



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 14 OF 2020

(Originally Nyamira High Court Civil Appeal No. 2 of 2019)

ZHONGMEI ENGINEERING GROUP LTD.....APPELLANT

V

ERICK NYANDIEKA MONG'ARE.....RESPONDENT

(Being an Appeal from the judgment of the Honourable Chief Magistrate Hon. Wambani

dated 15th day of January 2019 in Nyamira Chief Magistrates Court

Civil Suit No. 163 of 2016)

JUDGMENT

1. Erick Nyandieka Mong'are (the Respondent) sued Zhongmei Engineering Group Ltd (the Appellant) before the Chief Magistrates Court in Nyamira alleging breach of statutory duty of care/negligence.
2. In a judgment delivered on 15 January 2019, the trial Court found the Appellant 70% liable in negligence and awarded the Respondent Kshs 906,500/- (Kshs 634,550/- after deducting Respondent's contributory negligence).
3. The Appellant was dissatisfied, and it filed a Memorandum of Appeal before the High Court in Nyamira contending that:
 1. The learned Magistrate erred in law in making a finding of excessive damages against the Defendant.
 2. The learned Magistrate erred in law and fact in holding that the Defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.
 3. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to general damages of Kshs 900,000/- without concrete documentary evidence.
 4. The learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to special damages of Kshs 6,500/- without concrete documentary evidence.
 5. The learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to net damages of Kshs 634,550/-.
 6. The learned Magistrate erred in law and fact in failing to appreciate the long-established principle of *stare decisis*, precedent in law thus bringing the law into confusion and thereby deriving an erroneous finding/conclusion, in particular, relating to damages.
 7. The learned Magistrate erred in law and fact in failing to appreciate as follows:
 - (i) the Plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

8. The learned Magistrate erred in law and fact in entering judgment in favour of the Plaintiff against the Defendant in spite of the Plaintiff's failure to establish his case more, especially on quantum.

9. The learned Magistrate erred in law and fact in failing to appreciate the legal position to be considered. The Court award is unsustainable and baseless in the circumstances.

4. Both the Appellant and the Respondent filed their submissions on 4 July 2019.

5. On 19 December 2019, the High Court, citing lack of jurisdiction transferred the Appeal to this Court.

Role of this Court on the First Appeal

6. The Court of Appeal in *Seascapes Limited v Development Finance Company of Kenya Limited* (2009) eKLR stated the role of a first appellate Court thus.

As this is a first appeal, we are bound to look at the evidence that was adduced before the superior court afresh, analyse it, re-evaluate it and reach our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that.

7. This Court will bear those legal principles in mind.

Error in awarding general damages

8. In its submissions, the Appellant submitted on one broad ground of appeal, that the award of general damages was excessive.

9. According to the medical report produced before the trial Court, the Respondent had sustained a fracture of the right metacarpal hand and cut wound on the right-hand fingers. The fracture had healed well at the time of the medical examination.

10. In proposing general damages, the Respondent cited the case of *Isaac Mworira M'nabea v David Gikunda* (2017) eKLR where the High Court on appeal had awarded Kshs 1,000,000/- where the party had sustained mild head and neck injury, compound fracture of the right tibia fibula bones.

11. The injuries in the authority cited by the Respondent were far more serious than the injuries sustained by the Respondent. The decision was, therefore, irrelevant and not suitable comparator.

12. On its part, the Appellant had proposed general damages of Kshs 180,000/- by relying on *Johnson Mose Nyaundi (minor suing through next friend and father Wilfred Wadimbe Nyaundi v Petroleum Industries Ltd* (2014) eKLR.

13. In this latter case, the child had sustained bruises on the face and elbows, chest contusion, contusion, cerebral concussion and fracture of the right tibia and fibula bones.

14. The trial Court awarded Kshs 180,000/- general damages. The High Court dismissed the Appeal which was based on the ground that the award was inordinately low.

15. Again, the Court notes that the injuries in this authority cited by the Appellant were not comparable to the Appeal now under consideration.

16. Parties have a duty to place before the trial Court relevant and comparable authorities. None of the parties herein presented before the trial Court such relevant and comparable authorities. It is regrettable, as a Court should not be doing research for the parties.

17. This Court has looked at *Kenya Steel Fabricators Limited v Tom Moki* (2018) eKLR where the High Court reviewed several authorities, and more so **Olouch Eric Gogo v Universal Corporation Ltd (2015) eKLR wherein the injured party sustained** a crushed injury to the left thumb with fracture of the mid phalanx and was awarded Kshs 200,000/- in 2015.

18. Considering the foregoing, the Court concludes that the trial Court fell into by error by failing to consider relevant comparators thus awarding exceedingly high general damages.

19. Considering the lapse and inflation and the *Gogo* case, the Court is of the view that an award of general damages of Kshs 400,000/- would be appropriate.

Conclusion and Orders

20. In light of the foregoing, the Court sets aside the award of general damages in the judgment delivered on 15 January 2019 and substitutes it with an award of Kshs 400,000/-.

21. Each party to bear own costs of the Appeal.

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

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Mose, Mose & Millimo Advocates

For Respondent B.N. Ogari & Co. Advocates

Court Assistant Chrispo Aura