



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 107 OF 2012

(CORAM: GIKONYO J)

ISAAC MURIUNGIMBATARU..... APPELLANT

Versus

SILAS KALUMANI.....RESPONDENT

(Appeal arising from the judgment by Hon. Onyango in MERU CMCC NO. 621 OF 2010 delivered on 25.10.2012)

JUDGMENT

Appeal on quantum of damages

[1] On 22.5.2012, liability was settled by consent judgment wherein the Appellant (then the Defendant) was to shoulder 85% liability and the Respondent (then the Plaintiff) made a contributory negligence of 15%. Subsequent to that consent judgment the trial magistrate **Hon. Onyango** heard the case for purposes of assessment of damages, and delivered judgment in MERU CMCC NO. 621 OF 2010 awarding the Respondent a sum of Kshs. 350,000 as general damages for pain and suffering and Kshs. 3000 as special damages. He subjected the award to the contribution of 15% agreed between the parties and ultimately the sum payable was Kshs. 300,050. The Appellant was aggrieved by the said judgment and filed a Memorandum of Appeal dated 25th November 2012 which carried two grounds namely:

- (1) THAT the learned trial Magistrate erred in law in awarding general damages of Kshs. 350,000 which is inordinately excessive comparing to the injuries sustained by the claimant.**
- (2) THAT the judgment of the learned Magistrate is against the law and weight of evidence on record.**

Directions

[2] On 28th April 2016, by consent of the parties, the court directed that this appeal shall be canvassed by way of written submissions. Parties filed submissions thereto and I will consider them. I will also do what the first appellate court should do; evaluate the evidence and come to own conclusions in the matter.

Analysis of evidence

[3] Dr. John Macharia, who examined the Respondent, testified as PW1 and he produced the medical report on the injuries sustained by the Respondent. He told the court that the injuries sustained by the

Respondent were:

- (a) Soft tissue injuries on the right side of the face- there were swelling/lacerations and bruises
- (b) Loss of 2 incisors (upper teeth)
- (c) Tenderness and swelling of lower back.

According to the doctor, the Respondent did not have complaints at the time of the examination, except he had scars on the right side of the face and two missing upper teeth. The missing teeth required dental filling for aesthetic purposes and would cost Kshs. 15,000.

[4] The Respondent also testified among other things told the court that he was injured on the back of the head, the face and he lost two teeth. He also stated that he was admitted for 3 days as a result of the injuries suffered. He had, however, healed well. He sought for compensation to replace his lost teeth.

DETERMINATION

[5] This is an appeal on quantum of damages. I need not re-invent the wheel on the legal threshold in such appeal. Quantum of damages is a matter of the discretion of the trial court. Accordingly, the appellate court will only interfere with the exercise of discretion on quantum of damages only in circumstances set out in the case of **KENYA BUS SERVICES LIMITED vs. JANE KARAMBUGITUMA CIVIL APPEAL CASE NO 241 OF 2000** by the Court of Appeal when it stated thus:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

[6] Applying this test, did the trial magistrate commit an error of principle? The Appellant were of the view that the trial magistrate committed an error of principle. They sought to demonstrate the error and submitted that the trial magistrate took into account a non-existent injury- injury to the eye- which was not mentioned anywhere in the medical notes, medical report and the P3 Form. According to the Appellant, this erroneous consideration led to erroneous estimate of damages. They also submitted that the trial magistrate erroneously concluded that the Respondent had not healed well when the doctor had concluded that he had healed well. In consequence thereof, the Appellant urged that the trial magistrate did not exercise his discretion judicially and should be interfered with- be set aside. And after citing several persuasive judicial authorities filed in court and words of wisdom by Lord Morris of Borth-y-west in the case of **WEST (H) & SONS LTD vs. SHEPHERD (1964) A.C. 326** and Lord Denning MR in the case of **LIM POH CHOO vs. CAMDEN AND ISLINGTON AREA HEALTH AUTHORITY (1979) All ER 332** the Appellant suggested a sum of Kshs. 100,000 for general damages.

[7] Before I consider the submissions by the Respondent, let me clear one misconception by the Appellant. The trial magistrate only restated the testimony of the Respondent that he had injury to the eye but he did not specifically consider or take that testimony into account in his assessment of damages as was claimed by the Appellant. The emphasis placed on that point is, therefore, misplaced and misleading.

[8] I turn back to the submissions by the Respondent. The Respondent was of a different opinion; he submitted that the trial magistrate committed no error of principle as the award was consistent with the injuries sustained. They cited judicial authorities to support the award of Kshs. 350,000 and laid emphasis on the loss of two upper teeth as serious injury. Ultimately, he concluded that the trial magistrate exercised his discretion judicially and the court should uphold the award.

[9] Now it is the turn of the umpire to pass verdict. After careful consideration of the facts of the case, the evidence tendered, submission by parties and the law applicable, I take the following view of the matter. From the onset, I must say that the authorities cited by the Appellant in this appeal were decided in 2005, 2006 and the latest in 2009. Therefore, inflation will be a factor to consider when considering such decisions that were made about 12-8 years ago. At least, the trial magistrate also observed that fact and took inflation into account in assessing damages. That consideration was relevant and the trial magistrate did not err at all in that respect. Notably, in the case of **STYROPLAST**, the injuries were mere soft tissue injuries on the right footand which had healed fully- the court noted that they were not serious at all. Similarly, the court observed that the injuries sustained by the claimants in the **SOKOTO SAW MILL CASE** and **SOCFINAF CASE** were minor and mere soft tissue injuries. That explains the awards in those cases which ranged from Kshs. 20,000 to Kshs. 40,000. In the case before me, the injuries were on the face and left scars on the left side of the Respondent's face- this is an important matter in assessment of damages given the placing of those injuries. In addition, the Respondent lost two upper teeth which requires dental filling for aesthetic purposes and would cost Kshs. 15,000. Of course, these are relevant considerations which the court must take into account in assessing damages. However, the trial magistrate merely made a general statement on the judicial authorities cited without specifying the particular points of emphasis which justifies the figure of Kshs. 350,000 for general damages for pain and suffering as reasonable compensation of the injuries sustained. I think, as it is not possible to renew the physical harm caused by injuries, and it is not possible to find a decision exactly on the same injuries, it is desirable that the court should set out the specific points of emphasis and which are peculiar to the injuries in the case at hand and relate them to the comparable authorities cited in order to justify that the award he has made is reasonable compensation; something the trial magistrate did not do in this case, and thus, he made an excessive award. Accordingly, there is plausible reason to interfere with the exercise of discretion by the trial magistrate in this case, and I set aside the award by the trial magistrate. In lieu thereof, upon taking into account all the factors I have set out above, inflation and the comparable awards on such injuries- see the case of **PAUL KIPSANGKOECH & ANOTHER vs. TITUS OSULEOSORE [2015] eKLR**- I hereby award:-

(a) General damages for pain and suffering;.....Kshs. 200,000

(b) Special damages.....Kshs. 3000

GROSS TOTAL.....Kshs. 203,000

Less 15%Kshs. 30,450

NET TOTAL.....Kshs. 172,550.

Costs and interest

[10] I also award the Respondent interest on special damages from the time of filing suit and on general damages from the date of assessment. Cost and interest on the sum awarded goes to the Respondent. And given the outcome of this appeal, I order each party to bear own cost of the appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 23rd day of January 2017

F. GIKONYO

JUDGE

In the presence of:

Thangicia advocate for applicant

Muriuki advocate for respondent

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F. GIKONYO

JUDGE