



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & KANTAI, JJ.A.)

CIVIL APPEAL NO. 65 OF 2006

BETWEEN

RAM GOPAL GUPTA APPELLANT

VERSUS

NAIROBI TEA PACKERS LIMITED 1ST RESPONDENT

CHAI LIMITED 2ND RESPONDENT

R.J. WALJEE 3RD RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nairobi (Ang'awa, J.) delivered on 14th May, 2002

in

HCCC No. 2756 of 1996)

JUDGMENT OF THE COURT

The appellant **Ram Gopal Gupta** filed a suit at the High Court of Kenya at Nairobi against the 1st respondent, **Nairobi Tea Packers**, the 2nd respondent **Chai Limited**, and the 3rd respondent, **R.J. Waljee**. It was claimed in the plaint that the appellant was at all material times employed by the 1st respondent as its General Manager and that on the 2nd March, 1995 the 1st and 2nd respondents hired a forklift from the 3rd respondent to shift the 1st and 2nd respondents' machine within the 1st and 2nd respondents' premises. It was further claimed that on the said date the appellant while in the course of that employment was supervising the shifting of machines by the said forklift which was driven and managed by a servant of the 3rd respondent and that

while in the course of that engagement one of the machines being lifted slipped from the forklift and injured the appellant. Particulars of negligence were set out against the respondents and particulars of injuries suffered by the appellant were also set out. The appellant claimed special and general damages for the injuries he had suffered in the accident.

The 1st and 2nd respondents, on one hand, and the 3rd respondent, on the other filed defences against the

appellant's claim.

A trial took place before Ang'awa, J. who in a judgment delivered on 14th May, 2002 held on the issue of liability that the appellant had not contributed in any way to the occurrence of the accident. The learned Judge apportioned liability at 90% against the 3rd respondent and held that the 1st and 2nd respondents were liable for the accident to the extent of 10%. The learned Judge awarded agreed special damages in the sum of Shs.418,191/= and assessed general damages for pain and suffering at Shs.190,000/=. In the final award made after adding the general and special damages the learned Judge deducted 10% from the same even though she had found that the appellant had not contributed in any way to the occurrence of the accident.

The appellant was dissatisfied with those findings and filed this appeal.

There are six grounds set out in the Memorandum of Appeal and the first three grounds as would be expected are a challenge on the learned Judge for deducting the said 10% liability against the appellant when she had found that the appellant was not to blame in any way for the accident. It is said in other grounds that the learned Judge erred in not finding that as no workmen compensation was paid to the appellant the sum of Shs.190,000/= assessed as general damages for pain and suffering was inadequate. The last grounds state that general damages awarded were low and inadequate as not to represent the extent of injuries suffered by the appellant.

When this appeal came up for hearing before us on 20th February, 2017 **Mr. Rustam Hira**, learned counsel, appeared for the appellant but there was no appearance for the respondents who had been served through substituted service by counsel for the appellant as earlier ordered by court. We allowed hearing of the appeal to proceed because we were satisfied that the respondents had been served with a hearing notice but had not attended court. Mr. Hira informed us that he would rely entirely on his written submissions that had been filed in court and also on a list of authorities that he had filed on behalf of the appellant.

We have considered the record and the said submissions and the law. This is a first appeal and we are entitled to reconsider the record and the

evidence tendered before the said Judge and make our own conclusions but always remind ourselves that we have not had the benefit of hearing or seeing the witnesses which advantage the trial Judge had. On an enunciation of the duty of a first appellate court see the celebrated off-cited case of **Selle and Another V. Associated Motor Boat Co. Ltd & Others** [1968] 1 EA 123 where the predecessor of this Court had this to say of that duty:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

As we have stated the appellant takes issue with the learned Judge for holding in the judgment that it was the respondents who caused the accident with the appellant not contributing to the same at all but thereafter calculating damages in a way that led to a contradiction of that holding. On an agreed list of issues filed before the said Judge for determination issue 7 was:

“Did the plaintiff contribute to the occurrence of the accident?”

The learned Judge found on this issue as follows:

“I find that the plaintiff did not contribute to the occurrence of the accident. He stood the same distance as DW1 did from the machine. When the machine fell on him it did so on the side of the forklift (sic). He was unable to move out.”

The learned Judge therefore found as a fact that the appellant did not contribute to the accident at all. The Judge found that the accident was caused by the respondents and she apportioned liability against the respondents as we have stated. When it came to calculation of damages the learned Judge deducted 10% from the total and it would appear with due respect that her mind lost track and this effectively led to a final holding as if the appellant had contributed to the accident when the learned Judge had found that he did not. We therefore agree with learned counsel for the appellant that the learned Judge erred in apparently holding the appellant to have contributed to the accident to the extent of 10% when she had found as a fact that he had not.

The other main complaint by the appellant is the award of general damages for pain and suffering at Shs.190,000/=.

