



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO.128 OF 2015

BETWEEN

DANIEL NYANDIKA KIMORI APPELLANT

AND

FLORENCE EDITH ODHIAMBO RESPONDENT

(An appeal from the judgment and decree of Hon. Z. Nyakundi (PM) in

Rongo PMCC No.179 of 2010 dated 5th June, 2012)

JUDGMENT

1. This matter falls in a series of cases filed in the lower court where parties agreed to use PMCC No.178 of 2010 as a test case on liability. Subsequently the same files have come up for appeal with PMCC No.178 of 2010 now being HCA No.130 of 2015.
2. The facts are all similar and the only differences are the injuries sustained by the different claimants and the damages awarded.
3. I therefore adopt the judgment on liability in HCCA No.130 of 2015 *mutatis mutandis*.
4. As regards the damages awarded, the appellants counsel has submitted that the sum was awarded without any basis and is inordinately high because the respondent only suffered soft tissue injuries which had healed without any residual incapacity. The respondent's counsel argued that the sum was not inordinately high so as to warrant reduction.
5. The respondent suffered a fracture of the left ulna bone and soft tissue injuries on both legs. These injuries were confirmed by the report written by Dr Ajuoga, although Dr Wairoto's report stated that all he noted were soft tissue injuries. The findings of Dr Wairoto are rather puzzling-on one hand he stated that the respondent suffered a fracture of the ulna yet he concluded that there were only soft tissue injuries. What guided the findings to differ from the initial treatment notes and the findings by Dr Ajuoga? Dr Wairoto claimed to have done an x-ray on the injured limb yet he did not produce such evidence in court. Of greater significance is that the x-ray was not presented to Dr ZOGA who testified in regard to the respondent's injuries so that he could also give a professional comment.
6. Yes Dr Zoga admitted that the respondent suffered soft tissue injuries BUT he did not deny nor was he asked to clarify whether a fracture was also among the injuries the respondent had. He had referred to the fracture in his evidence in chief and also from the report he presented. With the greatest of respect to the appellants' counsel, he is being selective in that regard. Although the trial magistrate did not go into

details as to what guided the award, from re-evaluation of the evidence it is apparent this information was within the knowledge of the trial court.

7. I have considered the written submissions by both counsel, the appellants counsel suggests general damages of Ksh. 50,000/-, although he has not cited any past cases. The respondent's counsel argues that the sum awarded of Ksh200,000/- was fair. I considered the decided cases referred to by the respondent's counsel *visa vis* the injuries suffered, as well as the rate of inflation and the dwindling value of the Kenyan Shilling. I think the cases cited dealt with more serious injuries and the residual effects were more extensive. I am keenly aware of the position stated in the case of **BUTT versus KHAN [1981] KLR 389** which stated that

“...An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material aspect, and so arrived at a figure which was inordinately high or low...”

8. Since no explanation was given for the sum awarded, then using those cited decisions as a guide and the observations I have made, I am inclined to interfere with the sum awarded by reducing it to Ksh.150,000/-.

9. Consequently the appeal succeeds in part to the extent that the amount awarded as damages in the sum of Ksh.200,000/- is set aside. The same is substituted with a sum of Ksh.150,000/-.

10. The appellant shall bear 2/3 of the costs of this appeal and the respondent shall bear 1/3 costs of the appeal

DATED, SIGNED and DELIVERED at MIGORI this 11th day of November, 2016

H. A. OMONDI

JUDGE