



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL 92 OF 2007**

**TELKOM (K) LIMITED.....APPELLANT**

**VERSUS**

**STEPHEN NDOLO OWANGO.....RESPONDENT**

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

The appellant's Memorandum of Appeal dated 5-9-2007 has the following grounds:-

- 1. The learned magistrate erred in law and fact in making such a high award as to show that the magistrate acted on a wrong principle of law.**
- 2. The learned trial magistrate erred in law and fact in making an award in general damages that was so excessive as to amount to an entirely erroneous estimate of loss or damage suffered by the respondent.**
- 3. The learned magistrate erred in law and fact in failing to appreciate or take into account the appellant's pleadings, evidence and submissions or at all in the subordinate courts.**

There is no dispute that on 22-4-2003 the respondent was injured while offloading poles from a lorry while under the appellant's employment.

From the said accident, he sustained the following injuries:-

- (i) Longitudinal fracture of the distal phalanx of the left thumb leading to an amputation of the said thumb.**
- (ii) Massive loss of blood.**
- (iii) Contusion of the left hand.**

After the parties filed their pleadings, they entered into a consent on liability at 70% against the appellant and 30% against the respondent. The court awarded general damages of Kshs. 280,000/= against the appellant. The appellant felt that the said damages were excessive hence this appeal. This is the gist of the appellant's appeal.

As earlier on observed the parties fully acknowledged the existence of the contractual relationship between themselves. The parties further produced the exhibits by consent and of great significance are the reports by doctors **L.W. Okombo** which awarded the respondent a disability of 10% and **Feroz Alliboy** which awarded the respondent a disability of 2%.

Having confirmed that the issue of negligence was settled by the consent of the parties, the next issue to determine is whether the trial court misdirected itself in awarding the general damages not commensurate to the injuries. Ordinarily it is the discretion of the trial court to award damages and this court will only interfere with it if it finds the same to be inordinately high and or excessive.

I have had the occasion to peruse the authorities relied on by the parties. Those relied on by the appellant although relevant are two decades old. Equally those by the respondent are in my opinion manifestly excessive. They are equally old comparatively.

However, the award of Kshs.280,000/= is not excessive. The respondent has lost use of his thumb. Whether left or right is immaterial. He cannot use the same. This goes against the argument by the appellant that since he was right handed, he does not necessarily use the left hand as much as the right hand.

Another critical issue raised by the respondent is the competency of the appeal. The respondent has argued that the same was contrary to the provisions of section 79 G of the Civil Procedure Act which reads:-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.**

The judgment was delivered on 17-7-2007. The Memorandum of Appeal was filed on 5-9-2007. Clearly this was several days after the expiry of the 30 days period. There is no evidence on record that the appellant sought any extension of time so as to file the appeal out of time. Clearly this offended the provisions of section 79 G of the Civil Procedure Act.

In the premises I do disallow this appeal firstly on the reasons that the award by the trial court was not at all excessive in the circumstances. The trial court has in essence awarded the respondent the sum of Kshs. 196,000/= for the loss of his thumb.

Secondly, and of great significance is that the appellant’s appeal was non starter. The same was filed out of time and without the leave of the court. The respondent shall have the cost of this appeal.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> day of July, 2012.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

.....for the appellant

.....for the respondent

HKC/va