



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 103 OF 2010

KENBLEST LIMITED APPELLANT

VERSUS

JOHN MUTISYA WAMBUA RESPONDENT

JUDGMENT

Issue for determination

0. The only question for determination in this appeal is whether the quantum of damages awarded by the trial court. Judgment on Liability has been already been entered by Consent of the parties in the ratio of 80:20 for the respondent against the appellant. The trial court assessed damages for pain and suffering at Ksh.220,000/- , which award the appellant considers manifestly excessive in view of comparable wards for comparable injuries and which the respondent supports as the product of assessment by the trial court in its discretion which should not be interfered with it not having been shown that the trial court misdirected itself by taking into account irrelevant factors or failing to take into account relevant ones. The Counsel for the parties - M/S Manthi Masika & Co. Advocates for the Appellant and M/S N. M. Kamwenda & Co Advocates for the respondent - filed written submissions respectively dated 16th October 2014 and 28th October 2015.

Determination

Exercise of discretion in award of damages

0. The court agrees with the principle alluded to by Counsel for the respondent, and the decision of Kimaru J. in *Benson Charles Ochieng and Anor. v. Susan Odhiambo* (2013) eKLR) that the power of the appellate Court to interfere with the exercise of discretion by a trial court is circumscribed. Making that observation, Sir Clement De Lestang, V-P in Court of Appeal for East Africa in *Mbogo v. Shah* (1968) EA 93, 94 said:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so has arrived at a wrong conclusion.”

0. The application of this principle with regard to the assessment of damages has been elaborated by Kneller, JA in the leading Court of Appeal case of *Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini v. A. M. Lubia and Olive Lubia* (1982-88) 1 KAR 727, 730 (cited with approval in *Wambaira & 17 Ors. v. Kiogora & 2 Ors.* (2004) eKLR) 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 Eastern Africa to be that it must be satisfied that either 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 inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango v. Manyoka* (1961) 705, 709; *Lukenya Ranching and Farming Cooperative Society Ltd. v. Kavoloto* (1970) EA 414, 418,419. This Court follows the same principles.”

0. In accordance with the duty of a first appellate court, this court is required to evaluate the evidence and reach its own conclusion as set out in *Peters v. Sunday Post Ltd.* (1958) EA 424. The two medical reports by Dr. Kiama Wangai of 13/10/2006 and Dr. A. Madhiwala of 27/1/2009 produced in court by consent of the parties without calling their makers.
0. In the present case, the parties agree on the basis of the medical reports filed by their respective doctors that the appellant suffered the following injuries:

“i. cut wound over the head;

ii. cut wound over the left forearm.”

0. In a recent decision of *Simon Muchemi Atako and Peter Ambani Shrinawa v. Gordon Osore* Civil Appeal No. 180 Of 2005 of 8th November 2013, the Court of Appeal (Maraga, M’Inoti and J.Mohamed, JJA) award Ksh. 120,000/- as general damages for pain and suffering for more serious injuries of comparable soft tissue nature as follows:

“i. Blunt chest injury;

ii. Cut wound on the left leg;

iii. bruise wound on the right knee;

iv. blunt injury on the left shoulder;

v. cut wound above the right elbow;

vi. cut wound over the occipital part of the head; and

vii. cut wound on the palms aspect of the left thumb. ”

0. The Court of Appeal in *Wambaira* decision, supra, pointed to the accepted principle of comparable awards for comparable injury as the most practical method of dealing with assessment of damages in personal injury cases. Considering this general method of approach in assessing damages that “comparable injuries should, as far as possible, be compensated by comparable awards”, I find that a sum of Ksh.150,000/- would be reasonable compensation for the pain and suffering for soft tissue injuries herein taking into account the lapse of time since the *Simon Muchemi Atako’s* decision and the attendant inflationary trends to date.
0. The award of Ksh.80,000/- for soft injuries in *Kenya Power and Lighting Co. Ltd v. Samson Machuma Makori*, Machakos Civil Appeal No. 116 of 2008 by Lenaola J. on 18th November 2008 must give way to the binding and more recent Court of Appeal decision in *Simon Muchemi Atako’s case*, above.

Conclusion

0. Having found that the appropriate for general damages is Ksh.150,000/-, I find that the award by the trial court at Ksh.220,000/- which is more than ? (33%) in excess, is manifestly excessive as to warrant the interference by the appellate court with the said award in accordance with the

authorities.

ORDERS

0. Accordingly, the appeal is allowed and the trial court's award of general damages for pain and suffering in the sum of Ksh.220,000/- for the soft tissue injuries in this case is set aside and the Court substitutes therefor an award of Ksh.150,000/- for general damages. The special damages remain at Ksh. 2,000/- making a total of Kshs. 152,000/= in total damages. This award will attract interest from 10th June 2010, the date of the judgment in the trial court. The Respondent will have costs of the suit in the trial court and in the Appeal to this Court.

DATED AND DELIVERED THIS 2ND DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Ms. Mutuku for the Appellant

Mrs. Isika for Mr. Kamwendwa for the Respondent

Ms. Doreen Court Assistant.