



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 66 OF 2015**

**BETWEEN**

**GEORGE OKEWE OSAWA ..... APPELLANT**

**AND**

**SUKARI INDUSTRIES LIMITED ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. B. R. Kipyegon, RM in Principal Magistrates Court at Ndhwa in Civil Case No. 30 of 2014 dated 25<sup>th</sup> September 2015)***

**JUDGMENT**

1. The appellant was injured in the course of employment as he was driving the respondent's tractor on 13<sup>th</sup> August 2014. He sued the respondent for damages as a result of the injuries he sustained. The parties agreed on apportionment of liability with the respondent shouldering 90%.
2. For the injuries, the subordinate court awarded the appellant **Kshs. 80,000/-** as general damages on the basis that the injuries were soft tissue injuries. In assessing the damages, the learned magistrate observed as follows;

*The only version on how the incident happened in evidence is as exactly told by the plaintiff ..... The Discharge Summary in this case showed the hip and shoulder pain which was upon discharge of the patient after 3 days in unknown hospital was diagnosed as soft tissue injury to the pelvis. There are no other conceivable injuries or continual treatment proved in evidence. However, both [parties] in the suggested case laws suffered obvious severe injuries of multiple fracture bones and soft tissue injuries with reasonable deformities and limping. In my view, the two cases are .... not comparable to the established injuries or circumstances before me.*

3. Ms Kuke, learned counsel for the appellant, attacked the learned magistrate's assessment of the injuries on the ground that the discharge summary and the medical report relied on by the appellant disclosed that he had suffered a fracture of the pelvis. She contended that the learned magistrate disregarded the evidence and came to erroneous award of damages that was too low in the circumstances. Mr Maganga, learned counsel for the respondent, supported the learned magistrate's decision and submitted that there was no basis for the court to intervene as it appreciated the nature and extent of the appellant's injuries.

4. The general principal applicable to this appeal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, erred in principle and either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727**, ***Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR***) and ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5**.
5. The plaintiff, in his testimony, stated that he suffered a fracture of the pelvis and this fact was confirmed by the discharge summary from Homa Bay District Hospital where he had been admitted for 4 days and Dr Nyawade's report dated 27<sup>th</sup> September 2014. The reverse side of the Discharge Summary states, "*Pt advised to have bed rest for 4/53 to give the bones time to heal. Avoid walking for a long time.*" As the evidence was clear that the appellant sustained a pelvic fracture, I find and hold that the learned magistrate ignored or failed to take into account relevant and material evidence in assessing damages. Furthermore, the appellant's evidence was unrebutted given that he was the respondent's employee and the accident took place at the workplace. I therefore find that the appellant proved, on the balance of probabilities, that he sustained a pelvic fracture. In addition, the trial court ignored the respondent's own submissions based on the fact that the appellant sustained a pelvic fracture.
6. I allow the appeal and based on the decisions submitted to the subordinate court, I award the appellant **Kshs. 400,000/-** subject to 10% liability. The final award in favour of the appellant shall be as follows;

Pain and Suffering	Kshs. 400,000/-
Less 10% liability	Kshs. 40,000/-
<b>Total</b>	<b>Kshs. 360,000/-</b>

7. The sum shall accrue interest from the date of judgment in the subordinate court until payment in full. The appellant shall have the costs of this appeal assessed at **Kshs. 45,000/-** all inclusive.

**DATED and DELIVERED at HOMA BAY this 14<sup>th</sup> day of December 2015.**

**D.S. MAJANJA**

**JUDGE**

Ms Kuke instructed by Kuke and Company Advocates for the appellant.

Mr Maganda instructed by L. G. Menezes and Company Advocates for the respondent.



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