



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 81 OF 2012**

**CHARLES OCHOLA ..... APPELLANT**

**V E R S U S**

**MUMIAS SUGAR COMPANY LTD. ....RESPONDENT**

**J U D G M E N T**

This is an appeal from the judgment of L. Nafula, SPM Mumias in Civil Case No. 108 of 2010. The appeal is based on the amount of damages awarded to the appellant. The grounds of appeal are that the award is inordinately low in the circumstances, the trial court did not appreciate the evidence on record and the fact that the appellant lost his capacity to earn a living in future and that the court did not take into account all the relevant factors.

Counsels for both parties agreed to determine the appeal by way of written submissions. Mr. Nandwa counsel for the appellant contends that the award of KShs.100,000/= as general damages is quite low. The appellant sustained an injury to his eye and a specialist testified to the effect that the appellant will not be able to do welding work to earn his living. The appellant is a welder by profession. Counsel urged the court to award KShs.2 million as general damages and relies on the case of **LEA WAMBUI GITHUTHU V ATTORNEY GENERAL 2005 eKLR**. Counsels for the respondent contends that the award of KShs.100,000/= is sufficient compensation and cited the case of **RINGI KIBAO RINGI V SOUTH PORT LIMITED. Mombasa HCCC No. 349 of 1988** where KShs.140,000/= was awarded for injuries on the left eye leading to loss of vision in that eye. Counsel maintains that the appellant only suffered reduced vision and did not suffer permanent incapacity on his eye.

The record of the trial court shows that parties entered into a consent on liability and it was apportioned at 70%:30% in favour of the appellant. The only issue for determination by the trial court was the amount of damages to be awarded. The appellant testified that on the 22.7.2009 he was working at the defendant's company replacing a diffuser when he was hit on the eye by a T-bolt. He was treated at the company clinic as well as at Kakamega Provincial Hospital. He was also treated by an eye specialist. **PW2 DR. JUSTUS SAKWA WAMBANI** testified that he is an eye specialist based at Kakamega Provincial Hospital. He attended to the appellant on 20.8.2009. The appellant's left eye was red and the convex was clear. The vision on the left eye had reduced. The eye could not withstand light. He assessed the appellant's incapacity at 25%. He also opined that the appellant could not do his welding work because the eye cannot withstand light but if he were to do so he has to put on a photochromic eye wear that cost KShs.35,000/=. The appellant's other eye is ok and was not affected.

From the evidence on record the only issue in this appeal for determination is whether the amount of damages awarded by the trial court was inordinately low as contended by the appellant. The appellant according to the evidence before the trial court is 62 years old. PW2 testified that old age also affect eye sight. The medical report by PW2 dated 8.10.2009 is similar to the evidence he adduced before the trial court. The appellant testified that he is a welder by profession and had worked for 46 years. It appears that he had been engaged by the company the same month he got injured. It is clear from the evidence that the appellant did not suffer 100% loss of his eye sight on the left eye. The doctor also indicated that the appellant can work if he puts on a photochromic gadget. It is clear therefore to me that there is no loss of earning capacity as the appellant still work. With regard to the damages awarded I do find that the authority relied upon by counsel for the appellant relates to serious injuries. The complainant in that case lost his two eyes and even the eyeballs came out. He became totally blind. I do find that the authority does not come closer to what the appellant suffered.

The authority relied upon by the respondent is a 1988 case. It appears that counsels for both parties rely on the same authorities which they used before the trial magistrate. There was the authority of **SAMUEL WERE V LINT MARKETING BOARD UGANDA LIMITED. Mombasa HCCC No. 44 of 1987** whereby KShs.120,000/= was awarded for loss of vision in the right eye and there was no visible disfigurement. This authority is contained in the copy of authorities provided by counsel for the respondent. Several other cases were cited in the authority relied upon by counsel for the appellant. There is the case of **JOSPHAT WAINAINA MWANGI V ATTORNEY GENERAL HCCC No. 34 of 1993 Nairobi** where KShs.450,000/= was awarded in 1997 for loss of vision in one eye and injury to the other. There is also the case of **MUKO TIRIKO MUKO V ATTORNEY GENERAL Nairobi HCCC No. 2045 of 1995** where KShs.301,600/= was awarded for injury to the right eye leading to reduced vision amongst other injuries. Given the injury sustained by the appellant I do find that he will be able to do his welding work if he can be able to purchase the photochromic instrument. I do assess general damages at KShs.300,000/=. I will also award the appellant KShs.35,000/= to enable him purchase a photochromic gadget.

In the end the appeal succeeds. The award of the trial magistrate is hereby set aside. The appellant is awarded general damages of KShs.300,000/= and special damages of KShs.44,000/=. This amount include the sum of KShs.9,000/= awarded by the trial magistrate as special damages. The award shall be subject to the 30% contributory negligence. The award shall attract interest after the expiry of 60 days from the date of this judgment.

Delivered, dated and signed at Kakamega this 16<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**J U D G E**