



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL 99 OF 2010

**AMRITLAL S. SHAH WHOLESALERS LTD &
ANOTHERAPPELLANTS**

AND

JOSHUA EKENO.....RESPONDENT

***(Being an appeal from the judgment of the Resident Magistrate, Hon. I. Maisiba dated
14th May, 2010 at Eldoret Chief Magistrate's Court in Civil Case No. 410 of 2008)***

JUDGMENT

This appeal is from the judgment and decree of the Learned Resident **Magistrate I. Maisiba** dated 14th May, 2010 in Eldoret Chief Magistrate's Court Civil Case No. 410 of 2008. The appellants **Amritlal S. Shah Wholesalers and Another** were the defendants and the respondent, **Joshua Ekeno**, was the plaintiff.

On 19th March, 2010 parties consented to judgment on liability apportioned at 15% against the respondent and 85% against the appellants. With that consent, counsels' submissions on the issue of liability were clearly misconceived. It was also not open to the appellants to challenge the apportionment of liability. This appeal is therefore only against the assessment of damages.

The respondent's evidence before the Learned Resident Magistrate was that he sustained a fracture of his right leg when he was hit by the motor vehicle owned by the 1st appellant and driven by the 2nd appellant. He lost consciousness and came to at Moi Teaching and Referral Hospital where he was admitted for 2½ weeks. At the time of testifying he could not walk long distances and his leg was deformed. The medical report prepared by **Dr. Paul Kipkorir Rono** indicated that the respondent sustained compound fractures of the right tibia and fibula (lower 1/3). The doctor concluded that the leg would not be able to bare excessive weight as before. Also produced by consent, was another medical report prepared by **Mr. Z. Gaya**. The report indicated the same injuries. He added that the respondent would develop early Post Traumatic Osteoarthritis of the right ankle joint.

The Learned trial magistrate said as follows with regard to damages:-

“I have considered the submissions filed by counsel for the parties. I would award the plaintiff Kshs 350,000/= for pain, suffering

and loss of amenities plus proved special damages”

The cases which the Learned Resident Magistrate considered included Mombasa **HCCC No. 255 of 1992 – Shaffi Mohamed Shaffi -vrs- Express (K) Ltd.** In that case, the plaintiff who had suffered fractures of both ankle joints and he tibia and fibula was awarded Kshs 600,000/=.

Also considered by the learned Resident Magistrate are the cases of **Zakayo Barui –vrs- Juma Mohmood Abdalla (HCCC No. 207 of 1990) (UR)** and **Hamis K. Ndegwa -vrs- Narcol Aluminium Rolling Mills Ltd [HCCC No. 975 of 1984] (UR)**. In the former case, the plaintiff who suffered a fracture of the tibia/fibula at lower 1/3 of the right leg was awarded Kshs 80,000/=. In the latter, the plaintiff who suffered a fracture of the lower 1/3 of the tibia and fibula of the left leg was awarded Kshs 60,000/=. The first decision was made on 12th September, 1994. It was not clear when the other two decisions were made but I guess they must have been made earlier than 1994.

The three decisions could not in my view, provide a good guide to the Learned Resident Magistrate. Nevertheless, the Learned Resident Magistrate rightly considered them.

The written submissions made before me cited no new cases to support the parties' stand points. I therefore have no comparable awards for comparable injuries.

The principles upon which an appellate court will interfere with an award of damages are settled. The principles were laid down in the Court of Appeal case of **Buttler –vrs- Buttler [C.A. Co. 49 of 1983]**. They are as follows: - The Court will interfere:

- (a) If the lower court acted on wrong principles;
- (b) If that court has awarded damages which are so excessive or so low as to represent an erroneous estimate of the damages;
- (c) If the lower court has taken into consideration matters it ought not to have considered or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.

Having considered the award made by the Learned Resident Magistrate, I have not detected application of wrong principles. The Learned Resident Magistrate considered the submissions made to him by counsel. I have no doubt also that as the submissions discussed the injuries sustained by the respondent, the Learned Magistrate must have thereby considered the injuries sustained by the respondent and the medical reports produced before him. In the premises, he did not take into account matters which he ought not to have considered nor did he omit to take into account matters which he ought to have taken into account. I do not also consider the sum of Kshs 350,000/= so excessive as to represent an erroneous estimate of the damages suffered by the respondent. That being my view of the matter, I cannot interfere with the assessment of damages made by the learned Resident magistrate.

The upshot is that this appeal has no merit and is dismissed with costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDROET

THIS 31ST DAY OF JULY, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Barasa holding brief for Okoth for the appellant and Mr. Akengo holding brief for Mr. Chepkwony for the respondent.

F. AZANGALALA

JUDGE

31/07/2012.



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