IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 23 of 2004

SAVANA SAW MILLS LTD …….. APPELLANT

=VERSUS=

GEORGE MWALE MUDOMO ……..…….. RESPONDENT

(Being an appeal against the decision of Mr. Solomon Wamwayi, Esq. Chief Magistrate in Eldoret CM CC NO. 513 of 2003 dated & delivered on 20/01/04)

JUDGMENT

This is an appeal from the judgment of Solomon Wamwayi ; Esq. Chief Magistrate in Eldoret CM CC No. 513 of 2003 delivered on 20th January, 2004. The appeal was filed by Kigen & Company Advocates on behalf of the appellant Savana Sawmills Ltd who were the defendants in the subordinate court. The memorandum of appeal listed six grounds of appeal as hereunder:-

1. The learned trial magistrate erred in law and in fact in ignoring the evidence of the defendant's witness.

2. The learned trial magistrate erred in law and in fact in holding the defendant negligent in the absence of any evidence to the effect.

3. The learned trial magistrate erred in law and in fact in ignoring the submissions of the defence without proper reasons to do so.

4. The learned magistrate erred in law and in fact in awarding damages which were excessive in the circumstances.

5. The learned magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to law,

6. Without prejudice to the foregoing and any admission of liability the damages awarded were inordinately excessive in the circumstances.

When the appeal came for hearing before me on 12th July 2005, Mr. Kisia for the appellant

abandoned grounds 1, 2 and 5 of appeal. The grounds of appeal that remained were basically on quantum . Firstly that the learned trial magistrate erred in ignoring the submissions of the appellant's Counsel on quantum, and secondly that the damages awarded were excessive.

He submitted that the learned magistrate in the judgment ignored the submissions that were made on behalf of the appellant on quantum of damages without giving any proper reasons for the same. He also submitted that the learned magistrate erred in awarding excessive damages in the circumstances. In his view, If the learned magistrate was guided by Dr. Gaya's report which was produced as exhibit, he would not have arrived at the award of Kshs 120,000\= as general damages The learned magistrate should have been guided by applicant's Counsel who proposed figure of Kshs 60,000/= as general damages and cited case authority relied by the appellant in which the court awarded an amount of Kshs 50,000/=. The injuries suffered were soft tissue injuries and the court's award was inconsistent with earlier decided cases.

Mr. Katwa for the respondent opposed the appeal. He submitted that the appellant did not file submissions on quantum before the learned magistrate, though he was given up to 13/12/2003 to file the same. The learned magistrate could therefore not consider submissions which were not before him. He further submitted that the learned magistrate did, in fact, consider the report of Dr. Gaya in his judgment. The trial magistrate did not refer to Dr. Aluda's report in his judgment. He further submitted that the award of general damages was a discretion of a trial court , and an appellate court could only interfere with it if the trial court acted on wrong principles and warded damages which were excessive. The court gave reasons for the award of general damages of Kshs 120,000/=.

I have considered this appeal, the submissions of Counsel for both parties, and have also perused the documents filed and the proceedings. This being a first appeal, this court is bound to review the evidence and come to its own conclusions. The appeal is on two grounds. Firstly, that the learned magistrate did not consider the appellant's submissions. Secondly, that he awarded excessive damages, contrary to the decisions for similar injuries cited to him.

In brief the facts of the case are that the respondent (who was the plaintiff in the subordinate court) was injured on 23/11/2002 while working for the appellant (who was the defendant in the subordinate court). He was loading some logs on to a lorry when he fell down and was injured. He was treated at Moi Teaching and Referral Hospital. He was ex-rayed. The treatment card was produced as exhibit 1 and x-ray requests were produced as exhibit 2 (a) and 2(b). He was later examined by Dr. Aluda and the report was produced as exhibit 3. He was still later examined by Dr. Gaya and the report was produced as exhibit 5. The receipt for Kshs 2,000/= for the medical examination by Dr. Aluda was produced as exhibit 3.

At the hearing before the subordinate court, only the respondent tendered evidence. The appellant did not tender any evidence. Their Counsel Mr. Okara is recorded by the learned trial magistrate to have stated on 1/12/2003 that he had no evidence to offer. The learned trial magistrate consequently delivered his judgment and awarded general damages of Kshs 120,000/= less 30% contributory negligence resulting in an amount of Kshs 94,000/=. The liability of the respondent of 70% in negligence was agreed to by consent of the parties recorded in court on 1/12/2003 before the respondent testified. Now the appellant has appealed to this court on quantum of damages.

The first thrust of Mr. Kisia's arguments is that the learned magistrate erred in not considering the submissions of the appellant.

