



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 107 of 2010

KITALE HAULIERS LIMITEDAPPELLANT

versus

EMMANUEL SOITA SIMIYU.....RESPONDENT

JUDGMENT

The Appeal: Quantum of Damages

[1] I am not called upon to determine liability. Liability was agreed upon by consent of the parties and was recorded in court on 22/6/2010: the Appellant was to shoulder 75% while the Respondent 25%. The appeal herein is, therefore, limited to the quantum of general damages that were awarded by the Honourable trial magistrate.

[2] The single ground of appeal is that:

1) *The learned trial magistrate erred in awarding general damages that were manifestly excessive and incommensurate with soft tissue injuries as suffered.*

[3] The Plaintiff listed the following particulars of injuries:

Particulars of injuries

a) Painful shoulders

b) Bruises on right forearm and left upper arms

c) Bruises on the knee

d) Painful back

Current situation

1) Has scars – right forearm post mortem lateral

2) Left upper arm lateral anterior

3) The back still pains on lifting heavy load.

[4] It is not clear if the Respondent gave any oral testimony on the injuries he sustained. But the record shows treatment notes, P3 form, medical report, receipts and police abstract were produced and the

Plaintiff closed his case. The Defendant did not offer any evidence and closed its case.

[5] Parties were to file written submissions on the quantum of damages. The Respondent filed submissions and proposed a sum of Ksh.1,000,000/=. He relied on the case of **MOHAMMED SHEE KIBOI VRS DOMINIC MWAURA MSA HCCC NO.119 OF 1991**. The Appellant did not file any submissions on quantum of damages.

Assessment of quantum by trial court

[6] The trial magistrate then assessed damages payable and awarded a sum of Ksh.1,000,000/= in favour of the Respondent less 25% contributory negligence.

COURT RENDERS ITSELF:

[7] Assessment of quantum of damages in a claim for general damages, is a discretionary exercise. The discretion must, however, be exercised judicially: judiciously and upon some defined legal principles. When the exercise of discretion by the trial court violates some legal principle(s), the appellate court will be justified to interfere with that discretion. The appellate court will disturb the discretion of the trial court if, in assessing the amount of general damages payable, the trial court:

- a) *Took into account an irrelevant factor or*
- b) *Left out of account a relevant factor or,*
- c) *The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

[8] These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by our own Court of Appeal. For further illumination on this see:

1) *Kanga V. Manyoka [1961] EA 705, 709, 7013*

2) *Lukenya Ranching and Farming Co-op. Society Ltd V. Kavoloto [1979] E. A. 414, 418,*
419

3) *Kemfro Africa t/a Meru Express & another v. A. M. Lubia & another (1982 – 88) 1 KAR*
727

4) *C. A Civil Appeal No.66 of 1982 Zablon Manga v. Morris W. Musila (unreported)*

Applying the Test:

[9] The trial magistrate gave an award of Ksh.1,000,000/= on injuries which were clearly soft tissue injuries. The medical report and treatment notes that were produced revealed that those injuries were of the nature of soft tissue. The award made therefore was too far removed from, and could not be said to have been reasonable estimate of damages awardable on such injuries. By bare legal eyes, *the award is so inordinately high that it must be a wholly erroneous estimate of the damages*. That exercise of discretion was in violation of principle, and was not judicially exercised in the circumstances of the case. The trial court did not also base its assessment on any known principle, and was not guided by any relevant judicial authorities. What is easily discernible is that, the trial court seems to have relied on the decision of **Mohammed Shee (supra)** in assessing the quantum of damages: and that decision was not quite relevant as is born out below. As a consequence, the trial court fell into error in law.

[10] That decision related to more serious and multiple injuries, namely

- I) *Compound fractures distal third tibia and fibula*
- ii) *Fracture dislocation of left hip*
- iii) *Crush injury as to the left foot. The 4Th toe was completely crushed and had to be amputated.*
- iv) *5th metatarsophalangeal joint was dislocated*
- v) *Haemarthrosis of the left knee with post stiffness and osteoarthritis.*
- vi) *The left leg was shortened by 3 cm.*
- vii) *Post traumatic deformity of the acetabular cavity and pseudo arthrosis of the hip which led to limited flexion of the hip.*
- viii) *Right ankle healed with a malunion of the medial malleolus.*

[11] There was no comparison whatsoever, not even a semblance, between the injuries in the case quoted above and those in the instant case. That was an error of principle on which a discretion of the trial court could be interfered with.

[12] On that basis, I set aside the award of Ksh.1,000,000/= awarded. The injuries suffered ordinarily attract an award between Ksh.50,000/= - Ksh.200,000/= depending on the extent and severity of the injuries. I will therefore make an award of Ksh.200,000/= as general damages.

[13] I also award costs in the lower court on the sum awarded on this appeal. Each party shall however bear their costs on the appeal.

[14] Before I close, one more thing: the medical report by Dr. D. O. Raburu dated 24/4/2010 on the injuries sustained by the Respondent is not part of the record filed herein. It is not also part of the documents produced as exhibits and is not in the court file of the trial court. I have not therefore considered it in the results of the assessment of damages by this court. Parties should desist from the temptation to introduce new evidence on appeal unless the court orders for further evidence, and it is a more irritating attempt to use the written submissions to introduce new documents. To say the least, that practice smacks on the due process and integrity of the proceedings. I therefore recommend a strong deprecation to resist that kind of practice. I therefore order that medical report to be accordingly expunged from the record.

Dated, signed and delivered in open court at Bungoma this 7th day of May, 2013

**F. GIKONYO
JUDGE**

In the presence of:

Court Assistant: Khisa

Kraido for Mangi for Appellant

Onchiri for Respondent

**F. GIKONYO
JUDGE**