



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CIVIL APPEAL NO. 45 OF 2018

(Originally Kakamega High Court Civil Appeal No. 77 of 2015)

WEST KENYA SUGAR CO LTD.....APPELLANT

VERSUS

JOSEPH SORE SHIRAMBULA.....RESPONDENT

(Being an Appeal from the judgment and decree of the Chief Magistrates Court – Kakamega by Hon S. Wahome, Senior Principal Magistrate in Civil Suit No. 242 of 2013 delivered on 26/8/2015)

JUDGMENT

1. Joseph Sore Shirambala (the Respondent) sued West Kenya Sugar Co Ltd (the Appellant) before the Chief Magistrates Court (the trial Court) in Kakamega alleging breach of duty of care/negligence.
2. In a Judgment delivered on 26 August 2015, the trial Court awarded the Respondent) general damages of Kshs 600,000/-, special damages of Kshs 3,000/- (less 20%) contributory negligence agreed to by consent.
3. The Appellant was dissatisfied with the award of damages, and on 24 September 2015 it filed a Memorandum of Appeal before the High Court in Kakamega contending that
 1. The learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 2. The learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 3. The learned trial Magistrates award of damages was inordinately too high and manifestly excessive for the injuries allegedly sustained by the Respondent.
 4. The learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously.
4. The Appellant filed its submissions on 24 September 2018.
5. On 17 December 2018, the High Court citing lack of jurisdiction transferred the Appeal to this Court.
6. When the Appeal was mentioned before this Court on 17 November 2020, the Court directed the Respondent to file and serve his submissions on or before 4 December 2020. He filed the submissions on 2 December 2020.
7. The Court has considered the record and the submissions.

Role of the Court on first Appeal

8. The Court of Appeal in *Selle and Ar v Associated Motor Boat Co. Ltd & Ors (1968) EA 123* stated on the role of Court on the first appeal thus:

This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so, it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

9. This Court will bear in mind the interdict on its role.

The injuries

10. In the Plaintiff, the Respondent had pleaded that he had sustained an amputation of the distal phalanx left index finger at the distal interphalangeal joint and crush injury to the left index finger.

11. To support the nature of injuries, the Respondent produced a Health Passport from St. Elizabeth Hospital Mukumu and a medical report prepared by Dr Charles M. Andai on 13 March 2015.

12. The medical report confirmed the injuries as pleaded as opined that the injuries were serious soft tissue with permanent physical disablement of 3%.

13. However, the Medical Practitioners and Dentists Board in a letter dated 29 May 2015 indicated that Dr Andai though a registered doctor had not sought licensing from 2007 to the date of the report.

14. The Appellant also caused the Respondent to be examined by Dr P.W. Oketch, and in a report dated 20 November 2013 assessed that the Respondent had sustained a severe crush injury on the distal phalanx of his left index finger leading to amputation.

15. In the view of the Appellant's doctor, the Respondent had been occasioned a 4% permanent incapacitation.

16. The nature and extent of injuries sustained by the Respondent are therefore not in doubt.

Assessment of damages

17. Before the trial Court, the Respondent had proposed general damages of Kshs 1,000,000/- and he relied on the decision in *Ben Menges v Edith Makungu Lande* (2013) eKLR.

18. According to the decision, the injuries sustained were a blunt injury to the head, injury on both shoulders, blunt injuries to the back, numbness of lower limbs, tender lumbo sacral spine injuries, injuries to both legs and an injury to the chest.

19. By any standards, the injuries in the authority relied on by the Respondent were far more serious than in the Appeal under consideration. The authority was not relevant.

20. Before this Court, the Respondent sought to rely on *City Engineering Works (K) Ltd v Venatsio Mutua Wambua* (2016) eKLR and *Pietro Canobbio v Joseph Amani Hinzano* (2016) eKLR. Again, the injuries in these 2 authorities were more severe than those sustained by the Respondent in the present Appeal.

21. On the part of the Appellant, it had proposed general damages of Kshs 180,000/- and it drew the attention of the trial Court to the case of *Simba Posho Mills Ltd v Fred Michira Onguti* (2005) eKLR.

22. The injured in this case had sustained an amputated distal phalanx and comminute fracture of the right index finger of the right hand, decloving minor injury palp of the middle finger of the right hand and cut wound on the right thumb. The trial Court had awarded general damages of Kshs 360,000/-.

23. In its submissions before this Court, the Appellant cited *Sinohydro Corporation Ltd v Daniel Odhiambo Nyaura* (2016) eKLR where an award of Kshs 250,000/- was made for an injury in 2013 leading to amputation of the 4th finger of the right hand.

24. The injuries sustained in the *Simba Posho Mills* case cited by the Appellant were near similar to those suffered by the Respondent herein. The Court finds the decision more relevant.

25. However, the *Simba Posho Mills Ltd* case was decided in 2005 (injury was in 2000) while the case herein was decided in 2015 (injury in 2013), a difference of about 10 years.

26. In such circumstances, inflation would be a consideration. The trial Court took note of inflation at arriving at the award of Kshs 600,000/- general damages. That was excessive compared to the authority.

27. The Court must however note that the parties failed to file before the trial Court current and comparable authorities. By failing to cite current case law before the trial Court, the parties were doing a legal disservice to themselves, and it is strange that it is now alleged that the trial Court misdirected itself.

28. It becomes difficult for an Appellate Court in such cases to determine if the trial Court misapprehended the law or misdirected itself in law.

29. In this type of cases, parties should not expect the Court to carry out legal research on their behalf.

30. From the foregoing, the Court finds that the award of Kshs 600,000/- general damages was excessive.

Conclusion and Orders

31. In light of the above, the Court sets aside the award of general damages and substitutes thereof an award of Kshs 450,000/-.

32. The award to attract interest from today till full settlement.

33. Each party to bear their own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Ogejo, Olendo & Co. Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Chrispo Aura