



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 6 of 2012

PAUL KIPSANG KOECH

GLOBAL TRUCKS LIMITED..... APPELLANTS

versus

TITUS OSULE OSORE.....RESPONDENT

(Appeal from the judgment of Hon. Ng'ang'ar, P.M in BGM CMCCC NO 40 OF 2011)

JUDGMENT

A Preliminary Issue: The Record

[1] There are two records of appeal; one, prepared and filed on 26th June, 2012 by Abok Odhiambo & Co., Advocates for the Respondent, and the other prepared and filed on 6th September, 2012 by Mukite Musangi & Co., Advocates for the Appellants. For purposes of this judgment, both records will constitute the record of appeal in accordance with the requisite law on procedure.

The Appeal: Quantum of Damages

[2] I am not called upon to determine liability as it was agreed upon by consent of the parties and accordingly recorded in court on 3/11/2011: the Appellants were to shoulder 70% while the Respondent 30%. The trial magistrate then assessed damages payable and awarded a sum of Kshs 300,000/= in favour of the Respondent. The Appellant were aggrieved by the award of damages and appealed to this court. The judgment of the court will, therefore, be limited to the quantum of general damages that were awarded by the Honourable trial magistrate.

[3] The grounds of appeal are that:

I) The learned trial magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent which was manifestly excessive.

II) The learned trial magistrate erred in law in failing to appreciate the principles applicable in the award of damages.

Evaluation of evidence: duty of appellate court

[4] This being the first appeal, I should evaluate the evidence on the injuries sustained and make my own conclusions and findings.

The Complaint

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

Particulars of the Plaintiff's injuries

- a. *Bruised lower lip*
- b. *Fracture of the right upper lateral incisor tooth*
- c. *Loosening of the right upper canine tooth*
- d. *Loosening of the right upper medial incisor tooth.*
- e. *Blunt injury to the neck*
- f. *Bruised right cheek*
- g. *Blunt injury to the abdomen*
- h. *Bruised left elbow*
- i. *Bruised left knee*

Oral testimony by the Respondent

[6] The Respondent gave any oral testimony on the injuries he sustained. He stated the injuries he suffered as; a fracture of right upper incisor tooth, loosening of six teeth, blunt injuries to the neck, the head and left hand. He produced treatment notes, P3 Form and medical report by Dr. Andai. The medical report by Dr. Malik on the injuries suffered by the Respondent was also produced by consent of the parties.

Expert evidence: Medical Reports

[7] Two medical reports, by Dr. Andai and Dr. Malik, were produced. The findings of each doctor were as follows:

REPORT BY DR. CHARLES M. ANDAI

HEAD AND NECK

1. He had bruised lower lip
2. He had fracture of the right upper lateral incisor tooth
3. He has loosening of the right upper canine and right upper medial incisor teeth
4. He had blunt injury to the neck
5. He had a bruised right cheek

TRUNK

He had blunt injury to the abdomen

LIMBS

1. He had a bruised lefty elbow
2. He had a bruised left knee. He was treated at Teso District Hospital Kocholya (OP No.17289/2010). Treatment included pain relievers. He availed to me his treatment notes of Teso District Hospital Kocholya and a photocopy of his P3 completed at the same Hospital for perusal.

COMPLAINS

1. He complained of pain in the neck.
2. He complained of pain in the abdomen.
3. He complained of headache.
4. He complained of toothache.

ON PHYSICAL EXAMINATION

He was in a fair general condition with stable vital signs.

HEAD AND NECK

1. He had a healing fractured right upper lateral incisor tooth.
2. He had loose right upper canine and right upper medial incisor teeth.
3. He had pain in the neck on passive movements of the head.

REPORT BY DR. M. S. MALIK

MOUTH

There are no scars on the lip or cheek. The right upper 2nd incisor tooth is partly broken and loose. The right upper canine is also slightly loose. The rest of the dentition is normal.

CERVICAL SPINE

The curvature of the cervical spine is normal. There is tenderness to pressure over the posterior spinous processes. There is a full range of pain-free movements of the neck with normal muscle power.

LEFT ELBOW JOINT

There is no scar visible abnormality of the joint. There is a full range of pain-free flexion and extension with normal power. *Pronation* and *supination* of the forearm are also normal. All ligaments around the joint are intact.

ABDOMEN

The abdomen moves with respiration and there are no scars or other abnormalities seen. The liver and spleen are not palpable and there are no masses or free fluid demonstrated. There are no areas of tenderness, The bowel sounds are normal.

LEFT KNEE JOINT

There are no scars or swellings around the joint. All ligaments and cartilages in the joint are intact. There is a full range of flexion and extension at the joint with normal muscle power around it.

OPINION

Titus sustained minor soft tissue injuries as listed above as a result of a road traffic accident. He damaged two of his teeth but did not sustain any cuts or abrasions. He was seen and treated as an in-patient at a

hospital where he was given some medicines. He was discharged after an overnight stay and did not seek further treatment. Although he still complains about occasional pain in the left elbow and abdomen, he has no clinical signs indicating any permanent damage to these areas.

Soft tissue injuries: serious or minor?

