



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 4 OF 2016

(Before D. K. N. Marete)

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

VERSUS

JULIUS KIPKURUI KOSGEI.....RESPONDENT

JUDGEMENT

This is an appeal dated 14th June, 2011 and is grounded as follows;

- 1. The learned trial Magistrate erred in law and fact in basing his finding in respect of quantum 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 and also with respect to alleged loss of earning capacity.*
- 3. The learned trial Magistrate erred in law and fact in failing to hold that the Respondent's case was not proved on balance of probability as is required by law.*
- 4. The learned trial Magistrate erred on all points of fact and law in as far as award of damages is concerned.*

She prays for judgement as follows;

- 1. That the decision of the Chief Magistrate on quantum in Kericho PMCC No.216 of 2013 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 appeal is opposed vide the Respondent written submissions dated 20th May, 2016.

In her written submissions dated 6th May, 2016 the appellant submits that the respondent pleaded prolapsed intervertebral disc resulting into loss of lordosis due to spasm. It is her further submission that in the circumstances, an award of Kshs.300,000.00 would be sufficiently compensate the plaintiff bearing

in mind that he had already received an amount of Kshs.310,348.80 under the Work Injuries Benefits Act.

The appellant sought to rely on the authority of **David M. Mbutia vs Allied Industries Ltd (2000) eKLR** where the plaintiff was awarded Kshs.220,000 for similar injuries. She further submits that the respondent was seen by two doctors who prepared medical reports to the extent that he had 30% and 5% permanent disability respectively. The latter doctor was of the opinion that the respondent had recovered well therefore disentitling the plaintiff to loss of earning capacity. He is still able to work.

Again, in **Butler v Butler (1984) KLR, 225** the court held that a person's loss of earning capacity occurs whereas a result of injury, his chance in future of any working labour market as well as paid employment as before the accident is lessened by his injury. In the instant case the plaintiff's capacity has only been lessened.

The respondent in her written submissions and in reliance to the authority of **Selle Vs Associated & Boat Ltd (1968) 1960 EA 123** reminded this court that being a court of first appeal, it was bound to reconsider and re-evaluate the evidence on record afresh and give an independent conclusion on the same.

Further, the respondent submitted as follows;

4. Your Lordship, we are further minded that this court will not ordinarily interfere with the findings of a trial Judge on an award of damages unless it is persuaded that the trial Judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages which the plaintiff is entitled. See Butt Vs. Khan (1981) KLR 349 where it was held per law, JA;

".....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 he 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....."

The issues for determination therefore are;

1. Whether the quantum awarded by the trial court is inordinately high in the circumstances.
2. Whether the trial court in so awarding proceeded on wrong principle or a misapprehension of material facts?

On issue No. 1 above, the respondent submits a case of no dispute in the fact that the injury sustained by the respondent was a prolapsed intervertebral disc with an award of 30% permanent incapacity. The respondent was retired on medical grounds as a consequence of these injuries.

The respondent further rubbishes the thinking, submissions and authorities cited by the appellant and submits that these are irrelevant and inapplicable in the circumstances as they were borne out of soft tissue injuries not comparable to the injury sustained by the respondent.

I have scrutinized the evidence adduced by the respondent at the lower court and find that this was adequate to sustain a case for quantum and award of damages as was had by the learned magistrate. There is not the slightest iota of evidence that the learned magistrate proceeded on any wrong principles or a misapprehension of evidence in any material respect. The figures awarded are comparable to the injuries sustained and justifiable. These are not inordinately high and I wish to sustain the same. And this answers all the issues for determination.

I am therefore inclined to dismiss this appeal with costs to the respondent. This order also applies to costs at the lower court.

Delivered, dated and signed this 17th day of October 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Kipyego instructed by Kibichiy & Company Advocates for the Appellant.
2. Mr. Obosso holding brief for Magata instructed by Magata & Associates for the Respondent.