



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 363 OF 2018**

**(Before Hon. Justice Mathews N. Nduma)**

**TRANSMARA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**ALBERT OPIYO.....2<sup>ND</sup> RESPONDENT**

**[Appeal against the judgment of Hon. M.M. Wachira, Senior Resident Magistrate delivered on 16<sup>th</sup> February 2017 in Migori CMCC NO. 285 of 2014]**

**JUDGMENT**

1. The Appeal is filed against the judgment of Hon. M.M. Wachira, Senior Resident Magistrate delivered on 16<sup>th</sup> February 2017 in Migori CMCC NO. 285 of 2014. The parties entered into a consent judgment on liability in the ratio of 65:35 in favour of the respondent against the Appellant and as such the trial court was only left to assess quantum.

2. The trial magistrate made an award of Kshs. 800,000 as general damages for pain and suffering. The trial court also awarded costs of the suit to the plaintiff, now the respondent. It is against this award that the appellant has appealed.

3. From the pleadings, the respondent sustained the following injuries:

- Fracture of the left upper  $\frac{1}{3}$  fibula
- Septic wound on the left foot.
- Tender/swollen (sic) on the left foot.
- Multiple fracture of tibia fibula.

4. PW1, produced treatment documents from two medical facilities including Ram Hospital in Kisii and Homa-Bay District Hospital. The accident occurred on 7<sup>th</sup> October 2013 and that PW1 was under treatment for a period of more than a year in the aforesaid facilities. PW1 relied on a medical report from Dr. Nyawade dated 21<sup>st</sup> April 2014. The report was produced as exhibit '4' and the doctor stated that the damage inflicted on the foot of the respondent had adversely affected the official functions of both lower limbs and will remain so for a considerable period of time. The Doctor, further made a prognosis for full recovery of the injured foot to take up to seven (7) years from the date of the report, subject to strict compliance to regular reviews through the outpatient clinic. The report had listed the following injuries having been sustained by the respondent:

- i. Fracture on the left mid tibia – fibula.
- ii. Multiple fractures of tibia and fibula.
- iii. Fracture on the left upper  $\frac{1}{3}$  fibula
- iv. Subsequent infection of the left foot.
- v. Reduced functional status of the affected foot.

vi. Septic wound on the left foot.

vii. Tender/Swollen on the left foot.

5. The Doctor had also summarized the treatment received by the respondent.

6. The trial magistrate captured the evidence of PW1, the respondent in chief but failed to capture the cross examination. Re-examination was however captured.

7. The Appellant did not call any witness to rebut the evidence by the claimant. Both parties filed written submissions. The claimant relied on the case of **Joseph Musee Mue vs Julius Mbogo Mugii and three others (2013) eKLR** where the plaintiff with similar injuries was awarded Kshs. 1,300,000 in the year 2013. The claimant prayed for an award of Kshs. 1,550,000.

8. The appellant on the other hand relied on the court of Appeal decision in **Hassan vs Nathan Mwangi Kamau Transporters and 5 others Nairobi Court of Appeal NO. 123 of 1985** in which the court opined:

“Inordinately high awards will lead to monstrously high premiums for insurance of all sorts and it is to be avoided for the sake of everyone in the country....”

9. The Appellant then relied on the cases of **Sokoro Saw Mills Limited vs Grace Nduta Ndungu in HCCA NO. 99/2003** in which the plaintiff sustained soft tissue injuries and was awarded Kshs. 30,000 in general damages. The Appellant further relied on the case of **Kreative Roses Limited vs Opher Kerubo Osuno (2014) eKLR** in which the plaintiff sustained soft tissue injuries and a cut to the right leg and was awarded Kshs. 50,000 in general damages. The Appellant proposed an award of Kshs. 20,000 in general damages.

### **Determination**

10. This being a first Appeal, the court has a duty to assess the evidence afresh and come up with its own considered decision. The court was referred to the case of **Giorgio vs John Kuria Macharia (2014) eKLR** in this regard.

11. The court was further invited to consider the decision of **Francis Mano Kahura vs Nahashon wanjau Muriithi (2015) eKLR** in which the High Court sitting at Embu awarded the plaintiff who had suffered a segmental fracture of the mid-shaft right femur and a cut wound on the right knee and was admitted to hospital for three (3) months and the right leg was shortened by two (2) centimeters Kshs. 850,000 in general damages. On Appeal, the award was reduced to Kshs. 500,000.

12. The court was also referred to the case of **Akamba Public Road Services vs Abdikadir Adan Galgalo (2016) eKLR** in which the trial court awarded the plaintiff Kshs. 800,000 which was reduced on appeal to Kshs. 500,000. The plaintiff had sustained fracture of the tibia-fibula bone.

13. The court was reminded not to “interfere with exercise of discretion by a trial court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it ought to have taken into account and consideration and in doing so arrived at a figure which was inordinately high or low”. **Mbogo and another vs Shah (1968) EA 1993.**

14. In addition the court referred to the case of **Caroline Wanjiku Kariuki vs simon Kitum and another (2012) eKLR** where the plaintiff was awarded general damages in the sum of Kshs. 1,800,000 for similar injuries sustained in the year 2012.

15. This court has carefully evaluated the evidence on record before the trial magistrate and the judgment by the trial court and has found that the learned trial magistrate carefully analyzed the medical evidence before her regarding the injuries sustained by the respondent. The trial court also carefully analyzed the authorities presented before it by both the Appellant and the respondent and found:

“In the present case, and guided by the cited case of **Joseph Musee** which I find more relevant than the cases cited by the defendant’s counsel, I am of the view that an award of Kshs. 800,000 is adequate compensation and I so award”

16. Having reviewed all the above cited authorities referred to us by both parties and considered the nature and extent of injuries sustained by the respondent including the finding by the doctor in his medical report that the respondent was likely to take up to seven (7) years to fully recover from the injuries sustained; Having also considered that the injuries sustained by the respondent included fractures as opposed to soft tissue injuries sustained by the plaintiffs in the cases referred to the court by the appellant, the court finds no fault in the assessment of general damages awarded by the trial magistrate. The court finds that the omission to indicate cross examination did not in any manner negatively impact the valid judgment of the trial court.

17. The court shall not interfere with the exercise of discretion by the trial magistrate simply because it would have arrived at a different figure of damages.

18. The court finds that the award of Kshs. 800,000 in general damages was reasonable award and was not inordinately high in the circumstances of the case.

19. This court confirms the award by the trial magistrate in the sum of Kshs. 800,000 to be shared in the agree ratio of 65:35 in favour of the respondent.

20. The appeal lacks merit and is dismissed with costs before the trial court and this court.

**Judgment Dated, Signed and delivered this 10<sup>th</sup> day of March, 2020**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Murimi, Ndumia Mbago and Muchela Advocates for the Appellant.

Everlyne Kuke and Company Advocates for the Respondent.

Chrispo – Court Clerk