



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO 73 OF 2015

MATHEWS OMONDI OKUT.....APPELLANT

VERSUS

BROADWAYS INDUSTRIAL &

TOOLS LIMITED.....RESPONDENT

(Appeal against the judgement and decree by Hon. N. Moseki (RM) in Eldoret CMCC No. 451 of 2013 delivered on 16th June, 2015)

JUDGEMENT

1. The appellant has filed this appeal on grounds that:

- a) That the learned magistrate erred in law and in fact in awarding general damages of KShs. 300,000/- which was inordinately low keeping in mind the severe injuries that were sustained by the appellant.*
- b) The learned magistrate erred in failing to appreciate the appellant's submissions on the issue of quantum and comparative awards made in earlier decided cases.*
- c) The learned magistrate erred in failing to consider the injuries sustained by the appellant while making the award on damages payable to the appellant.*

2. This is a first appeal, this court is therefore under duty to re-evaluate the evidence adduced in the subordinate court both on points of facts and law and come up with its findings and conclusions. See: **Selle v. Associated Motor Boat Co. Limited [1968] EA, 123**. It is clear to me that the appeal is purely on quantum and I shall therefore restrict myself to the said issue.

3. The appellant sued the respondent seeking recovery of damages arising from an accident alleged to have occurred on or about 29th November, 2011 while undertaking duties assigned by the respondent. He prayed for special damages of KShs. 1,500/- for medical report and KShs. 2,420/- for treatment expenses. The appellant allegedly sustained the following injuries:

- a) The forehead was swollen and tender.*
- b) Blunt trauma to the neck which was tender and stiff.*
- c) Blunt trauma to the chest which was tender.*
- d) Blunt trauma to the spinal column which was tender.*
- e) Both forearms were swollen and tender.*
- f) Fracture of the left radius at the wrist joint.*
- g) The right hip and right lower limb were swollen and tender and*
- h) Fracture of the right radius at the wrist joint.*

4. It was the appellant's testimony that he was assigned the duty to plaster a wall. He ascended using a ladder and had completed the 1st

floor and 2nd floor. He called on the foreman to inspect the work. The foreman ascended and stood on the rings of the ladder, while inspecting, the ladder suddenly broke and fell occasioning him the mentioned injuries. He was taken to the company clinic for first aid then referred to Moi Teaching and Referral Hospital (MT & RH). He was later examined by Dr. Aluda and Dr. Gaya who prepared medical reports in that regard. The appellant stated that he spent KShs. 2,200/- for treatment and he produced receipts to that effect as P. Exhibit 6 (a) – (e). Dr. Paul Kipkorir (PW2) who is in charge of medical legal section at MT & RH confirmed that the appellant was treated at the facility as alleged. He produced patient card (P. Exhibit 1), treatment notes as P. Exhibit 2, X-ray test forms as P. Exhibit 3 (a) – (c), patient attendance card (P. Exhibit 4) and prescription as P. Exhibit 5. Dr. Aluda (PW3) confirmed that he examined the appellant with the pleaded injuries which he stated were fresh and were continuing to heal. He produced a medical report and a receipt for KShs. 1,500/- as P. Exhibit 7 (a) and (b) respectively.

5. Nicholas Juma (DW1) stated that he and the appellant fell on the material day but that the appellant suffered minor injuries. That the wall that the appellant was plastering was 12 feet tall but that it was impossible for the appellant to suffer fracture considering that they fell from a height of 5 feet.

6. The parties sought to rely on the submissions tendered before the trial court. It was submitted by the appellant that Dr. Gaya confirmed the injuries and assessed permanent disability at 16% confirming the gravity of the injuries suffered by the appellant. The appellant cited **Tarasia Wanja & Another v. Peter Kirihi Muthuri., Meru HCCA No. 12 of 2013** and urged the court to award KShs. 800,000/- as general damages. He further urged that special damages be awarded at KShs. 3,920/- receipts having been produced.

7. The respondent on the other hand submitted that no X-ray films were produced to confirm the alleged fractures and that the appellant's injuries raise a red flag. The respondent cited **Amalgamated Saw Mills Ltd v. Tabitha Wanjiku., Nakuru HCCA No. 272 of 2004, Kiwanjani Hardware Ltd v. Laban Kiilu Muthoka., Machakos HCCA No. 17 of 2008** and **Samuel Ndirangu Ng'ang'a v. Lucy Wambui Wachira., HCCA No. 117 of 2008** and urged that KShs. 200,000/- will reasonably compensate the appellant.

8. The issue for determination in this appeal is whether or not the trial court awarded inordinately low award in the circumstances. Dr. Gaya who examined the appellant confirmed that he sustained the said injuries as pleaded and assessed the permanent disability at 16%. The principles to be applied by an appellate court to determine whether or not to interfere with a trial court's finding on quantum was discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)”

9. In awarding the said damages, the trial court bore in mind the extent of the injury suffered and authorities relevant thereto. I find the appellants injuries were not severe and the cases relied upon by the trial court had relevant comparable injuries and awards. In the circumstances, I am unable to find that the trial court erred in awarding the damages as done. In the end, I find no merit in this appeal and it is hereby dismissed with costs.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22nd day of **November, 2018.**

HELLEN OMONDI

JUDGE