



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 6 OF 2014**

**WANYONYI WANJALA LUVISIA.....APPELLANT**

**VERSUS**

**NZOIA SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

1. This is an appeal arising from the judgement of Hon. Abuya in Principal Magistrate's Court in Webuye in P.M.C.C. No.57 of 2013 that was delivered on 16<sup>th</sup> January, 2014.

2. The appellant Wanyonyi Luvisia had sued the respondent Nzoia Sugar Company Limited seeking for general and special damages as a result of an industrial accident which occurred while he was in the course of his work as an employee.

3. The trial Court apportioned liability at 70% to 30% which is acceptable to the appellant. This appeal is therefore only against the award of damages.

4. The grounds of appeal are as follows;

- *The Principal Magistrate erred in Law and fact in awarding damages that were inordinately low as to amount to gross under estimation of the informer sustained.*
- *The assessment was arrived at by the application of wrong principles on the award / assessment of damages.*
- *The Principal Magistrate erred by relying solely on the submissions of the respondent's Counsel thereby displaying obvious bias.*

5. Being the first appellate Court I will consider, evaluate and analyse facts and evidence in relation to the case in order to arrive at an independent opinion as set out in Sella vs Associated Motor Boat Company Ltd (1968) E.A. 123.

6. I am also minded that I will only interfere with the award if the same is inordinately too low or too high as to cause a miscarriage or if the trial Court failed to take into account an important factor. In Robert Msioki Kitavi -vs- Coastal Bottlers Ltd (1985)1 KAR 981 at 895 Kneller J.A. stated as follows:-

*“The Court of Appeal in Kenya, then should as its fore runners did, only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so low or so high that it amounts to an erroneous estimate”*

7. PW1 Wanyonyi Wanjala Luvisia (the appellant) while giving evidence stated that he sustained the

injuries as he worked as a sugar loader. He was injured on the right leg near the waist. He sustained a fracture. At the time of hearing he walked with the aid of a walking stick. He produced in evidence two discharge summaries and a Report from Dr. Aluda.

8. A discharge summary from Lugulu Mission Hospital marked as exhibit 3 whose the diagnosis is fracture of the right femur exhibit 6 is a discharge summary from Moi Teaching & Referral hospital which indicates that he had a fracture of the femur and had undergone K- Nailing at Lugulu. Further that he sustained limb shortening of 2cm.

9. Dr. D. Aluda examined the appellant and in his medical report dated 2/4/2013 made the following findings;

Injuries sustained

1. The right thigh was swollen and tender with Lacerated wounds.
2. Fracture of right femur.

Treatment

1. A pin was inserted into the fractured femur In an open reduction operation.
2. Anti-biotics and analgesics was administered.

Findings on Examination

- i) Slight tenderness in the right thigh
- ii) Scars on the right thigh
- iii) Sustain fracture cause shortening by 2cm.

The appellant had occasional pain

Prognosis and opinion

1. Injury sustained was very severe, has healed but the appellant had occasional pain.
2. Scars were permanent.
3. The shortening is also permanent

10. Mr. F. Omondi in his written submissions urged the Court to give an award not less than 650,000/- he relied on the case of *James Mwaniki –vs- Magaret Mbugua. Kitale HCCA 18 of 2008* decided in 2011, *Mombasa HCCC No.103 of 2004, Erick Onyango Okumu –vs- SDV Tansami(K) Ltd* decided in 2007 and two other authorities.

11. On his part the Respondent's Counsel urged the Court not to interfere with the award.

12. I must point out that the authorities relied upon by the appellant's Counsel are not comparables as the victims therein sustained far serious injuries to justify the awards made in the respective cases.

13. In *HCC No.728 of 2007 Regina Mwikali Wilson –versus- Peter Muinde* in assessing damages Mabeya, J relied on the following authorities which I find very useful in considering damages herein namely;

“The task of assessing damages in a case such as this is a difficult one. The Court must nevertheless be guided by relevant authorities ...

In assessing compensatory damages the Court will always bear in mind that the purpose of awarding is not to pay as it were for the loss or injury the plaintiff suffered.

Damages only assuage the pain or loss suffered by the plaintiff because no amount of money can replace a lost limb”.

Kigaraari v Aya (1982-88)1 KAR 768 the Court stated

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

14. I have also relied on Francis Maina Karsura vs Nahashon Wanjau Mureithi HCA No.25 of 2013 where the victim (respondent) suffered a segmental fracture of the mid shaft femur and a cut wound on the right knee, had a surgical scar of 8x6cm and shortening of the right leg by 2cm. The Court awarded general damages of Kshs.500,000/- and Kenyatta University vs Isaac Karumba Nyuthe (supra) where the plaintiff was awarded Kshs.350,000/- in 2004 for a fracture of the femur and soft tissue injuries.

15. Guided accordingly I am of the view that the award of Kshs.200,000/- was inordinately low and failed to take into account the permanent injuries sustained. I will accordingly therefore set the same aside. I proceed to make the following award

(i) General damages	Kshs.500,000
(ii) Special	<u>Kshs. 1,500</u>
Total	Kshs.501,500
Less 30% contribution Negligence	Kshs.150,450
Total	<u>Kshs.351,050</u>
(iii) Costs of the suit	

DATED at BUNGOMA this 9<sup>TH</sup> day of MARCH, 2017

**ALI-ARONI**

**JUDGE**