



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 156 OF 2012

TONONOKA ROLLING MILLS LTDAPPELLANT

VERSUS

JAMES TO BOSO WERE RESPONDENT

J U D G M E N T

1. The Respondent brought a suit against the Appellant in the NRB CMCC no. 6489 of 2009 claiming compensation for injuries sustained whilst in the course of employment with the Plaintiff. The Respondent alleged that the Appellant was negligent and set out particulars of negligence in his statement of claim. He alleged that as a result of the Appellants negligence an accident occurred in respect of which he sustained injuries. He set out the injuries as being segmented fractured left femur, degloving injury left thigh and pain, blood loss and soft tissue injuries.
2. The Appellant filed a defence denying the Respondents entire claim. It denied any employer-employee relationship with the Respondent. It also denied that the Respondent was injured as alleged. In the alternative, it pleaded that if the Respondent was injured, it was out of his own negligence and it set out the particulars of negligence of the Respondent in its statement of Defence.
3. At the trial, the Respondent testified and called one Dr. Rodger Hannington Kayo who testified as to his injuries. The Appellant called no evidence in rebuttal. After analyzing the evidence, the trial court entered judgment in favour of the Respondent on the basis of 90% liability and assessed damages at Kshs.850,000/-. Aggrieved by that judgment, the Appellant has now appealed against the said decision quantum only.
4. This being a first appeal, the court is duty bound to analyse and re-evaluate the evidence afresh and come to its own independent conclusions (See **Selle Vs Associated Motor Boat Co. & others [1968] EA 123.**)
5. The Appellant only raised one ground of appeal, that is; that the trial court erred in law and fact in awarding general damages not commensurate with the nature, extent and severity of the pleaded injuries and was not supported with authorities produced. It was submitted on behalf of the Appellant that the award by the trial court was so manifestly excessive as to amount to an erroneous estimate of the damage suffered by the Respondent; that the Appellant had relied on the case of **Elizabeth Mulwa Vs Tawfiq Bus Services MSA HCCC No. 81 of 2000** wherein the Plaintiff was awarded Kshs.200,000/= but the same was not considered by the trial court. The Appellant relied on the case of **Kemfro Africa Ltd T/a Meru Express Services & Anor Vs A.M Lubia & Anor (1978) KLR 3** in support of the submission that in the circumstances of this case, the award of the trial court should be interfered with.
6. The Appellant relied on the case of **Gichuhi Vs Kahia & Anor (HCCC No. 2654 of 1997**

- wherein the Plaintiff was awarded Kshs.180,000/= in 2002 in injuries submitted to be more severe than in this case. In the circumstances, the Appellant submitted that the damages awarded should have been Kshs.400,000/=
7. The Respondent on his part opposed the appeal. it was submitted on his behalf that the injuries sustained were severe as had been described in the Medical Report of Dr. Kayo; that the ugly scars were witnesses by the trial court and the award of Kshs.850,000/- was far much less and should have been Kshs.1,500,000/-. The Respondent relied on the case of **Jane Otieno Vs Mombasa Liners Ltd & Anor MSA HCCC No.47/03 (UR)** wherein a sum of Kshs. 1.5million and urged that the appeal be dismissed.
 8. The jurisdiction of this court on appeal is well settled. In the case of **Mariga Vs Musila (1984) KLR 257**, it was held that this court can only interfere with the trial court's findings on quantum if it is found that, in assessing damages, the trial court took into account an irrelevant factor or failed to consider a relevant factor or the award is so manifestly excessive or low as to amount to an erroneous estimate of damages.
 9. The record of appeal was filed on 24th January, 2013 and the Appeal was admitted on 12/05/2014. On 16/6/04, the Appellant was directed to file a Supplementary Record of Appeal within 30 days to include the certified copy of the decree appealed against. It did so on 17/7/14. On 13/2/15, the parties told the court that the record was complete and directions for the hearing of the appeal were given. However, after the parties had argued the appeal and the court retired to write the judgment, it transpired that the Record of Appeal did not contain the Medical Report produced by PW1 Dr. Rodger Hannington Kayo as PExh1 (a) as can be seen from the proceedings. Having failed to include such an important piece of evidence and which is central to its appeal, I really doubt the basis of the Appellant's appeal.
 10. Under our law, it is the party who alleges must prove (See Sections 107 and 108 Evidence Act Cap 80 Laws of Kenya). To my mind, it was incumbent upon the Appellant to show to the court that the judgment of the trial court was not in tandem with the injuries sustained by the Respondent. A mere assertion in the Memorandum of Appeal and in the submission is not enough. On that basis alone, the appeal is incompetent and is for dismissal.
 11. Be that as it may, the record shows that in preparing his medical Report that he produced before the trial court, Dr. Kayo (PW1,) relied on medical records from Guru Nanak hospital where the Respondent was admitted and treated. The injuries suffered were shown to be degloving injury to the left thigh, compound commutated fracture mid third left femur X-ray, soft tissue injuries, pains and blood loss. The Respondent underwent several surgeries at Guru Nanak Hospital for surgical toilet, skin grafting and reconstruction and for insertion of drift-k-nail. The removal of the implant was assessed by Dr. Kayo to cost Kshs.150, 000/-. The doctor assessed functional disability at 15%.
 12. I have considered the authorities relied on by the parties, whilst the one relied on by the Respondent is for severe injuries, the one relied by the Appellant is both very old and for lesser injuries as opposed to those suffered by the Respondent in this case. In the case of **Esther Wanjiru Kiarie Vs Joseph Kiarie Ng'ang'a NKR HCCC No. 384 of 2000 (UR)**, the court awarded a sum of Kshs. 1 million general damages in 2003 for slightly similar injuries. I have looked at the judgment of the lower court. Although it is true that the trial court did not cite any authority for guidance, I am satisfied that the court considered all the relevant factors. Indeed it disallowed the claim for Kshs.150,000/= for removal of the implant on the basis that it had not been pleaded although proved. To my mind the award of Kshs.850,000/= was not inordinately high to amount to an erroneous estimate of the damages suffered. It has not been demonstrated that this is a fit case for this court to disturb the findings of the trial court.
 13. In the premises the appeal is without merit and he same is hereby dismissed with costs.

DATED and DELIVERED at Nairobi this 10th day of July, 2015

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A. MABEYA

JUDGE