



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 59 OF 2015

BETWEEN

SINO HYDRO CORPORATION LTD APPELLANT

AND

DANIELA ATELA KAMUDA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.P. Gichohi, CM in the Chief Magistrates Court at Homa Bay in Civil Case No. 92 of 2014 dated 25th June 2014)

JUDGMENT

1. On 30th July 2014, the respondent was injured in the course of employment with the appellant while repairing a barching machine. He sued the appellant for damages claiming that the appellant was negligent. The parties settled the issue of liability in favour of the respondent with the appellant shouldering 70% liability. The matter proceeded for assessment of damages. The learned magistrate awarded Kshs. 1,000,000.00 as general damages. The appellant now appeals against the award.
2. According to the Memorandum of Appeal dated 8th July 2015, the appellant attacked the judgment on the ground that the award of damages was inordinately high, that the learned magistrate failed to appreciate the submissions and authorities filed by the appellant, that the learned magistrate wrongly assessed the injuries sustained by the respondent, that the judgment was against the weight of evidence, and that it was contrary to the principles of *stare decisis*.
3. Mr Ojuro, Counsel for the appellant, reiterated the grounds set out in the Memorandum of Appeal. He noted that according to the particulars in the Plaint, the respondent's two middle fingers on the right hand were cut off and that in light of the fact that he admitted that he could continue to work, the award of Kshs. 1,000,000.00 was inordinate in light of the authorities cited. He submitted that an award of Kshs. 200,000.00 was reasonable and cited ***Eastern Produce (K) Ltd v Allan Okusi Wasike Civil Appeal No. 15 of 2013 [2014]eKLR*** where the plaintiff sustained traumatic amputation of the left finger and Kshs. 200,000.00 awarded.
4. Counsel for the respondent, Ms Kuke, opposed the appeal and submitted that the award was reasonable considering the injuries sustained by the respondent. She further submitted that the injuries were serious and that disability was assessed at 10%. Learned counsel maintained that the learned magistrate considered all the relevant factors in assessing damages. The relied on ***Joseph Ibrahim Alasau v Steering Ship Contractors and Another Civil Appeal No, 170 of 2004 [2008]eKLR***. In that case the plaintiff sustained crush injuries on the right arm and shoulder

resulting in an amputation from the shoulder blade. The Court of Appeal awarded Kshs. 2,020,000.00 as general damages for pain and suffering and loss of future earnings.

5. As this is a first appeal, I am enjoined to review the evidence and reach an independent conclusion while making an allowance for the fact that I never heard or saw the witnesses (see ***Selle v Associated Motor Boat Company Ltd* [1968] EA 123**).
6. It is not in dispute that the respondent had the middle and ring fingers of the right hand amputated as a result of the accident. He was admitted and treated at the Homa Bay District Hospital. According to the medical report prepared by Dr Nyawade dated 24th October 2014, the respondent complained that he was unable to lift heavy objects and could not adduct or abduct the right hand fingers. At the time of examination, the respondent complained that he was unable to actively perform his duties. When Dr Andrew Otieno examined the on 24th March 2015, he complained of a painful and weak right hand. He concluded that the injuries were permanent and estimated the degree of disability at 10%. The respondent testified that he was not working and was staying at home. He admitted in cross-examination that he was able to work but that he lacked finances.
7. The learned magistrate held that he sustained injuries which resulted in complete amputation of two fingers on the right hand. She noted that he could not use the right hand effectively. In order to reach the award of Kshs. 1,000,000.00, the learned magistrate relied on ***David Mwawughanga Kingaga v Narcol Aluminium Rolling Mill Ltd* MSA HCC No. 133 of 1998** where the plaintiff suffered traumatic amputation of the left middle and ring fingers and was awarded Kshs. 540,000.00 and also ***Samuel Kazungu v Umoja Rubber Industries Ltd* MSA HCCC No. 350 of 1996** where the plaintiff sustained a traumatic amputation of his index and ring fingers with a laceration of the little finger. The court awarded Kshs. 500,000.00.
8. As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727**, ***Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014]eKLR** and ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5**).
9. I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind the following principles;
 - (1) Damages should not be inordinately high or too low.
 - (2) They are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered.
 - (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - (4) Where past awards are taken into consideration as guides, an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shilling at the time of the judgment.
10. I also accept the advice given by Potter J.A., in ***Rahima Tayah and Another v. Anna Mary Kinaru* [1987-88] 1 KAR 90**

*I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of ***West (H) & Son Ltd v. Shepherd* [1964] A.C. 326 at pg.345:-***

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

11. While the nature and extent of the respondent's injuries is not in dispute, the issue is whether the award is too high. Mr Ojuro complained that the learned magistrate referred to cases which were not cited by the parties. In my view, the learned magistrate correctly held that the cases cited to her bore little relation to the injuries sustained by the respondent. It was the duty of the advocates to guide the court by citing relevant cases and they can hardly complain if the court looks at other decisions in order to satisfy itself that the award it makes is similar and consistent with the awards in similar or related cases.
12. Taking into account all the decisions cited by the parties and those considered by the learned magistrate, I find the amount of Kshs. 1,000,000.00 awarded inordinately high. A sum of Kshs. 600,000.00 would be more reasonable and would be sufficient recompense for the injuries suffered.
13. For the foregoing reasons, I allow the appeal and substitute the award of general damages with an award of **Kshs. 600,000/-** which subject to agreed contribution is **Kshs. 420,000.00**. The appellant shall have the costs of this appeal assessed at Kshs. 60,000.00.

DATED and DELIVERED at HOMA BAY this 4th day of April 2016.

D.S. MAJANJA

JUDGE

Mr Ojuro instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Ms Kuke instructed by Everlyne Kuke and Company Advocates for the respondent.