I have perused the record and the judgment of the learned trial magistrate. According to the record,

when the defence chose not to call evidence on 1/12/2003, the learned magistrate gave the parties time up to 15/12/2003 to file submissions. The case was mentioned on 15/12/2003 when Mrs. Kigen for the appellant/defendant was present and Mr. Kitiwa for the respondent/plaintiff was present. Judgement was set for 20/1/2004. The record in the proceedings before the learned magistrate on 15/12/2005 does not show whether the parties had filed written submissions by 15/12/2003. The learned magistrate proceeded to write the judgment and delivered the same on 20/1/2004.

From the judgment, it is abundantly clear that the learned magistrate did not consider the submissions of the appellant. He had this to say in his judgment relating to those submissions:-

"Mrs Kigen has not handed in her submissions . I do find the injuries in the case relied upon were more severe pain the (sic) injuries in the instant case"

It is clear from the foregoing that the learned magistrate found that the appellant's counsel Mrs. Kigen had not filed her submissions as at the time the judgement was written after 15/12/2003, which was the deadline given to the parties for filing written submissions. The learned magistrate therefore relied on submissions and authorities cited by the respondent's Counsel, which were filed and I have seen the same in the file. Counsel for the appellant appears to be arguing that appellant's submissions on quantum were filed and should have been considered by the learned magistrate. On the other hand Counsel for the respondent argues that no such submissions were filed.

Obviously, in my view, the learned magistrate was bound to consider the appellant's submissions if they were filed as at the time the judgment was being written, even if they were not filed by the deadline of 15/12/2003. If the submissions of the appellant were not filed, the learned magistrate definitely had nothing to consider, and cannot be blamed for not doing so. The learned magistrate stated clearly, in his judgment that such submissions, were not filed. The question is, were those submissions filed"

I have perused the court record and documents filed. In the record of appeal filed, there is a copy of defendant's appellant's submissions dated 8th December,2003. They were signed by Kigen and company Advocates . They are stamped as having been received in the Senior Principal Magistrate's Court on 10th December, 2003. In the original file of the subordinate Court, however, these written submissions of the appellant are not there. There are only written submissions of the plaintiff dated 8th December, 2003 signed by Kitiwa & Company Advocates filed in the subordinate court. These plaintiff's / respondent's written submissions are stamped as having been received in the Senior Principal Magistrate's Court on 9th December, 2003. There is also a receipt for payment for filing these plaintiff's /respondent's submissions for Kshs 75/= also dated 9/12/2003. There is no such similar receipt for filing the defendant's written submissions.

It is trite that a document filed in court can only be deemed to be so filed if relevant court fees has been paid. This must be the import of section 96 of the Civil Procedure Act (cap 21) which provides:-

"Where the whole or part of any fees prescribed for any document by the law for the time being is force relating to court fees has not been paid, the court may, in its discretion at any stage, allow the person by whom such is payable to pay the whole or part, as the case may be of the fee, and upon such payment the document in respect of which such fee is payable shall have same force and effect as if such fees had been paid in the first instance".

It is clear to me from the above provisions of law, that a document for which no payment of court fees has been made is not validly filed. The written submissions of the appellant were not paid for. The appellant's Counsel has not said that he paid for filing fees for the said written submissions.

The said written submissions are not in the original case file of the subordinate court, either. They cannot surface in the record of appeal. The record of appeal is a record of documents in the original file. One cannot validly introduce strange documents and claim that they were part of the original filed documents. In any event, even if the written submissions were actually in the original file, they could not be taken to have been filed as they were not paid for. I come to the conclusion that the learned magistrate was correct in finding that the appellant did not file written submissions. Therefore there were no submissions of the appellant for the learned magistrate to consider. Counsel for the appellant cannot be correct to expect the learned magistrate to consider submissions which were not filed.

The second limb of argument for appeal on quantum was that the learned magistrate erred in not finding that the respondent only suffered minor injuries, and also that the magistrate awarded excessive damages. I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless that discretion is exercised on wrong principles of law. There are several case authorities on this position. It will suffice if I cite what was stated by the Court of Appeal in the case of **Catholic Diocess of Kisumu –vs- Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001** in which the Court of Appeal reiterated what it had earlier held in the case of Kemro =vs= Lubia (1982-88) that:-

“it is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

Coming now to our present case, the evidence of the respondent was uncontroverted. The appellant did not call any evidence in rebuttal. The injuries suffered were highlighted in the report of Dr. Gaya dated 20/6/2003 and the report of Dr. S.I Aluda dated 27/11/2002.

The report by Dr. Aluda was done on a date closer to the accident, about 4 days from the date of the accident. He observed that the x-ray of wrist showed a dislocation of the left wrist joint and reduction was done and a pop was applied. He found tenderness in the left forearm as well as swelling of the left forearm. Though he found the injuries sustained to be severe, they were continuing to heal with treatment. This was four days after the accident.

The report from Dr. Gaya was on the other hand done on 20/6/2003, which was more than 6 months after the accident. Dr. Gaya found healed soft tissue injuries in the left upper limb with normal range of movement in the left wrist joint. There was normal power and grasp functions of the left hand. The x-ray showed no fracture of left radius or ulna. No dislocation of the left wrist joint or fracture of the carpal bones of the left hand was found. Though respondent suffered multiple soft tissue injuries on duty, there was no permanent loss in terms of the Workmen’s Compensation Act.

In the judgment, the learned magistrate had this to say on the injuries suffered**:-**

“According to Dr. Aluda the plaintiff sustained a dislocation of the left wrist joint. According to Mr. Gaya, the plaintiff only sustained soft tissue injuries on the left forearm, wrist and hand. Mr. Gaya found that the plaintiff did not sustain a dislocation of the left wrist joint or fracture of the carpal bone of the left hand. Mr. Gaya found that plaintiff multiple (sic) soft tissue injuries

have healed without permanent loss in terms of Workmen's Compensation Act. Since Mr. Gaya is a surgeon, I prefer the report of Mr. Aluda".

Having perused the two medical reports, I come to the same conclusion that the learned magistrate came to, that the report of Dr. Aluda was more reliable. This is not so much because Dr. Gaya is a surgeon as found by the learned magistrate. Both doctors agreed that there was no fracture sustained. As at the time Dr. Gaya examined the respondent, healing had obviously taken place and there was no permanent incapacity for Workmen's Compensation. This was more than 6 months after the accident However, workmen's compensation is different from common law compensation. It can only be deducted from the common law compensation . My reason for coming to the conclusion that Dr. Aluda's report is more reliable is that it was done only four days after the accident. The injuries must have been fresh. The findings on dislocation were from an x-ray report. Obviously after six months and after treatment, the dislocation must have been corrected through treatment though it was initially suffered. Dr. Gaya's report was made after healing had taken place. I find no error in the findings of the learned magistrate on the injuries suffered and on his reliance on the report of Dr. Aluda.

The next issue is whether the magistrate relied on cases which were for more serious injuries. In his judgment the learned magistrate clearly stated that the relied on the case of **Peter Mburu Kibera –vs- Kamau Waweru – Nairobi HCCC No. 4465 of 1987** (unreported) in which **Justice Mbogholi Msagha** awarded general damages of Kshs 300,000/= on 19/9/1991. The plaintiff had sustained dislocation of the cervical spine (neck), contusion to chest, lower back and knees and had lost 30% of total body function. The learned magistrate considered the case of Peter Mburu above and came to the conclusion that the injuries suffered in that case were more severe . Therefore he awarded the plaintiff Kshs 120,000/= as general damages, less 30% contribution which came to Kshs 94,000/=. Counsel for the appellant has now submitted before me that the learned magistrate should have awarded general damages of Kshs 60,000/= as proposed by the appellant's Counsel before the learned magistrate.

First of all, I have to say that there was no such proposition of an award of Kshs 60,000/= before the learned magistrate, since I have already found that the appellant's Counsel did not file any submissions on quantum of damages. Secondly , learned Counsel for the appellant has not even hinted at the actual error that the learned magistrate committed in awarding the general damages. I have already found that the learned magistrate was correct in relying on the more current medical report of Dr. Aluda on the injuries suffered. Learned Counsel for the appellant has not pointed to me what relevant factor that the learned magistrate failed to take account of nor what irrelevant factor which he took into account, which resulted in an inordinately excessive award of general damages. Merely stating that they proposed an award of Kshs 60,000/= as general damages without relating it to the nature of injuries suffered, and the time or date of the award, does not help the appellant's appeal.

In arriving at the figure of general damages awarded the learned magistrate stated in relation to the case of Peter Mburu above :-

" On 19/9/01 (it should be 19/9/1991) the High Court awarded the plaintiff Kshs 300,000/= as general damages for pain suffering and loss of amenities …….. I do find the injuries in the case relied upon were more severe pain the (sic) injuries in the instant case. Doing the best I can I do award the plaintiff Kshs 120,000/= as general damages for pain and suffering less 30% contribution which comes to Kshs 94,000/=".

It is quite clear from the above that the learned magistrate was very conscious of the fact that the injuries suffered in the present case were less severe than in the case of Peter Mburu. The case of

Peter Mburu was decided more than 12 years earlier. The learned magistrate awarded less than half of the damages awarded in the previous case. I find no misdirection on the part of the learned magistrate. I also find that the award of general damages was not excessive. It was justified considering the injuries suffered.

For the above reasons, I dismiss this appeal and uphold the decision of the learned magistrate. I award costs of appeal to the responded.

Dated and delivered at Eldoret this 19th day of December, 2005.

George Dulu,

Ag. Judge.

In the presence of:-