



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 6 OF 2016

(Before D. K. N. Marete)

JAMES FINLAY (K) LTD.....APPELLANT

VERSUS

GEORGE ODHIAMBO OGOLLA.....RESPONDENT

JUDGMENT

This is an appeal dated 12th July, 2012. It is set out as follows;

- 1. That learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.*
- 2. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the Plaintiff.*
- 3. The learned trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned.*

The Appellant pray for relief and judgment as follows;

- 1. That the decision of the Resident Magistrate on quantum in Kericho CMCC No.30 of 2012 be set aside and a proper finding be made by this Honourable Court.*
- 2. That this Honourable Court do make such further orders as may be just and expedient.*
- 3. This appeal be allowed with costs.*

The appellant in her written submissions dated 1st July, 2014 reiterates the non contested facts of the case that this matter arises out of an accident involving the respondent on board the appellant's tractor which rolled occasioning injury to the respondent. This was in the cause of an employment relationship *inter partes*.

The parties by consent agreed on the issue of liability and allotted this Act 85:15 against the appellant. The issue before court therefore is only on quantum.

It is the appellant's case in support of the appeal that all evidence adduced that the respondent, despite a plea of inability to pass urine and severe back ache, indicated that the respondent was getting better and

on the verge of full recovery. It was also evidentially established that the appellant had assisted the respondent with all medical fees relating to the injury. The other issue of erectile dysfunction brought out in Dr. Joseph Isabirye's Medical Report is not committal as this was borne out of clinical examination alone.

The appellant sought to rely on the authority of **Paul Kipkosgei vs Kenya Tea Development authority Kericho High Court CC No. 40 of 1999** where a second medical report was relied on to prove a case of permanent disability. It is his submission that in this case, this was not had and therefore the futility of the enormous award in damages.

She also sought to rely on the authority of **Sokoro Saw mills Ltd vs Grace Ndutha Ndungu 2006 eKLR** where the award for damages was reduced from Kshs.80,000.00 to Kshs.30,000.00 on the basis that the trial magistrate had taken into account irrelevant factors all left out a relevant matter in such determination of damages. This also took into consideration that an award of damages should not be inordinately too low or too high as not to make sense and be erroneous.

The respondent in the Respondent's Written Submissions dated 14th November, 2015 brought out the law on award of damages as follows;

- 1. Either the trial magistrate in assessing damages, look into account an irrelevant factor or left out on account a relevant factor, one or*
- 2. The amount is inordinately so high or so low that it must be a wholly erroneous estimate of damages.*

She also sought to rely on the authority of **SOKORO SAWMILLS LTD =VS= GRACE NDUTA** (also cited by the appellant.)

My Lord we rely on the authority of Sosphinats Co. Ltd=vs= Daniel Ng'an'ga – Nakuru Civil Appeal No. 315 of 2001 (Appeal from the judgement of the High Court of Kenya at Nakuru (I Rimita J) dated 23rd day of March, 2001.)

At page 2 – 3 it states:-

The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous award for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by trial Judge and will invariably depend on the peculiar facts of each case.

In this case, the trial Judge considered the evidence of the Respondent, the three medical reports which he quoted extensively, the submissions of respective counsel and the authorities cited to him in arriving at what he referred to as adequate compensation". It is evident from the medical reports that the Respondent sustained a severe head injury resulting in the deformity of the skull which deformity has exposed the Respondent to further brain injury.

It has not been shown that in assessing the damages the learned Judge failed to apply the relevant principles nor can it be justifiably said that the award in the circumstances of the case so high that it amounts to an erroneous estimate. There are no valid ground, in our view, for interfering with the award.

As a court of first appeal, this court is mandated to reconsider and re-evaluate the evidence of the witnesses before the trial magistrate so as to arrive at an independent decision as to whether to uphold the decision of the trial magistrate. This is in regard to the authority of **Jabane vs Olenja, [1986] KLR 661 at page 664** where Hancox, JA observed as follows;

*“ I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand – see **Peters –vs- Sunday Post [1958]EA 424**. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular **Ephantus Mwangi – vs- Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278 and Mwana Sokoni – vs- Kenya Bus Service (1982 – 88) 1 KAR 870.**”*

In this appeal, the issues for determination are;

1. Whether the respondent proved her case that he was injured due to the negligence of the appellant.
2. The quantum of damages awardable to the respondent for the injuries sustainable.

The 1st issue for determination is not contested. The parties agreed on this and entered a consent on apportionment of liability at 85:15 against the appellant. This is therefore not disputed. The appellant cannot be heard to call upon the court to relook and re-evaluate the evidence of the parties when this was agreed on at trial and a consent on liability entered *inter partes*.

The 2nd issue for determination is quantum. The parties have opposing positions on the evidence adduced at trial. It is the appellant’s case that the award of damages was incommensurate with the nature of injuries sustained. It is her further case that this were soft tissue injuries which had considerably healed and were not of a permanent nature. The respondent on the other hand testified that he was injured and taken to Chemogondai Hospital where he was operated on the same night. He was in hospital for five months and was transferred to Tenwek Hospital and thereafter to Kenyatta National Hospital for further surgery. He was at Kenyatta for four months.

The respondent further testified as follows;

I have not healed from the injuries. The tyre passed over my lower abdomen and ruptured my bladders. I walked around with a catheta for eight months and when it was removed I had to go back every three months so that they can fit another catheta because I cannot pass urine ... I go to Maridi Medical centre where I see Dr. Ochola.

In arriving at the decision on quantum, the trial magistrate took into consideration that the respondent suffered lower abdominal pain, inability to pass urine, severe back ache, fracture of the pelvis and urethral structure and concluded that these injuries have affected the sympathetic nerves therefore causing erectile dysfunction. The appellant disclaims this but did not controvert the same at trial. I therefore agree and uphold the evidence of the respondent on the nature of the injuries and their implications on his future health status.

This being the position, this court further agrees with the award of the trial magistrate on quantum. It is not inordinate, unreasonable or excessive in the circumstances of the case.

I am therefore inclined to dismiss the appeal with costs to the respondent.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirima holding brief for Kibichiy & Company Advocates for the Appellant.
2. Mr. Meroka instructed by Meroka & Company Advocates for the Respondent