[8] Looking at the reports by the doctors, I am of the opinion that, their individual findings support the particulars of the injuries as contained in the plaint. They both agree those injuries were soft injuries, except; Dr. Andai classifies them as "*serious soft injuries*", and Dr. Malik as "*minor soft tissue injuries*". This is the fundamental issue the court must consider, and should be the gist on which the judgment of this court should turn. I will, therefore, revert to this issue at a later stage after considering the submissions of the advocates filed in the trial court and in the appeal; they carry the clue as to the direction the court should take in the matter.

Submissions by parties at the trial

[9] Parties filed written submissions on quantum of damages. The Respondent filed submissions and proposed a sum of Kshs 750,000/=. The Appellant also filed submissions and proposed a sum of Kshs. 70,000/= as being reasonable award of damages for the injuries sustained by the Respondent. Both parties quoted judicial authorities in support of their proposal on quantum of damages.

Assessment of quantum: by trial court

[10] The trial magistrate then assessed damages payable and awarded a sum of Kshs 300,000/= in favour of the Respondent less 30% contributory negligence.

Submissions by parties in the appeal: The Appellant's

[11] The Appellant filed submissions in support of the appeal on 21/3/2012. Those submissions dwell mostly on the fact that the trial magistrate erred in the assessment of damages, and for the following three reasons, the appeal should succeed;

- a. That the trial magistrate did not assess damages based on the injuries enumerated in the plaint and as established in evidence; which were minor soft tissue injuries;
- b. That the trial magistrate erred by not adhering to the principles applicable in assessment of damages; i.e. fairness, reasonableness, moderation and *stare decisis*; and
- c. That, due to errors in (a) and (b), the award of Kshs 300,000/= was inordinately high and out of tune with judicial awards on similar injuries.

Submissions by parties on the appeal: The Respondent's

[12] The Respondent filed submissions on 10/4/2013. According to those submissions, the award of damages should not be disturbed for the following reasons:

- a. The trial magistrate arrived at the correct assessment;
- b. The trial magistrate did not take into account any irrelevant factor
- c. The award was not manifestly excessive and was in accordance with the applicable case law

Appellate court: Analysis and orders

[13] It is a well-established law that, assessment of quantum of damages in a claim for general damages, is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion; must

be exercised judicially, with wise circumspect and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if 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.

[14] 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:

[15] The trial magistrate gave an award of Kshs 750,000/= 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 only point of variance between the doctors, is in the specific classification of those injuries; one doctor classified them as *serious* and the other as *minor*. But, the truth of the matter is that both doctors agree that there was a fracture of the right upper incisor tooth, and there was loosening of two others. The doctors are also agreed on the fact that the Respondent still experiences some pains on the left elbow and the abdomen. In my own assessment, without classifying the injuries as minor or serious, there is no doubt, those factors I have pointed out would affect an assessment of damages.

[16] That notwithstanding, however, the award of Kshs 300,000/= made was far removed from, and could not be said to have been reasonable estimate of damages on such injuries. The *award is inordinately high that it must be a wholly erroneous estimate of the damages*. The exercise of discretion was in violation of principle, and was, therefore, not exercised judicially. The trial court did not also base its assessment on any known principle; was not guided by the relevant judicial authorities; failed to take into account the award proposed, and judicial authority quoted by the Respondent. The latter error is demonstrated by the following statement in the judgment of the trial magistrate that:

The defence (read-Respondent) on the other hand has made no proposals on quantum. [addition mine]

Yet, the Respondent in their submissions proposed a sum of Kshs 70,000/= as being the reasonable amount of damages for the injuries suffered, and quoted authorities to support the proposal. As a consequence, the trial court fell into error in law.

[17] The authorities quoted by the parties were not useful for purposes of assessment as they were severely restricted in substance and cannot be relied upon as judicial authorities. This is a practice the courts have lamented over time and again; that counsels should provide full text of the authorities, but the practice persists. I should think, courts should formally reject such restricted extracts as they serve an all together different purpose than assisting the court to assess damages.

[18] I have looked at the authorities and that quoted by the Respondent did not involve a broken tooth and was decided a while ago. Those relied upon by the Appellant involved much more serious injuries.

[20] I must conclude by saying that; there has been an error of principle on which the discretion of the trial court should be interfered with. On that basis, I set aside the award of Kshs 300,000/=. The injuries suffered ordinarily attract an award between Ksh.50,000/= - Ksh.200,000/= depending on the extent and severity of the injuries. since there is a fracture of the right upper incisor tooth, loosening of other two teeth, and post accident pains on the left elbow and the abdomen, I will hereby make an award of Kshs 200,000/= as general damages. The amount of damages awarded is subject to the liability as recorded by the trial court. All the other items remain as awarded by the trial court.

[21] 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.

Dated, signed and delivered in open court at Bungoma this 9th day of May, 2013

**F. GIKONYO
JUDGE**

In the presence of:

Khisa Court Assistant

Onkangi for Mukite for Appellant's

COURT: Ruling read and delivered.

**F. GIKONYO
JUDGE**

ONKANGI: I pray for stay for 30 days.

COURT: I grant a stay of execution for 30 days.

**F. GIKONYO
JUDGE**