



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 150 OF 2013**

**WYCLIFFE C. NDIEMA.....APPELLANT**

**VERSUS**

**PAN AFRICA CHEMICALS LTD.....RESPONDENT**

***(Being an appeal for the judgment/decree of Honourable TOWETT, Resident Magistrate,  
delivered on 15<sup>th</sup> August, 2013)***

**JUDGMENT**

1. The Appellant sustained chemical burns in an accident that occurred on the 13<sup>th</sup> November 2009 while a fare paying passenger in the Respondent's motor vehicle which was involved in an accident. He was treated in several hospitals among them Kitale District Hospital and Moi Teaching and Referral Hospital for the chemical burns where he had been admitted for a total period of two months and sixteen days. Dr. Wellington Kiamba referring to the discharge summary issued from the two hospitals prepared a medical report on the 3<sup>rd</sup> September 2010 on the appellant's injuries. The report itemised injuries sustained as

- multiple chemical burns on the severe chemical scalp
- burns on the lower limbs

Examination showed

- multiple scars on the scalp
- Extensive scars on the posterior and medial aspect of the left thigh, leg and foot
- Extensive scars on the right thigh on the distal part left foot
- Septic wounds on the thighs
- restriction of flexion movements at the right knee joint.
- The doctor opined that the Respondent had healed with permanent scars, that the lower limbs had not fully healed, had restricted movement of the right knee joint and was developing contractures. He classified the injury as "grievous harm."

In his second medical Report prepared on the 12<sup>th</sup> June 2013, Dr.W. Kiamba, added that movement of the right knee joint was restricted resulting into reduction of function of the right lower limb.

He recommended plastic surgery due to the disfiguring scars and contractures of the right knee joint. He awarded temporary incapacitation of 18 months and permanent disability of 40%. These injuries are not contested.

2. The Appellant in his submissions in the trial court submitted that a sum of Kshs.1,200,000/= was reasonable and relied on the case **Ngalashedi -vs- Jackson M. Nyambu HCCC No 152 of 1992** where the court awarded Kshs.250,000/=.

The Respondent submitted for damages of Kshs.150,000/= upon considering the case **Simon Azeze Muhandia -vs- A.G. HCCC NO. 3041 of 1997** where the plaintiff had sustained burns on his right leg, and a sum of Kshs.140,000/= awarded.

3. The trial court in its Judgment acknowledged the severity of the appellant's injuries as stated in Dr.W. Kiamba's medical reports and considered the authorities tendered by the parties Advocates and made a finding that Kshs.300,000/= was enough compensation for the appellant. This appeal is against the award of Kshs.300,000/= general damages as having been too low. The appellant has in this appeal reiterated his submissions in the trial court that a sum of Kshs.1,200,000/= would be more reasonable.

4. This is the first appellate court. It will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate of the damages. The appellant must show that the court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at an erroneous figure.

The above principles were stated in the case **Bashir Ahmed Butt -vs- Uwai Ahmed Khan C.A. No. 40 of 1977**, and followed in many other decisions.

5. This court has considered the trial court's judgment. It is evident that the court considered the Doctor's medical reports and indeed itemised the injuries. It also considered the only two authorities submitted by both the appellant and the respondent and awarded the general damages of Kshs.300,000/= for pain and suffering.

6. Assessment of damages by a trial court is an exercise of discretion that an appellate court will be slow to interfere with. See **Butt -vs- Khan case (Supra)** and followed in **Kemfro Africa Ltd t/a Meru Express & Another (1982-88) I KAR 727**. The appellant in his submissions in this appeal did not offer any recent comparable authorities in support of his submissions that the general damages ought to be enhanced to Kshs.1,200,000/=.All the decisions tendered are over 10 years old and awards were between Kshs.210,000/= and Kshs.250,000/=.

See **Construction -vs- Charles Wekesa Kasembeli - Civil Appeal No. 121 of 2002 (Eldoret)**, and judgment delivered in December 2005 and **Gohil Soap Factory Ltd -vs- Dickson Odima Yinu – Civil Appeal No 88 of 1998, the court upheld an award of Kshs.250,000/= in 2005** where the plaintiff had suffered second degree burns on the right lower limb from the thigh upto the foot, left thigh, left hand and wrist joint, with a permanent disability of 10%.

7. The appellant's injuries were of serious soft tissue nature and degree of disability assessed at 40% by Dr. W. Kiamba. I note that the Respondent did not question the degree of disability during the trial. None of the parties assisted the court by providing comparable and more recent decisions on the injuries.

The court has considered two recent and comparable decisions.

In **Paul Kipasang Koech & Another -vs- Titus Osule C.A No. 6 of 2012 (Bungoma) (2013) e KLR** the court reduced damages to **Kshs.300,000/=** from Kshs.750,000/= awarded by the trial court for bruised lower lip, blunt injuries to cheek and abdomen, loosening of right upper canine and incisor teeth and injury to the left knee with a fracture of the right upper incisor teeth in May 2013. In **Shem Shituyi -vs- Rexon Shiyanga (2014) e KLR C.A No. 108 of 2012 Kakamega**, the High Court reduced an award of Kshs.500,000/= by the trial court to Kshs.400,000/= In June 2014 for blunt injuries to the back lacerations to the elbow, skin traction to the back with a 20% physical disablement.

8. It is trite law that a claim for general damages is at the discretion of the court but such discretion must be exercised judiciously. Such discretion will only be disturbed if the appellate court is satisfied that

the trial court

- (a) **took into account irrelevant factor**
- (b) **Left out of account a relevant factor**
- (c) **The award is so inordinately low or high as to be an erroneous estimate of the damages.**

**(See Kemfro Africa (Supra)).**

9. The appellant has not demonstrated in what manner the trial court failed to consider the principles stated above. I find no error of principle that the trial court misapprehended the evidence tendered nor do I find the award inordinately low so as to warrant this court's interference. The award is in tandem with recent and comparable awards stated above.

I am satisfied that the trial court's discretion in the assessment of the damages was exercised judiciously and the damages awarded represent reasonable compensation for the injuries sustained.

10. For the above reasons the appeal is devoid of merit and is dismissed.

Each party shall bear its own costs of the appeal.

**Dated, signed and delivered in open court this 14<sup>th</sup> day of April 2016.**

**JANET MULWA**

**JUDGE**