



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 232 OF 2004

DEVKI STEEL MILLS LTD APPELLANT

VERSUS

JARED OSODO RESPONDENT

J U D G M E N T

This appeal arises from the judgment and decree of Mrs. N.A. Owino (SRM) delivered on 11th March 2004 vide Nairobi Milimani Chief Magistrate's Court Civil Suit No. 8542 of 2003.

The appellant herein Devki Steel Mills Ltd a limited liability company was the defendant whereas the respondent herein Jared Osodo was the plaintiff.

The suit arose out of an industrial accident which occurred on 23rd July 2003 when the respondent herein, while engaged in his employment with the appellant at the latter's premises, molten metal splashed on the respondent as a result of which he was seriously injured.

The respondent blamed his employer, the appellant for negligence and breach of terms of the contract of employment. Judgment on liability was entered by the court following a consent between both parties to the suit at the ratio of 80% against 20% for the plaintiff.

The parties then left the issue of quantum of damages payable to the respondent to be determined by the court after producing two medical reports one prepared by Dr. Okere and Dr. R.P. Shah dated 15th August 2003 and 11th April 2003 respectively by consent.

According to the plaint filed in court on 20th August 2003, the respondent pleaded that he sustained the following injuries as a result of the material accident:-

- a) Burns on the left shoulder
- b) Burns on the left lower abdominal wall
- c) Burns on the left waist and buttock

- d) Burns on both lower legs and feet
- e) Burns on both upper legs.

He therefore claimed for special damages for medical report 1,500 and general damages for pain and suffering.

The medical report prepared by Dr. Cyphanus Okoth Okere dated 15th August 2003 revealed that the respondent was 29 years old and married with a child. He was employed as a casual worker and sustained the injuries while at work; as stated in the plaint and replicated hereinabove.

He received treatment at Makadara Healthcare. He complained of pains in the left waist and burns left him with scars on the left shoulder and back of chest, left waist and lower abdominal wall, left forearm right and left legs, foot and lower leg anterior. The degree of burns was assessed at about 8%.

On the other hand, Dr. R.P. Shah, ChB, FRCS, a consultant surgeon who examined the respondent on 11th November 2003 three months after Dr. Okere's examination described the injuries as burns over left shoulder, abdomen, left side of pelvis, left leg, left foot and left forearm. The respondent paid 2 visits to this company clinic and 2 others to Makadara Health Centre for treatment which involved injections, ointment and tablets. He was unable to work for one month. He had multiple scars with precise measurements all over the burnt areas of the body although the doctor described them as simple ordinary thin scars covering 4% of his body area.

Dr. Shah concluded that since the respondent was not admitted in hospital and as the treatment required was simple to treat the superficial burns, the patient was expected to heal in 10-14 days after the accident. It was also expected that he would resume work within the said period without symptoms. He had zero permanent incapacity.

The respondent's counsel filed written submissions and proposed a figure of Ksh. 350,000/- as reasonable compensation for the injuries sustained relying on the case of **Kanderboy Jan Mohammed – Vs – Bamburi Portland Cement Co. Ltd HCC 32 of 1993**. Where the plaintiff suffered burns on his right hand thumb, little palm and wrist, hospitalized for 26 days. The plaintiff was off work for 26 days and the injuries left permanent ugly scars on the right hand wrist with contractures of scars on the limb and 2 fingers. The scars were keloid preventing full movements and causing itching in humid climate. There was also wasting of muscles of the palm of the hand resulting in a weak grip and little use of the hand. He was awarded Ksh. 280,000 general damages for pain, suffering and loss of amenities.

The appellant's counsel filed their submissions comparing the two medical reports of Dr. Okere and Dr. Shah and concluding that the injuries sustained by the respondent were superficial burns as described by Dr. Shah. Further, as the respondent did not require to be hospitalized, his treatment was simple and that he had no doubt healed without any permanent incapacity. He urged the court to treat the said injuries as minor soft tissue injuries. He cited 5 authorities in support of his contention that an award of Ksh. 20,000/- would be sufficient compensation for pain, suffering and loss of amenities less 20% contribution. By her judgment delivered on 11th March 2004, the learned Senior Resident Magistrate awarded the respondent Ksh. 170,000/- less 20% contribution as general damages and Ksh. 1500/- plus costs of the suit.

In awarding the said damages, she observed that Dr. Okere's medical report was prepared when the respondent's injuries were fresh whereas Dr. Shah's examination was done after the respondent had recovered. She stated that the injuries covered a longer area when fresh. She noted the injuries suffered, the after effects, submissions and inflation incidences.

Dissatisfied with the award of Ksh. 170,000/- general damages, the appellant filed the appeal herein on 31st March 2004 challenging the same and setting out one ground of appeal as follows:-

1) The learned Magistrate erred in awarding general damages of Ksh. 170,000/- which are high, excessive, unreasonable and unjustified in view of the circumstances of the case and in view of the nature of injuries sustained by the respondent.

They prayed that the appeal be allowed, the award of damages, in the court below be varied substantially reduced and the appellant be awarded the costs of the appeal.

The test as to whether an appellate court may interfere with a decision of the trial court was stated in the case **Mbogo & Another – Vs – Shah (1968) EA 93** as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it was acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

This court appreciates that awarding damages is a matter of discretion for the trial court, and as was observed in the case of **George Kirianki Laichena – Vs - Michael Muturi CA 162/2011,**

“It is daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately, the awards will very much depend on the facts and circumstances of each case.”