The injuries suffered by the appellant were set out in the plaint and were confirmed in a detailed report of **Dr. N.H. Bhanji**, a Consultant General Surgeon and Traumatologist who in a report dated 24th April, 1996 set out the following as the injuries suffered by the appellant:

- 1. Fracture of the shaft of the right humerus bone (upper arm)*
- 2. Fracture of the right wrist joint (intra-articular fracture of radius).*
- 3. Fracture of the shaft of the ulna bone (forearm).*
- 4. Deep abrasions over the extensor aspect of the left elbow joint.*
- 5. Compound fracture of the left proximal tibia and the fibula bones involving the tibial plateau.*
- 6. Tear of the medial as well as collateral ligaments of the left knee joint.*
- 7. Fracture of the lower third of the right tibia bone (lower leg).*

The doctor stated that the appellant was admitted to the Aga Khan Hospital where he underwent several operations and that he was discharged home on 28th March, 1995 and followed up with the doctor for further reviews and management. It was further stated that the appellant was readmitted to the same hospital on 21st March, 1996 and operated upon on the 23rd and 25th March, 1996 when all the metal implants were removed and a synthetic reconstruction of the ligaments and left knee joint was carried out. Post-operatively the appellant's left leg had been immobilized and the appellant suffered the following disabilities:

- 1. Shortening of the left leg by 3 cm. in comparison to the right.*
- 2. Restriction in movements of the left knee joint.*
- 3. Painful restriction in movements of the right wrist joint.*
- 4. Stiffness and numbness in the right upper as well as forearm due to soft tissue injuries sustained by the right upper limb.*

The doctor on physical examination awarded a permanent incapacity of 30% for the injuries suffered by the appellant and stated that the incapacity related mainly to the restriction in movement of the right wrist joint as well as the shortening of the left leg and restriction in movements of the left knee joint.

The learned Judge took submissions from counsel for all parties. Counsel for the appellant citing various

authorities recommended an award of Shs.1,000,000/= general damages for pain and suffering. Counsel for the 1st and 2nd respondents recommended a sum of Shs.500,000/= while counsel for the 3rd respondent recommended an award of Shs.450,000/=. The learned Judge awarded Shs.190,000/=.

Learned Counsel for the appellant in this appeal believes that this sum of Shs.190,000/= was so low and inadequate as not to represent the obviously serious injuries suffered by the appellant. We agree. Even a cursory look at the injuries reveals a victim of an accident who appeared before the learned Judge and who testified about serious injuries that he suffered and the doctor's report which was admitted by consent of the parties confirmed those injuries.

Counsel appearing for the respondents recommended minimum award of Shs.450,000/= and Shs.500,000/=. How the learned Judge arrived at a sum of Shs.190,000/= when the respondents' who made those recommendations

with their clients' interests in mind recommended almost 3 times what the Judge awarded is a case that we must say boggles the mind. Kneller, JA. in **Kemfro Africa Limited t/a Meru Express Services Kadogo Kanini v A.M.M. Lubia and Another** [1982-1988] 1 KLR had this to say on the principle to be observed when we are asked as here to interfere with a learned trial Judge's discretion in awarding damages:

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

Taking this principle into account and because of what we have already said, it is obvious that the sum of Shs.190,000/= awarded to the appellant for pain and suffering was so inordinately low as not to represent the injuries suffered by the appellant which we have set out. We are therefore entitled to interfere with that award and we shall proceed to do so.

Some of the cases that were cited before the learned Judge by the opposing advocates were the following:

1. Morris W Kahoto v David Musau and Others (HCCC No. 182 of 1991)

(unreported) where the plaintiff suffered 5 broken ribs and injuries to the hip

joint and right leg and an award of Shs.400,000/= was given on a date not given in the judgment.

2. John Gichuru v Johnson Kihoro HCCC No. 4222 of 1996 *(unreported) where the plaintiff suffered fracture to the ulna/radius right arm, a compound fracture of the lower femur of the right thigh and an award of Shs.350,000/= was given for general damages on a date which is not stated.*

3. Beatrice Wairimu Kimani v Kenya Bus Services Limited HCCC No. 3503 of 1998 *(unreported) where the plaintiff suffered various fractures and an award of Shs.400,000/= was made.*

Counsel then appearing for the appellant (plaintiff) recommended an award of Shs.1,000,000/= to the trial Judge and counsel for the respondents thought that the award should be between Shs.450,000/= and Shs.500,000/=. A perusal of the judgment written by the trial Judge shows that although the learned Judge set out the cases referred by counsel on either side nonetheless she did not make any comment on the cases at all; nor did she say whether they were relevant to the matter before her; or even compare the injuries in the previous cases to the case before her. She did not distinguish them. All she satisfied herself with, was to state cases referred to and proceeded to make the award we have referred to without reference to any past decided case. We think that the learned Judge erred by failing to make reference to past decided cases and make an award without laying any basis for it. This was, with respect, an improper

use of her discretion and this is a case where we must interfere with that wrong use of discretion and correct the error that

the learned Judge made. The appellant in the Memorandum of Appeal says that the award for pain and suffering should not be less than Shs.1,000,000/=. In the written submissions the appellant asked for Shs.1,500,000/=. We note that the authorities cited by the appellant in the list of authorities are for judgments delivered in the last about two years. Those would not have applied to the judgment that was delivered in 2002.

Going by the authorities cited by various lawyers before the learned Judge and looking at the nature of serious injuries suffered by the appellant which were much more serious than the injuries set out in the cases referred to by the respondents' lawyers, we think that an appropriate award in 2002 would be in the sum of Shs.800,000/= for pain and suffering. We therefore set aside that part of the judgment where the learned Judge appears to hold the appellant to have contributed to the accident and hold that the respondents were wholly to blame for the accident as found by the learned Judge. We set aside the award of Shs.190,000/= in general damages for pain and suffering and substitute thereof an award of Shs.800,000/=. The final award is therefore as follows:

- i) General damages for pain and suffering - Shs. 800,000/=
- ii) Special damages (agreed) - Shs. 418,191/=

Shs.1,218,191/=

The sum awarded in respect of general damages will earn interest from the date of judgment of the lower court while the sum of Shs.418,191/= being agreed special damages will earn interest from the date of filing suit. We do not find it necessary to make any finding on the complaint relating to no award having been made in respect of workmen compensation as this is not a live issue before us in any way at all. We award costs in the court below and here to the appellant.

Dated and Delivered at Nairobi this 31st day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR