



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 1 OF 2017

VISARO CONSTRUCTION CO. LTD APPELLANT

V

BENJAMIN OTUKE

RESPONDENT

(being an appeal from the judgment of Honourable Orange K.I. Senior Resident Magistrate (SRM) delivered on 11th January 2017 in Milimani CMCC No. 432 of 2015)

JUDGMENT

1. In a judgment delivered on 11 January 2017, the Hon Orange SRM awarded the Respondent general damages of Kshs 200,000/-. The parties had earlier on entered a consent on liability at the ratio of 80% to 20% (the Respondent had alleged breach of statutory duty leading to injury in the workplace).
2. The Appellant was aggrieved, and in a *Memorandum of Appeal* set out 5 Grounds of Appeal, to wit,
 1. **THAT** the learned trial Magistrate erred in law and in fact in failing to judiciously analyse the medical evidence on record thereby arriving at an award on general damages that was highly excessive and exaggerated.
 2. **THAT** the learned trial Magistrate erred in law and in fact in failing to consider that the Respondent sustained a minor injury thus arriving at a finding on quantum that was inordinately high, excessive and an erroneous estimate of the sum payable to the Respondent.
 3. **THAT** the learned trial Magistrate erred in law and fact in applying the wrong principles while assessing damages that was excessive and highly exaggerated.
 4. **THAT** the learned trial Magistrate erred in law and fact in failing to judiciously consider the Appellant's submissions on record thereby arriving at an award on quantum that is highly excessive and exaggerated.
 5. **THAT** the Appellant shall upon receipt of the duly typed proceedings file a supplementary Memorandum of Appeal to include other grounds and reasons that may become apparent therein.
3. Pursuant to directions issued by the Court on 22 October 2019, the Appellant filed its submissions on 27 November 2019 (should have been filed and served before 8 November 2019) while the Respondent's submissions were not on file by this morning, most likely due to the delay by the Appellant.
4. The Court has relooked at the pleadings, reconsidered and re-evaluated the evidence, and further examined the submissions before the subordinate Court.
5. In considering the Appeal, the Court will consider whether the trial Court took into consideration irrelevant factors or failed to take into account relevant factors in assessing damages and/or whether the general damages were inordinately high.
6. The gravamen of the Appeal is on quantum as the parties had agreed on liability before trial.
7. The Respondent sustained *blunt trauma to the right wrist joint*, and which injuries were classified as harm.

8. In assessing general damages, the subordinate Court relied on the cases of *Isinya Roses Ltd v Zakayo Nyongesa* (2016) eKLR where the Claimant had sustained *injuries to the right-hand wrist and blunt trauma to the volar aspect right wrist joint* and the Court awarded Kshs 155,000/- as general damages. The Court also factored in inflation.

9. During the trial, the Respondent had drawn the attention of the Court to the case of *Wiyumirire Saw Mills v Paul Kariuki* (2005) eKLR where the Respondent had sustained severe injuries leading to massive loss of blood and a resultant keloid, and damages of Kshs 230,000/- was assessed.

10. The Appellant had on the other hand cited the case of *Kreative Roses Ltd v Olpher Kerubo Osumo* (2014) eKLR where the Court had awarded Kshs 50,000/- for a cut wound on the right leg and soft tissue injuries to the right leg, and *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi* (2013) eKLR where the Appellate Court reduced general damages to Kshs 70,000/- for soft tissue injuries.

11. The Court notes that the authorities relied on by the Appellant were for 2013 and 2014, while the authority cited by the Respondent was decided in 2005.

12. The instant case was determined by the trial Court in 2017. It is not clear to the Court why the parties did not bring to the attention of the trial Court more contemporary and relevant authorities.

13. The injuries the subject of general damages in the *Isinya Roses Ltd* case were near similar to the injuries sustained by the Respondent in the present case. The subordinate Court gave its judgment in 2013, and the High Court affirmed the judgment of general damages of Kshs 155,000/- in 2016.

14. In the view of the Court, the trial Court did not err when it considered the *Isinya case* and effects of inflation, and the time difference when the cases cited and relied on were delivered.

15. The general damages of Kshs 200,000/- was not out of character with contemporary norms and awards then.

Conclusion and Orders

16. The Appeal is therefore found without merit and is dismissed.

17. Costs of the Appeal and before the subordinate Court to the Respondent.

Delivered, dated and signed in Nairobi on this 29th day of November 2019.

Radido Stephen

Judge

Appearances

For Appellant Morara Apiemi & Nyangito Advocates

For Respondent Mwaura Kamau & Co. Advocates

Court Assistant Lindsey