of the parties’ advocates pursuant to the consent that was recorded by Hon L Arika (Mrs) SPM, be and is hereby released to the Appellants’ advocates forthwith.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of October 2018

J. KAMAU

JUDGE