



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 4 OF 2018

EXPORT TRADING COMPANY LIMITED.....APPELLANT

VS

RAMADHAN SHIUNDU MURUNGA.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. A. Lesootia, SRM

in Mombasa CMCC No. 1893 of 2015)

JUDGMENT

1. On 14th November 2015, **Hon. A. Lesootia, SRM** delivered judgment in Mombasa CMCC No 1893 of 2015, in the sum of Kshs. 2,437,040 in favour of the Respondent. Being dissatisfied with the judgment, the Appellant filed the present appeal.
2. The brief facts of the case as recorded by the trial court are that the Respondent worked for the Appellant as a loader. On 3rd July 2014, while in the course of his work, bags of rice collapsed on him causing him injury. He suffered fractures on both femurs, ligament injury to the knee and fractures on the 3rd, 4th and 5th toes plus soft tissue injuries. He was admitted at Bomu Hospital for 3 weeks.
3. A consent on liability was recorded before the trial court at 20:80% in favour of the Respondent, leaving only the issue of quantum for determination.
4. In its Memorandum of Appeal dated 22nd November 2016, the Appellant lists the following grounds:
 - a) That the learned trial Magistrate erred in law in awarding the Respondent Kshs. 1,200,000 as general damages in that the said sum was so excessive as to amount to an erroneous estimate of the damages payable to the Respondent;
 - b) That the learned Magistrate erred in failing to consider or adequately consider the medical report of Dr.Udayan Sheth dated 6th November 2015 on the injuries sustained by the Respondent which was tendered in evidence;
 - c) That the learned Magistrate erred in finding that since Dr.Udayan Sheth was not subjected to cross examination, the Court could not appreciate the findings in his report when Dr.Udayan Sheth's report dated 6th November 2015 was produced in evidence before the Court by consent of both parties;
 - d) That the learned Magistrate erred in law in awarding the Respondent Kshs. 1,843,200 for loss of earning capacity in that the said sum was so excessive as to amount to an erroneous estimate of the damages payable to the Respondent for loss of earning capacity;
 - e) That the learned Magistrate erred in law and in fact in adopting a multiplier of 16 years while assessing damages payable to the Respondent for loss of earning capacity when there was evidence before him that the Respondent was a casual labourer and his continued employment was not guaranteed considering the normal vicissitudes and imponderables of life;
 - f) That the learned Magistrate erred in law in awarding the Respondent a sum of Kshs. 250,000 for future medical treatment when there was no evidence led before him in respect thereof;
 - g) That the learned Magistrate erred in law in that he failed to consider the fact that the Respondent would be paid a lumpsum which he could invest wisely to earn interest and as a consequence thereof the multiplier of 16 years adopted by the learned Magistrate was erroneous;

h) That the learned Magistrate failed to give any or any adequate reason or reasons on how he arrived at the figure of Kshs. 1,200,000 for general damages awarded to the Respondent;

i) That the learned Magistrate erred in failing:

- i. To appreciate the significance of the various facts that emerged from the evidence of the Respondent's witnesses;
- ii. To consider or properly consider all the evidence before him and/or;
- iii. To make any or any proper findings on the aspect of quantum of damages on the evidence before him

j) That the learned Magistrate erred in failing to consider or adequately consider all the evidence before him and the written submissions filed by Counsel for the Appellant.

5. This is a first appeal and the role of the Court is clear. It is as defined by the Court of Appeal in **Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR** where the following holding from the earlier decision in **Kenya Ports Authority v Kuston Kenya Limited [2009] eKLR** was cited with approval:

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

6. In my view, the grounds raised by the Appellant in its Memorandum of Appeal may be classified under three strands:

- a) The probative weight assigned to the medical reports produced before the trial court;
- b) The number of years used as multiplier to tabulate loss of earning capacity;
- c) The basis for the award on future medical expenses.

7. On the first strand, the Appellant submits that by disregarding the opinion by Dr.Udayan Sheth, on the extent of permanent disability suffered by the Respondent, the trial court proceeded on wrong principles, thus arriving at a manifestly excessive award.

8. As held in the well tested decision in **Butt v Khan (1982-1988) 1 KAR, 1**

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

9. In similar fashion, the Court of Appeal in **Kemfro Africa Limited T/A Meru Express Services (1976) & another v Aziri Kamumudika Lubia & another[1985] eKLR** stated the following:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing 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 that either 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 wholly erroneous estimate of the damage.

