



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, KIAGE & MURGOR, J.J.A.)

CIVIL APPEAL NO.60 OF 2004

BETWEEN

DENSHIRE MUTETI WAMBUA APPELLANT

AND

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Nairobi (Angawa, J) delivered on 11th April 2002

in

H.C.C.C. NO. 865 of 2001)

JUDGEMENT OF THE COURT

The contest in this appeal is only in respect of quantum of damages awarded to the appellant, **Denshire Muteti Wambua**, by the High Court in H.C.C.C. No.865 of 2001 for injuries sustained by him while working in the field as an artisan in the course of his employment with the respondent, Kenya Power & Lighting Co. Ltd.

The brief facts giving rise to the injuries and hence the claim for damages are that the appellant as an employee of the respondent was instructed by the respondent on or about 12th August 1998 to lay overhead electric cables. In the course of doing so, the pole upon which he was working fell to the ground as a result of which he tumbled-down to the ground and suffered injuries. He was hospitalized for 77 days.

After the incident, the appellant instituted in the High Court the said suit against the respondent seeking damages for the injuries sustained in the accident. In paragraph 8 (i) of the plaint he stated:

Particulars of injuries

1. *Serious injuries to the arms and legs.*

The hearing of the suit came before Ang'awa J. The plaintiff gave testimony and called Dr. Wambugu Mungai who had examined him and given a medical report. The doctor was cross-examined as was the appellant. His medical report was placed before the superior court and it detailed the injuries. From the evidence given by Dr. Wambugu Mungai, the appellant suffered *multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp.*" The plaintiff closed his case after the doctor's evidence.

The respondent did not adduce evidence in the High Court. But the respondent's counsel did cross-examine the appellant and the appellant's witness. Both counsel made submissions before the trial Judge and cited authorities.

In its judgment delivered on 11th April 2001 the High Court found the respondent 100% liable, a point that is not in contention in this appeal.

As regards damages the High Court made findings as follows:

"there are no particulars of injuries that have been precisely pleaded. I would award Shs. 100,000/= and enter judgment for the plaintiff accordingly. As the special damages have not been proved the same is dismissed. Future medical care of Shs. 40,000/= has been recommended although it could be cheaper in public hospital. I will nonetheless award this amount as having been pleaded and proved."

In the result, the learned trial Judge awarded the appellant Ksh.140,000/= plus costs and interest on the sum of Shs. 100,000/= from the date of the judgment.

Aggrieved by the decision of the superior court the appellant preferred this appeal and proffered 5 grounds as follows:

1. *The learned trial Judge erred in law in awarding an amount that was too low and not commensurate with the nature of the injuries suffered.*
2. *The learned trial Judge erred in overlooking the medical report together with the evidence of Dr. Wambugu the maker thereof despite there being no opposition from the defendants.*
3. *The learned trial Judge erred in law in not appreciating the authorities relied on by counsel for both the parties.*
4. *The learned trial Judge erred in ruling that pleadings on the nature of injuries were inadequate despite the doctor's own confirmation of the findings.*
5. *The trial Judge erred in not appreciating future complications were imminent despite the incapacitation which was up to 50%."*

This appeal came before us for hearing on 22nd April 2013. Mr. Jonathan Omangi of Omangi & Company advocates appeared for the appellant while Mr. Joseph Ngugi of Wambugu & Company advocates appeared for the respondent. Both advocates had filed written submissions which we have perused.

Mr. Omangi, the learned counsel for the appellant, contended that the award of general damages by the High Court was inordinately low. It was his submission that the court failed to have regard to all the evidence relating to the injuries sustained by the appellant and to appreciate the authorities cited. He submitted that there was in the High Court a consent by both parties for production of pertinent documents relating to the injuries sustained by the appellant. He contended that although there was paucity of particulars of injuries in the plaint, the injuries were brought out in evidence. It was his submission that on the basis of that evidence, the High Court should have awarded the appellant more damages commensurate with the injuries and he urged us to reinforce the award of damages. He conceded that there was no claim for loss of future earnings. He also cited the authorities which we shall turn to hereinafter. It was his submission that an award of Kshs. 1.5 million would be reasonable compensation.

On his part, Mr. Joseph Ngigi, the learned counsel for the respondent, conceded and agreed with Mr. Omangi that the award of damages made by the High Court was inordinately low. He pointed out that the respondent was not averse to enhance the award of general damages from Shs. 100,000/= to Shs.200,000/=. The respondent, he said, was now willing to increase the general damages to Ksh.400,000/= which, in his view, would fairly compensate the appellant. As regards the authorities cited, he submitted that the trial court did not appreciate the decisions but otherwise contended that the pleadings on injuries were inadequate although there was a consent for production of the documents which detailed the injuries. In his view, the plaint should have been amended to accord with the injuries reflected in the evidence. He was categorical that the documents relating to the injuries sustained by the appellant were produced by consent of both parties. It was his submission that the Judge gave an award only in respect of pain and suffering but did not make any award on 50% incapacitation as it was not proved. It related, he said, to special damages. He pointed out, correctly in our view, that loss of earnings is a special damages claim must be proved. In reply, Mr. Omangi confirmed that the appellant was not claiming loss of future earnings.

Both counsel were in agreement that the award of general damages for the injuries sustained by the appellant was inordinately low. The issue before us for decision in this appeal is whether should interfere with the award of damages by the High Court and if so what quantum of damages should be awarded to the appellant for the injuries sustained by him.

This Court has in the past propounded on the principles to be applied while considering whether to interfere with damages awarded by the trial Court. In **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE GATHOGO KANINI V. A.M.M LUBIA AND ANOTHER [1982 – 88] 1 KAR 777 at p.730**, Kneller, J. A. held:-

*“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 to be that it must 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 this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **Ilango v. Manyoka [1961] EA 705 709, 713; Lukenya Ranching and Farming Co-operatives Society Lt v. Kavoloto [1970] EA, 414 418, 419.**”*

In its decision in **ARROW CAR LIMITED –VS- BIMOMO & 2 OTHERS (2004) 2 KLR 101** this Court cited and applied the **KEMFRO AFRICA LTD** case (supra) with regard to the principles to be considered before interfering with an award of damages by a trial Judge when it held:

“in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Although the plaint in the suit in the trial court was poorly drafted and did not reflect the correct particulars of the injuries sustained by the appellant, the parties themselves agreed by consent which was recorded as an order of the court about the production of the documents relating to the injuries. In addition, the appellant’s witness, Dr. Wambugu Mungai, gave testimony and the medical report he had compiled was also produced as part of the documents. Clearly, in our view, the trial court had before it sufficient evidence on which to assess the damages. The finding therefore, by the learned trial Judge that “A party is bound by his pleading as there are no particulars of injuries that have been precisely pleaded, I would award Shs.100,000/=” was, in our view, erroneous because it ignored the oral and documentary evidence that was placed before the court. The documentary evidence was by consent of the parties. There was no indication that the respondent had reneged on or resiled from the consent relating to the production of the documents. The court proceeded to assess damages on the erroneous basis that the injuries complained of were only those that featured in the plaint. In arriving at the award of Shs. 100,000/= the learned trial Judge failed to take into account all the evidence adduced which clearly

showed that the injuries were more severe and more extensive. Consequently, the assessment of the damages by the learned trial Judge omitted a relevant factor and resulted in an award that was wholly erroneous. We have no hesitation in stating that there is sound basis in this appeal for interfering with the award of general damages.

Further, we observe that the learned trial Judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that “**comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases**” (see the decision of the court in **Arrow Car Limited vs Bimomo & 2 Others [2004] 2 KLR 101**). Although the award of damages was at the discretion of the trial court, that discretion required to be exercised judicially. The learned trial Judge did not consider any of the authorities cited by counsel for the parties so as to guide herself on the assessment of the damages. If she had done so, she probably would have seen that the award she made was not in consonance with decided cases. The award of damages by the learned trial Judge was, in our view, so inordinately low that it is a wholly erroneous estimate of the damage.

In our assessment of damages in this case, regard being had to the nature, severity and extent of the injuries suffered by the appellant which, as indicated above, were multiple, the authorities show that awards vacillate between Shs. 1million and 2 Million shillings. In the case of **Timo Kalevi Jappien & Another – vs Texcal House Service Station & Another – Nairobi HCCC No.220 of 1977**, the 1st plaintiff suffered multiple injuries particularized as posterior dislocation of the right joint hip, commuted fractures of the posterior rim, compound commuted fracture in the lower third left tibia and fibula and bruises over the right side of the forehead. The High Court assessed general damages for pain, suffering and loss of amenities at Ksh.1,750,000/=.

In **Joseph Poko Ochieng’ – vs – Kenya Bus Servies (MSA) Limited, Mombasa H.C.C.C. No.705 of 1986**, where the plaintiff suffered a fracture of the right femur, compound fracture of the left femur, a massive laceration of the left thigh and a cut over the proximal medial of his right leg, general damages were assessed at Ksh.1,100,000/=

In the case of **Jane Mulinge – vs – Antony Maina Ndere & Others – Nairobi H.C.C.C. No.5057 of 1992**, the Plaintiff sustained similar injuries to those in the instant appeal and had been hospitalized for six weeks. The court assessed general damages for pain and suffering and loss of amenities at Ksh.950,000/=

These authorities are not recent. The other authority cited by counsel reflected injuries that are at variance with those suffered by the appellant.

Mr. Omangi, learned counsel for the appellant urged us to award the appellant Shs.1.5 million.

The Learned counsel for the respondent, Mr. Ngigi, submitted that in the event that the Court considered it necessary to set aside the award, an upward revision of the damages should be in the region of Ksh.400,000/= as that would be adequate compensation for the injuries sustained. He referred us to the following authorities. “**Antony Mwangi – vs – Martin Muiruri (208) eKLR**, where the plaintiff sustained a fracture of the femur and was awarded Ksh.400,000/= as general damages; **Joseph Suri Nyateng – vs – H.P. Mashru (1999) eKLR** where the plaintiff sustained a fracture of the femur and a dislocation of the shoulder and was awarded Ksh.450,000/= ”

After due consideration of the authorities cited by both counsel, and having regard to the multiple injuries sustained by the appellant it is our considered view that an award of Ksh.1.5 million is in tune with the trend in awards of damages in similar injury cases. We realize of course that monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness. In the instant case, the award of 1.5 million shillings commends itself to us is reasonable.

With respect to loss of earning capacity as special damages, the learned counsel for the respondent conceded that the appellant had failed to plead it and was therefore not entitled to make the claim.

As regards the special damages amounting to Shs.40,000/= we see no reason to disturb the figure.

In the result, we allow the appeal with costs and set aside the judgment of the High Court and in its place we enter judgment for the appellant in the sum of Shs. 1,540,000/= made up as follows:

| | |
|--|------------------------|
| General damages for pain and suffering and loss of amenities | Ksh.1,500,000/= |
| Special damages | <u>Ksh. 40,000/=</u> |
| Total | Ksh.1,540,000/= |

The general damages shall carry interest at court rates from the date of this judgment but the special damages shall carry interest (at court rates) from the date of filing the suit. The respondent shall bear the costs of this appeal and of the suit in the High Court.

Dated and delivered at Nairobi this 21st day of June 2013.

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR