



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 39 OF 2018

(Before Hon. Justice Mathews N. Nduma)

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

BONVENTURE ABWIRE WERE.....RESPONDENT

J U D G M E N T

1. The appellant challenges only the quantum of damages awarded by Hon. B. Khapoya SRM Kakamega Law Courts in a judgment delivered on 13th September 2017 in that:

- (i) The learned trial magistrate grossly misdirected himself in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
- (ii) The learned trial magistrate ignored the principles applicable in awarding of quantum of damages and the relevant authorities on quantum cited thereby arriving at inordinately high and manifestly excessive quantum of damages for the injuries sustained by the respondent.

2. The learned magistrate in the judgment delivered on 13th September 2017, awarded the respondent general damages for injuries sustained in the course of employment in the sum of Kshs. 800,000 on 100% liability subject to 30% contribution and Kshs. 10,000 special damages.

3. By a consent order by the parties dated 15th November 2017, stay of execution of the decree was agreed upon on condition that half the decretal sum herein being Kshs. 285,000 with costs awarded at Kshs. 111,230 be released to the respondent and the other half in the sum of Kshs. 285,000 be deposited in interest earning account in the joint names of the advocates for the parties.

4. The suit did not proceed to hearing on 26th April 2017, as the appellant conceded to the issues of liability and judgment on liability was entered in favour of the respondent at 70% and 30% ration.

5. The respondent testified as PW1 and in his brief witness statement testified that on 15th December 2016 he was in the ordinary course of employment by the Appellant when he was boarding an alternative tractor to head back to the Appellant's premises after the tractor registration number KAW 053B broke down due to the Appellant's negligence. The handle used in assisting the respondent to board the tractor broke occasioning the respondent to fall and the tractor to run over him and as a result, the respondent suffered severe bodily injuries and pecuniary loss whose full particulars are contained in the plaint.

6. According to the medical report from Lubick Medical Clinic produced before court by Dr. Charles M. Andai, the respondent sustained:

- (i) Subluxation of the right shoulder joint and
- (ii) Potts fracture of the right leg ie fracture of the distal ends of the right tibia and fibula.

7. At the time of examination the respondent complained of pain in the right ankle joint and in the right shoulder. The Doctor stated that upon examination, the respondent was in a fair general condition with stable vital signs. That he had pain in the right shoulder joint on movements of the right upper limb and had plaster of paris on his right lower limb.

8. The Doctor categorized the injuries by the respondent as "*serious soft tissue and skeletal (bone) injuries*". These injuries were expected to heal completely within one and a half years from the date of examination on 30th December 2014. A further medical report by Dr. Oketch

dated 24th October 2016 concluded upon assessment that

“He had since healed from the said injuries with no (NIL) resultant permanent incapacitation”

9. This was the evidence before the learned magistrate for purposes of assessing quantum of damages to be awarded to the respondent.
10. The learned magistrate was referred by the respondent to the case of ***James Gathuwe Ngugi versus Multiple Haulers (EA) Limited and Moses Kasalu Kilonzo HCCC at Nairobi Suit No. 658 of 2009*** in which the court awarded General damages as follows, pain and suffering 2 Million, Loss of amenities Kshs. 1,980,000 and future medical expenses of Kshs. 120,000.
11. In that case the plaintiff sustained compound commutated fracture of the right tibia and compound commutated fracture of the right fibula with a long list of residual injuries. These were more serious injuries than those sustained by the respondent in the present case. The plaintiff had sustained permanent disability in that case.
12. The court was also referred to the case of ***Coast Broadway Company Limited vs Elizabeth Aleka Achebei HCCC at Nairobi Civil Appeal No. 415 of 2006*** in which Mabeya J. upheld an award of Kshs. 300,000. The respondent had sought general damages in the sum of Kshs. 1,500,000 in the Coast Broadway Case supra, the injury sustained was on 14th September 2005 and the X-rays showed the plaintiff had not suffered a fracture but the Doctor had diagnosed a dislocation of the shoulder. (a croni-clavicular joint)
13. The Appellant had on the other hand relied on the case of ***Simon Mucheri Ateko and Another vs Gordon Osore (2013) eKLR*** urging the court to award the respondent Kshs. 70,000 general damages.
14. This being a first appeal, and in terms of the guidance in ***Selle vs Associated Motor boat Company and others (1968) EA 123***, the court is under an obligation to re-evaluate the evidence afresh and come to independent findings and conclusions taking into consideration that the appellate court had not had the advantage of hearing the witnesses directly and assessing the credibility of witnesses.
15. The Appellate court is not to depart from an award of the lower court on damages, which decision is largely discretionally, just because it would have arrived at a different decision. The Appellate court must find gross misdirection of law and/or fact leading to miscarriage of justice on the part of the final court to depart from the decision of the trial court.
16. Upon a careful analysis of the evidence on record, the submissions by the parties and the precedents presented to the court for comparative purposes, the court finds that the learned trial court properly analyzed the facts and law before it and did not misdirect itself in arriving at a global award of general damages assessed at Kshs. 800,000 taking into account that the respondent had suffered subluxation of the right shoulder and fracture of the distal end of the left tibia and fibula that took about two years to heal. The court correctly took into consideration that the injuries had healed with no resultant permanent disability.
17. It is important to note that the matter was determined in the year 2017, whereas the case of James Gathuwe Ngugi, supra was decided in the year 2009. Coast Broadway case was decided in the year 2006 and the Simon Mucheru Ateko case was decided in the year 2013.
18. The learned trial magistrate clearly appreciated the passage of time and the nature of the injuries suffered by the respondent in arriving at the award of General damages in the sum of Kshs. 800,000 apportioned at 70% and 30% on the part of the Appellant and respondent respectively. This court has also considered the case of ***Joseph Museemwa vs Julius Mbogo Mugi and 30 others (2013) eKLR*** in which the plaintiff was awarded Kshs. 1,300,000 for fracture of tibia and fibula in 2013. The injuries in that case were more severe than in the present case.
19. Accordingly, the Appeal lacks merit and is dismissed with costs incurred before the trial court and this court. Consequently the award of Kshs. 800,000 General damages and Kshs. 10,000 special damages is upheld by the court.
20. The Appellant to pay costs of the suit in the trial court and this court.

Judgment Dated, Signed and delivered this 19th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Ogejo, Oledo and Company Advocates for he Appellant.

V.A Shibanda and Company Advocates for the Respondent.

Chrispo – Court Clerk