



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 14 OF 2018

(Formerly Kiambu HCCA No. 151 of 2017)

Before Hon. Lady Justice Maureen Onyango

BENVAR STONES LIMITED.....APPELLANT

VERSUS

BENARD OSIEKO EKASIBA.....RESPONDENT

(Being an appeal from the judgment of Hon. Magistrate L. M. Wachira SPM,

delivered on 6th September 2017 at the Principal Magistrate's Court

at Gatundu in Civil Suit No. 93 of 2016)

JUDGMENT

The appellant was the defendant in the Senior Principal Magistrate's Court at Gatundu in Civil Case No. 93 of 2016. Judgment in the suit was delivered on 6th September 2017. The court awarded the plaintiff (now respondent) Kshs.200,000 as general damages and Kshs.2,000 in special damages. Liability was determined at 75.25 in favour of the respondent herein.

The court further awarded the respondent herein costs.

Aggrieved by the decision of the Learned Senior Principal Magistrate, the appellant filed the instant appeal. In the memorandum of appeal the appellant sets out the following grounds of appeal –

1. That the learned Magistrate erred in Law and fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs.200,000 for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries alleged sustained by the respondent herein.
2. That the learned Magistrate erred in Law in making such a high award as to show that the magistrate acted on a wrong principle of law.
3. That the learned Magistrate's award on damages was so high as to be entirely erroneous.
4. That the learned Magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in

- view of the medical evidence presented before the court.
5. That the learned Magistrate erred in Law and Fact in failing to consider the defendant's submissions and authorities in making a finding on quantum.
 6. That the whole judgment on quantum was against the weight of evidence before the court.

The appeal was originally filed at the High Court in Kiambu vide Kiambu High Court Civil Appeal No. 151 of 2017.

On 21st November 2017, the parties appeared before Hon. Joel. Ngugi J. in Kiambu for hearing of the application for stay of execution pending hearing of the appeal when they recorded the following consent:

- i. That the Appellant to pay Kshs.140,000 to the Respondent within 30 days.
- ii. That the Appellant to deposit the remaining amount of the decretal sum in a joint interest - being account in the names of both parties advocates, within 30 days.
- iii. A stay of execution to issue subject to (i) and (ii) above.

The file was transferred to this court by order of the Judge sitting in the High Court Kiambu on 23rd July 2018 on grounds that it involves a dispute arising within employer/employee relations.

The parties appeared before me for directions on 26th February 2019 and were allowed upon application, to proceed by way of written submissions. The appellant filed submissions on 28th March 2019 and the respondent on 10th June 2019.

Facts of the Case

The facts of this case were not contested either in the subordinate court or in this court. At the lower court parties recorded consent on liability at 75.25 in favour of the respondent submissions.

From the pleadings filed in the lower court, the facts of the case are that the respondent was employed by the appellant as a loader in April 2015 on causal basis. While in the course of duty the respondent's Supervisor instructed the respondent and his co-workers to transfer a metallic bar (a rail used by the stone cutting machine) to a quarry. The rail was greasy and slipped from their hands. In the process, it injured the respondent on the small toe of his right leg.

The respondent was first treated at the company's internal clinic and later at Joy Nursing Home. In the medical report filed in court by Dr. A. K. Mwaura M. D. Ph. D. dated 4th January 2017; the diagnosis was as follows –

“PROGNOSIS AND OPINION

Benard suffered a cut wound to the right small toe during the accident. He suffered a lot of physical and psychological pain

and blood loss.”

The injuries have healed leaving a scar and residual pain which will subside gradually.

He suffered bodily harm.”

Submissions by Parties

In its submissions, the appellant argues that the damages awarded were not commensurate with the nature of injuries suffered by the respondent. That it is clear from the medical report that the respondent suffered soft tissue injuries, a fact the trial court was cognisant of as reflected at pages 41, 43 and 44 of record of appeal where the court observed that –

“... According to the medical report by Dr. A. K. Mwaura, the plaintiff sustained a cut wound on the right small toe. The injury healed without any permanent disability...”

It is further submitted for the appellant that the trial court did not take into account authorities cited by the appellant in its submissions which are of persuasive nature. That there is no indication in the judgment how the award of Kshs.200,000 was arrived at as the respondent had proposed Kshs300,000 while the appellant proposed Kshs.70,000.

It is submitted that the trial court failed to take into account the principles to be considered when assessing general damages.

Appreciating that assessment of damages is discretionary and may only be interfered with by an appellate court where the lower court fails to take into account a relevant factor, or takes into account an irrelevant factor, or the amount awarded is either inordinately low or high to amount to a wholly erroneous estimate of damages, the appellant submitted that the pleaded injuries had healed with no permanent incapacitation which were proved, that inflation rate and comparable awards would lead to a conclusion that the lower court misdirected itself or misapprehended the law in arriving at the award of damages.

The appellant relied on the decision of the High Court (C. Kariuki J.) in **Hassan Farid and Another –V- Sataiya Ene Mepukori and 6 Others (2018) eKLR**, where the court awarded Kshs.80,000 for soft tissue injuries.

For the respondent it is submitted that it is trite law that an appellate court will not interfere with a lower court award on damages unless the lower court acted on wrong principles of law or made an award of damages which is inordinately low or high, relying on the case of **Mugambi and Silas –V- Isaiah Gitiru**.

The respondent submitted that the appellant has not pointed out the irrelevant factor the court took into account and/or the relevant factor the court failed to take into account in arriving at its decision.