And as observed by Lord Morns in **H. West & Sons Ltd – Vs – Shepherd (1964) AC 326,**

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and experience. In a sphere in which no one can predict with complete assurance that the award made by another is wrong, the best that can be done is pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made.

Having done so, and remembering that in this sphere there are inevitable differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

The appellant in their submissions filed on 13th August 2014 contend that the report of Dr. R. Shah gives the most current analysis of the plaintiff’s injuries. They cited the case of **Kemjo Africa Ltd – Vs – Menu Express Service & Gathogo Kanini – Vs – A.M. Lubia & Another** where the Court of Appeal restated the principles that guide an appellate court in assessing damages thus:

“The principles to be observed by an appellate court in deciding whether is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages took into account an irrelevant factor, or left out of account or a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

This principle was restated by Law JA in **Butt – Vs – Khan [1977] KAR.** Counsel submitted that the general damages awarded by the learned Magistrate was so manifestly excessive as to amount to an erroneous estimate of the damage suffered by the respondent and therefore warrants disturbance by this court.

A careful perusal of the medical reports produced by the parties consent reveal that indeed the respondent suffered burns on his body occasioned by molten metal. The medical report by Dr. Shah was prepared two months after Dr. Okere’s hence there is no much difference in the age of the injuries as the

respondent was injured on 23rd July 2003. He was first examined by Dr. Okere in August 2003 just about a month after the injury whereas Dr. Shah examined him on 11th November 2003. From both reports, none of the doctors describe the injuries as very serious burns or injuries that had a debilitating effect.

As at August 2003, the injuries had healed leaving scar marks. None of the doctors found the scars to have keloids or any permanent incapacity occasioned to the respondent. Looking at the two medical reports and the submissions by parties and the authorities cited in the lower court, I find that none of the authorities cited was relevant or comparable to the case herein. On the one hand, the respondent counsel submitted an authority that reflected extremely serious injuries where the claimant was admitted in hospital for 26 days, was out of work for 26 days and the injuries left permanent ugly scars with contractures and keloids preventing full movements in his limbs and itchiness during humidity. The plaintiff's muscles were wasted in the palm of the hand resulting a weak grip and little use of the hand. Yet the court therein awarded him Ksh. 280,000/- in 1993. The above injuries in my view were very serious and graphic compared to the injuries sustained by the respondent herein. None of the medical reports presented a graphic description of what the respondent suffered. He was treated as an outpatient and had attended clinic not more than 4 times. He was treated using injections and tetanus toxoid and other medications. There was no permanent incapacity in as much as Dr. Okere stated that the burns covered 7% and Dr. Shah presented 4%.

On the other hand, the various authorities cited by the defendant/appellant in the lower court in support of their proposition for an award of Ksh. 20,000/- general damages, were totally irrelevant. The injuries listed in all the authorities had nothing to do with the burns.

The trial Magistrate in awarding the respondent ksh. 170,000/- stated that she had taken into account the after effects, the submissions and inflation. She never referred to a single authority cited by the parties to make comparisons.

As I have staged, going by what the parties had presented before her, there was no relevant authority that could have guided her to arrive at a fair award. The respondent's proposal in my view was overly exaggerated and on the other hand the appellant's proposition was understated.

Regrettably, the learned Magistrate did not make any reference or comparisons between the authorities cited and the case before her. It is therefore not clear how she exercised her discretion in awarding the respondent Ksh 170,000/-. In my view, the award merits interference as it was not commensurate with the injuries sustained by the respondent. It was an erroneous estimate as it did not take into account the relevant authorities with comparable injuries and awards.

The appellants have submitted that in their view, this court should reduce the award from Ksh. 170,000/- to 70,000/-. They rely on several authorities where the appellate court reduced awards made by the trial court.

The respondent did not attend court on 19th September 2014 despite fixing the said date by consent on 31st July 2014 before **Justice Mwita Chacha** and agreeing to file their written submissions within 19 days by both parties. The 19th September 2014 mention date was intended to confirm compliance with the consent order of 31st July 2014.

I exercised my discretion and granted them 7 more days to file written submissions but none were filed. They did not, therefore oppose the appeal herein.

Considering the submissions and authorities provided by counsel by the appellant herein, I am satisfied that the relevant authority is that in **Eldoret HCCA 64 of 2007 Eldoret Steel Mills Ltd – Vs - Jeremiah Njuguna Karanja** where the plaintiff sustained 4% degree burns to the left and right knee joint, bilateral burns to both legs and elbow joint. An award of Ksh. 100,000 was upheld by **Hon. Justice Azangalala** in February 2011.

Comparing the above authority with the injuries sustained by the respondent herein, taking into account the two doctors' accounts that the respondent was not hospitalized and the burns were superficial healing within 4 months and leaving him with simple scars and no keloids, contractures or itchiness, and doing the best I can in the circumstances and taking into account inflationary trends in Kenya and being aware that an award of general damages is not intended to enrich the party but to try as much as possible to put them in the same position they were before the injury, I find that the trial magistrate's award of Ksh. 170,000/- was manifestly excessive.

Accordingly, I set aside the learned Magistrate award and substitute it with an award of Ksh. 80,000/- general damages for pain, suffering and loss of amenities less 20% contribution as agreed by the parties on liability. The special damages of Ksh. 1500/- awarded remain undisturbed less agreed contribution of 20%.

The respondent shall have costs of the subordinate court less 20% contribution. As the appellant has substantially succeeded on this appeal, I award them 60% of the costs of this appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 5th Day of November, 2014.

R.E. ABURILI

JUDGE