10. Further, the Court of Appeal in **Catholic Diocese of Kisumu v Tete [2004] eKLR** rendered itself thus:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if satisfied that the trial court applied wrong principles. As by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrive at a figure so inordinately high or low as to present an entirely erroneous estimate.”

11. I do not need to say more; this issue is well beaten and settled.

12. According to the record of appeal, Dr. Sheth filed a report dated 6th November 2015. The report captures the following injuries and treatment:

- a) Fracture of both femurs;
- b) Ligament injury to left knee;

- c) Phalanges of left foot, cut wound over left foot;
- d) He was admitted till 21st July 2015;
- e) He was operated, fractures were fixed with nail and screws;
- f) Wounds were stitched;
- g) Present complaint: pain in both thighs, unstable knee.

13. In Dr. Sheth's opinion, the Respondent had an unstable mildly stiff left knee for which he would require surgery to repair ligament. He assessed permanent incapacity at 15%. For some reason that was not clear to the Court, Dr. Sheth did not testify before the trial court. His report was however admitted in evidence by consent of the parties.

14. On his part, the Respondent called Dr. S.K Ndegwa who drew the conclusion that the Respondent had suffered very severe multiple bone, joint and soft tissue injuries. He placed permanent disability at 28 %.

15. The issue here is that the learned trial Magistrate adopted Dr. Ndegwa's opinion rather than Dr. Sheth's. My role as an Appellate Court is limited to determining whether the Magistrate had reason to make the choice he made.

16. At page 2 of his judgment dated 14th November 2016, the learned trial Magistrate states:

"I have carefully gone through the medical records, reports and submissions on record. It is not in dispute the nature of injuries sustained by the plaintiff. The only dispute is the degree or percentage of the permanent disability."

17. He goes further to reiterate the reasons given by Dr. Ndegwa for his opinion and finally states:

"The Defendants (sic) Defence Exhibit 1 and the opinion as to permanent incapacity of 15% is not in the court's view fully explained."

18. Looking at the two medical reports which form part of the Record of Appeal, it is indeed true that while Dr. Ndegwa gives a detailed account for his opinion, Dr. Sheth did not give a single reason for his conclusion. I must therefore agree with the learned trial Magistrate that while there was a clear basis for the 28% permanent disability returned by Dr. Ndegwa, there was none laid before the trial court for the 15% permanent disability assigned by Dr. Sheth. As a result, I find no reason to interfere with the finding of the learned trial Magistrate on this account.

19. The next strand has to do with the 16 years multiplier adopted by the trial court. The Appellant submits that the trial court erroneously applied a multiplier of 16 years in the absence of evidence that the Respondent would have done casual work until the age of 45 years.

20. It was common cause that at the time of the accident, the Respondent was 29 years old. It was also not in contest that he was engaged in a job that required heavy lifting. There was however no evidence laid before the trial court to show that he would not continue being engaged in this work up to 45 years of age.

21. The Appellant further submits that the trial court misdirected itself when it failed to subject the award of loss of earning capacity to 28% incapacity as proposed by Dr. Ndegwa or 15 % as proposed by Dr. Udayan.

22. With much respect, I think the Appellant is misdirected on this score. First, the Court did not find any record of this issue having been canvassed at the trial and as stated in the foregoing parts of this judgment, it is not within the province of the Appellate Court to entertain new issues on appeal. Second, loss of earning capacity is calculated on the basis of the job occupied by the plaintiff at the time of the accident and the degree of overall permanent disability is not a necessary factor.

23. The final strand is with respect to the award of Kshs. 250,000 for future medical expenses. The Appellant submits that the trial court made an error in making this award in the absence of strict proof.

24. By taking this position, the Appellant appears to classify this head under the category of special damages. With much respect, I find that the Appellant took the wrong path on this one as well. As defined in the High Court decision in ***Zachary Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR*** special damages are reimbursed to a party for what they have already spent. Future medical expenses on the other hand, are based on an assessment by a Medical Doctor on the cost of medical care that will be required in the future, they can only be based on the opinion of the Medical Doctor and once incurred, may vary slightly. The point is that if the opinion of the Medical Doctor is on the whole reasonable, the Court has no basis to disagree.

25. That said, I find no reason to interfere with the award for Kshs. 250,000 for future medical expenses.

26. In the ultimate, this Court finds no reason to interfere with the award by the learned trial Magistrate. The Appellant's appeal therefore fails and is dismissed with costs to the Respondent in this Court and in the Court below.

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF MARCH 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Maundu h/b Mr. Gor for the Appellant

Mr. Njoroge for the Respondent