



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 279 OF 2007
CRSTAL INDUSTRIES LTD.....APPELLANT
VERSUS
SEVVAS MUTUNGA KILONZA.....RESPONDENT

(From the judgment and Orders of L Wachira (Mrs.) Resident Magistrate Kikuyu SPMCC No.164 of 2006)

J U D G M E N T

The Respondent instituted proceedings in the Principle Magistrate Court's at Kikuyu against the Appellant claiming damages arising out of an industrial accident which occurred on 26th October 2005. On 9th March 2007, the parties entered into a consent apportioning liability at the ratio of 70:30 and the only part that was left for the court to decide was quantum. As part of the consent, the medical reports from Dr Ashwin Madhiwalla and Dr Moses Kinuthia and submissions from the parties were also used as a guide in assessment of damages. The court delivered its Judgment on 30th March, 2007 awarding the Respondent Kshs.400,000/- as general damages for injuries suffered and Kshs.1,500/- as special Damages.

The Appellant being dissatisfied with the Judgment of the Honourable Resident Magistrate L Wachira (Mrs.) delivered on 30th March 2007, appeals in this court on the following grounds:-

- 1. That the learned magistrate erred in law and in fact in awarding excessive general damages contrary to law.*
- 2. That the learned magistrate erred in law and in fact in disregarding the Appellant's submissions on quantum.*
- 3. That the magistrate erred in not following the law relating to award of general damages.*

During the hearing Mr. Omwenga counsel for the Appellant and Mr. Wahome counsel for the Respondent agreed to prosecute the appeal by way of submissions. Both parties filed and exchanged the submissions.

The Appellant submitted that the principles in assessing general damages are those set out in the case of **WESTCH & SONS LTD VS SHEPARD (1964) A.C AT P.G** in which the court stated:

“But money cannot renew a physical frame that has been battered and shattered. All that judges

and court can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent award must be reasonable and must be assessed with moderation. Further, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable award. When all this is said it still must be that amount which is awarded are to a considerable extent conventional.

The Appellant also submits that for the injuries sustained by the Respondent Kshs.150,000/= would adequately compensate him for the pain and suffering. The Appellant relied on the case of **Samuel Kariuki Kinyua vs Makenzie & Another HCCC 520 of 1987** in which the Plaintiff suffered a fracture of his right index finger and deep abrasion on his right arm. General damages for pain suffering and loss of amenities had been assessed at Kshs.100,000/-. The Appellant also relied on the case of **Joseph William Vs Kenya Cargo Handling Service Ltd & Another HCCC 843 of 1987 Mombasa**. Where the court awarded Kshs.100,000/= for general damages for pain and suffering and loss of amenities.

On special damages, the Appellant submits that the Respondent did not specially plead in the plaint and the same was not proven during the hearing. The Appellant relied on court of appeal decision in the case of **Hahn vs Singh Civil Appeal No.42 of 1983**.

The Appellant raised the issue of res-judicata. They submitted that the Respondent had filed a similar suit in Milimani being **CMCC No. 1118 of 2006** arising out of the same subject matter and judgment was entered in favour of the Plaintiff after which he was compensated.

The Respondent on his part submitted that the medical reports showed that he suffered a crush injury which resulted in multiple fractures, loss of middle finger and fixed deformity of right index finger which is considered as permanent disability of 25%. The Respondent relied on the case of **Patrick Odhiambo Obiro Vs The Catholic Diocese of Nakuru HCCC No. 177 of 1995 At Nakuru** where the Plaintiff was awarded Kshs.400,000. The Plaintiff sustained a cut on the thumb, cut on the 3rd and 4th ring left hand, fracture of the middle phalanx finger of the left hand. The Respondent also submitted that the special damages awarded were determined by the consent recorded on 9th March 2007 at Kshs.1,500/-.

In response to the issue of res judicata, the Respondent submits that the memorandum of appeal raises only 3 grounds of appeal and they are the quantum of damages. He stated the issue of res judicata is a side show and should be disregarded.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which carefully considered all the above documents. The issue for determination ***is whether or not the Trial Magistrate was entitled to arrive at the conclusions she did.***

In the instant case, the issue of liability is not in dispute. What is disputed is the quantum. In his plaint dated 14th February 2006, the Respondent sought for general damages for pain, suffering and loss of amenities. He also sought for special damages of Kshs.1,500/- being charges for a medical report. The court awarded him Kshs.400,000/- as general damages and Kshs.1,500/- for special damages.

Mr. Omwenga, during the oral submission, stated that the amount is too high and that most authorities show that the injury of right, middle finger should attract an award of Kshs.150,000/-. He accused the trial court of taking the submissions from both parties and awarding as damages, the average figures suggested therein, thus disregarding legal authorities available in such cases. Mr. Wahome on his part submitted that the award was not too high to warrant interference by the appeal court.

It is trite law that an appellate Court can only interfere with an award of damages where the award was either based on a wrong principle or is so inordinately high or low as to be a wholly erroneous estimate. (see **Kemfro Limited T/A Meru Express Services Vs. Lubia And Another [1987] KLR 30**).

In the judgment, the trial magistrate states that the court considered the injuries suffered by the

Respondent, the authorities cited and the inflationary trends. The Respondent at the trial had submitted that Kshs.650,000/- would adequately have compensated him. The Respondent had cited **Patrick Odhiambo Obiro Vs The Catholic Diocese Of Nakuru HCCC No. 177 Of 1995** at Nakuru, where the Plaintiff who was training as a carpenter, at St Luke's Training Centre Nakuru, was injured and his fingers of the left hand were chopped off. The court had awarded him general damages Ksh.400,000 and special damages of Kshs.200,500/-. But the Appellant had submitted that Kshs.150,000/- would be adequate. They cited the case of **Katundu Musyoki Mangole Vs Abdalla Mohamed Mwambegu & Others Civil Case No. 10 of 1988** where the Plaintiff was injured in a road accident and had sustained injuries of colle's fracture of left wrist, fracture of subluxation of metacarpo-phalangeal joint of the left thumb and left little figure. The court had awarded Kshs.120,000 as general damages.

Taking the above cases into account, it is the view of this court that the award of Kshs.400,000/- is not too much to attract court act of interference. It is not disputed that the Respondent sustained injuries. The medical reports show that Respondent has permanent disability as result of the accident. Kshs.400,000/- is not an inordinately high compensation for the injuries sustained taking into account the 25% disability, the inflation increase and seriousness of the injuries. I would not interfere with the award.

The Appellant has also raised the issue of res judicata in the submission. In my view, the Appellant has raised the issue too late in the day. Res-judicata is a point of law which ought to have been raised at the preliminary stage of these proceedings. The issue would have barred the same parties from litigating a second suit on the same claim or any other claim arising from the same transaction or series of transactions that could have been but were not raised in the first suit. Res-judicata aims at ensuring that litigation comes to end and a matter that has been conclusively decided upon by a competent judicial authority must not find itself again before the same or other competent tribunal for reconsideration. In this case, the issue is suddenly sprung at the face of the court without any indication that it had been litigated and decided in the court below. Furthermore, it is an issue that would have stopped liability. However, in this suit the Appellant had voluntarily entered consent on liability, thus stopping this court from having even a mere glance to it.

The end result is that this appeal has no merit. It is hereby dismissed with costs. Orders are so made.

Dated and delivered at Nairobi this 10th day of March, 2015.

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D A ONYANCHA

JUDGE