The respondent urges the court not to interfere with the award of the trial court as the same is not inordinately high to warrant interference relying on the decision in the case of **Wiyumiririe Saw Mills – V- Paul Kariuki** where the appellate court dismissed an appeal against an award of Kshs.230,000 for injuries similar to those suffered by the respondent.

The appellant urges the court to dismiss the appeal.

Analysis and Determination

I have carefully considered the grounds of appeal, the record of appeal and the submissions of the parties. The only issue raised in all the six grounds of appeal is that the award of Ksh.200,000 was inordinately high considering the nature of injury, comparable awards, evidence before the court and relevant principles of law.

As has been appreciated by both the appellant and the respondent, the award of general damages is discretionary and an appellate court will only interfere with quantum where the court arrived at the quantum after taking into account irrelevant factors, or failing to take into account relevant factors on where the quantum is inordinately low or high as to amount to an erroneous estimate of damages.

In the case of **Hassan Farid and Another -V- Sataiya Ene Mepukuri and 6 Others**, Kariuki J. cited with approval the decision of the Court of Appeal of Nigeria in **Dumez (Nig) Ltd -Vs- Ogboli{1972} 3 S.C. Page 196** the Court of Appeal of Nigeria stated as follows;

"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial Court acted under a

misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."

The duty of the court herein is thus to consider whether the award of the lower court was inordinately high as to warrant interferences by this court.

As submitted by the appellant, the trial court did not state the factors it took into consideration in arriving at a quantum of Kshs.200,000 for the respondent's injury. The court observed as follows –

"According to the medical report by Dr A. K. Mwaura, the plaintiff sustained a cut wound on the right small toe. The injury healed without any permanent disability. The plaintiff submitted that Kshs.300,000 was commensurate compensation for the injuries suffered, while the defendant was of the view that Kshs.70,000 was adequate compensation.

I have considered the injuries in question and the authorities cited by the parties. I have also in mind previous awards by the superior courts for comparable injuries. I will award the plaintiff Kshs.200,000 (Two Hundred Thousand shillings only) in general damages. Special damages as agreed is Kshs.2,000. In summary therefore, judgement is entered for the Plaintiff against the defendant as follows:

LIABILITY

75.25

QUANTUM

General Damages..... Kshs.200,000

Special Damages..... Kshs.2,000

Total..... Kshs.202,000

Less the 25% contribution..... (50,500)

Award Kshs.151,500

(One hundred and fifty one thousand five hundred shillings only). The plaintiff is also awarded costs of the suit and interest at court rates."

In its submissions, the appellant had relied in the case **Nairobi HCCA No. 883 of 2006, Kanguru Estate Limited V- Jeremiah Nandwa Musta (2009) eKLR** where the Respondent suffered a cut on his left toe. The appellate court did not disturb the trial Magistrate's award of Kshs.60,000 in general damages for pain, suffering and loss of amenities, dismissed the appeal with costs.

The appellant also relied in the case of **Mombasa HCCA NO. 94 of 2010, Atta Kenya Limited -V- Philip Maina (2017) eKLR**, where the Respondent sustained the following injuries; soft tissue injuries to the left big toe, left hip and left elbow. The High court allowed the appeal with costs and the lower court judgment was set aside on liability and on quantum. The respondent was awarded Kshs.80,000 in general damages for pain, suffering and loss of amenities at the lower court

Respondent on the other hand relied on the case of **Eldoret Civil Appeal No. 110 of 2000, Wiyumiririe Saw Mills -Vs- Paul Kariuki (2005) eKLR**, where the plaintiff sustained a cut wound on the right hand. He was awarded Kshs.230,000 as general damages by Hon. Mary J. Kiptoo a Resident Magistrate. The defendant appealed stating that the award was excessive. The High Court dismissed the appeal and upheld the judgment of the lower court on 21st June 2005 vide judgment delivered by Dulu J.

It is clear from the authorities cited by the parties before the trial court that there was no comparison between the two positions held by the parties. The Learned Magistrate therefore ought to have explained the basis of the decision arrived at which he did not do. I thus find that the Learned Trial Magistrate failed to take into account relevant considerations and thus arrived at an erroneous quantum of damages thus justifying interference by this court.

I have considered the authorities cited by the appellant both at the trial court and herein. I have further considered the respondent's authority cited before the trial court.

Taking into account that the respondent suffered soft tissue injury to the right small toe which according to the medical report had only left a cut wound at the toe with no permanent, I am satisfied that this is similar to the injury in the case case of *Hassan Farid and Another –V- Sataiya Ene Mepukuri and 6 Others*, (supra) in which the court awarded Kshs.60,000 in September 2009, and the case of *Atta Kenya Limited* (supra) where the court awarded general damages of Kshs.70,000 in April 2017.

I thus find from authorities cited that injuries similar to those suffered by the respondent attract awards of between Kshs.60,000 and Kshs.80,000.

It is thus manifest that the award of Kshs.200,000 was inordinately, high as to justify interference by this court.

From the foregoing it is my finding that an award of Kshs.100,000 would be appropriate in the instant suit.

Conclusion

In conclusion, the appeal succeeds partially. This court thus makes the following orders –

1. The court allows the appeal to the extent above.
2. The award of Kshs.200,000 for general damages is set aside and in its place this court substitutes an award of Kshs.100,000.
3. The rest of the judgment of the subordinate court is undisturbed.
4. The costs of the appeal will be borne by each party while the costs in the lower court shall remain undisturbed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE