Case Number:	Civil Appeal 131 of 2001
Date Delivered:	01 Jul 2005
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Kaburu Bauni
Citation:	MASTERMIND TOBACCO (K) LTD v FELIX OKELLO[2001] eKLR
Advocates:	-
Case Summary:	Land Adjudication - ascertaining valid owner of land
Court Division:	Civil
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL DIVISION

CIVIL APPEAL 131 OF 2001

MASTERMIND TOBACCO (K) LTD …… APPELLANT

VERSUS

FELIX OKELLO …… RESPONDENT

JUDGMENT

FELIX OKELLO the respondent sued MASTERMIND TOBACCO (K) CO. LTD – the appellant claiming damages for injuries suffered in a Traffic accident. Judgment on liability was entered by consent in the ratio of 85% to 15% in favour of the respondent. The court then heard the respondent's evidence and proceeded to enter judgment on quantum of damages. Shs.250,000/= was awarded as general damages. The appellant being unsatisfied brought this appeal.

There are two grounds of appeal the first being that the award of general damages was manifestly excessive. The second ground is that the magistrate failed to consider the defendant's submission on quantum.

It was submitted for the appellant that the learned magistrate in awarding damages considered evidence that the respondent suffered a compound fracture of the left lower leg. This injury was not one of those listed in the plaint. The magistrate therefore considered extraneous matters and this led her to award excessive damages. In reply Mr. Olel for the respondent submitted that the injuries shown in the plaint were serious. The plaintiff was examined by two doctors who confirmed the fracture of the left leg.

He said that the issue was raised during the trial and since the appellant had a chance to cross examine the court was entitled to take into account that injury even if it was not pleaded. On the second ground it was submitted that the magistrate did not take into account the appellants submission.

The judgment therefore failed to conform with provisions of order 20 rule 4 CPR. This was a grave error on the part of the magistrate.

It was admitted that the respondent had not in the plaint pleaded fracture of the left leg as one of the injuries suffered. The plaint was never amended to include this. In her judgment the learned magistrate did refer to the fracture as one of the injuries suffered. Ideally the respondent should have shown it as one of the injuries sustained. It would therefore look as an extraneous matter taken into account by the magistrate in arriving at the award. In the case of BUTLER VS BUTLER 1984 KLR 226 which was cited one of the holding of the court was that an appellate court may interfere with a lower courts award where it is found that court took into consideration matters which it ought not to have considered in assessing damages. However the facts of this case was different. As submitted by Mr. Olel the issue of compound fracture was raised by the respondent in his evidence. He clearly stated that he had sustained a compound fracture of the left leg. The appellant did cross examine and never raised the issue that it was not pleaded. They did not object to that evidence.

Further two medical reports were produced one of which was by a doctor appointed by the appellant.

Both medical reports confirmed that the respondent sustained a fracture. There was no questions raised against these two reports. Indeed even in his written submission counsel for the appellant clearly acknowledged that the respondent suffered a compound fracture. He did not in the submission raise the issue that it was not pleaded. It is clear therefore the issue of the fracture was raised before the magistrate. Once this was done it cannot be said to be extraneous issue as the appellant was aware of it. The magistrate was therefore right to consider the same.

In the light of the injuries sustained the award of general damages was not manifestly excessive to warrant this court to interfere with the said award. The two medical reports showed the injuries suffered one being the fracture. The magistrate tabulated the injuries. Both doctors had concluded that the injuries were serious. Award of shs.250,000/= was not therefore excessive. As for the magistrate not considering the submission by the appellant that seems not to be true. In her judgment she clearly said that she had considered the submissions and the two medical reports. True she did not set down the submissions but there is nothing to show that she actually did not consider the submissions. The appellant's submissions were about one page and cited one authority.

All in all I find that the appeal has no merit. The same is dismissed with costs.

Dated this 11th day of April 2005

KABURU BAUNI

JUDGE

cc. Mobisa.

Mr. Ogutu H/B for Mereka for the appellant

N/A for Respondent.