Otieno & another v Odhiambo (Civil Appeal E027 of 2024)
[2024] KEHC 7688 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E027 OF 2024

RE ABURILI, J

JUNE 25, 2024

BETWEEN

COLLINS ODHIAMBO OTIENO ..... 1ST APPELLANT

EZEKIEL OTIENO MOMBO ..... 2ND APPELLANT

AND

EVANS OUMA ODHIAMBO ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable G. Serem in the Chief Magistrate's Court at Kisumu delivered on the 26th January 2024 in Kisumu SCC No. E260 of 2023)

JUDGMENT

Introduction

1. The appellants herein were sued by the respondent for general and special damages following injuries sustained by the respondent on the 22nd July 2023 at around 5.30am when he was involved in a road traffic accident while travelling as a fare paying passenger aboard motor vehicle registration no. KDC 699V which he alleged was negligently driven and lost control.

2. The appellants entered appearance and filed their statement of defence denying any negligence attributed to them and putting the respondent to strict proof and further denying that the accident occurred stating that if it occurred, it was due to the respondent's negligence.

3. After a full hearing, the trial court found the appellants 100% liable for causing the accident and after considering the nature of injuries sustained by the respondent, the court awarded him general damages of Kshs. 300,000 based on the case of *Justine Nyamweya Ochoki & Another v Prudence Anna Mwambu* [2020] eKLR.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 12th February 2024 challenging the trial court's award on quantum based on the following grounds;

1. That the learned trial magistrate erred in law and in the assessment of quantum by awarding Kshs. 300,000 for general damages an award which was excessive and an erroneous estimate of the damages awardable compared to the injuries sustained by the respondent.

2. That the learned magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages.

3. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.

4. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

5. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on quantum by completely disregarding the submissions and authorities of the appellants and as a result arrived in unjustified decision on quantum.

5. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

6. It was submitted that the initial treatment notes dated 22.7.2023 from Nyakach County Hospital showed that the respondent sustained soft tissue injuries and that the treating doctor managed the said injuries by antibiotics and analgesics and further that there was no indication of fractures of the tooth as pleaded.

7. The appellants submitted that CW3, Dr. Morebu who re-examined the respondent 3 weeks after the accident noted in cross-examination that the nature of injuries sustained by the respondent as detailed by the initial treating doctor were soft tissue in nature and that there was no mention of fracture of the teeth as alleged. It was further submitted that the respondent failed to produce any evidence supporting his allegation of having a fracture of the tooth rather all the documents he adduced supported soft tissue injuries.

8. It was submitted that the trial magistrate erred in awarding the respondent damages which were inordinately high and against comparable awards and as such the court ought to interfere with the same. It was submitted that an award of Kshs. 80,000 would be sufficient.

9. The appellant relied on the following cases:

    i. *Godwin Ireri v Franklin Gitonga* (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee and an award of Kshs. 300,000 to Kshs. 90,000.

    ii. *Lamu Bus Services & Anor v Caren Adhiambo Okello* (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh and an award of Kshs. 300,000 was reduced to Kshs. 130,000.

The Respondent's Submissions

10. It was submitted that the respondent adduced credible evidence which was not controverted that he sustained fractured right and left lower last molar teeth and produced medical documents and treatment notes to prove that he was injured as a result of the said accident and thus the trial magistrate did not err in holding the same.

11. The respondent submitted that the court should uphold the award granted by the trial magistrate. The following cases were cited in support of the award made by the trial court:

    i. *Washington Mukanya Karanja & Another v Margaret Wambui Maina* [2020] eKLR in which the appellate court upheld the sum of Kshs. 300,000 awarded on general damages to the plaintiff with swelling of upper part of mouth, alveolar fracture of both incisor teeth, soft tissue injuries on right leg and a superficial wound.

    ii. *Martha Agok v Kampala Coach BGM* [2017] eKLR where the claimant suffered a swollen face, tender lacerations and cut wounds, lost 1 incisor tooth and fracture on the other, blunt trauma on the lower abdomen, the chest and body iliac region with a swollen cut wound on the right leg and Kshs. 350,000 was awarded.

    iii. *Acacia Ventures Limited v Nellie Belindah Osok* [2021] eKLR where the plaintiff was awarded general damages in the sum of Kshs. 500,000 for bruises on the forehead, upper lip cut wound, nose bleeding, loss of four lower teeth, complex soft tissue injuries and anterior maxillary dental alveolar fracture.

12. It was thus submitted that the instant appeal lacked merit and ought to be dismissed with costs to the respondent.

Analysis and Determination

13. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Anor. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd*. (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).

14. I have carefully considered the proceedings, the judgement appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions. The parties apportioned liability by consent in the ratio of 80:20 in favour of the 1st respondent against the appellants and as such the only issue for determination is whether the trial court erred in its award of the general damages.

15. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages."

16. From the trial court record, the respondent pleaded and testified that he sustained the following injuries, following the material accident:

    i. Fractured right and left lower last molar teeth

    ii. Bruises on the frontal region of th head.

iii. Blood loss

iv. Blunt trauma to the mouth

v. Psychological pain

vi. Chest contusion

vii. Blunt trauma to the right shoulder

viii. Blunt trauma to the right hip

ix. Physical pains

x. Bruises on the right leg

17. CW2 Dr. Morebu testified that he saw the respondent 3 weeks after the accident. He admitted that the fracture of the teeth as pleaded by the respondent were not in the initial treatment notes from Nyakach County Hospital but that he had seen them thus he included them in the P3 form.

18. The appellants did not call any witness in support of their case and instead elected to close the case.

19. The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the *Evidence Act*. The appellants closed their case without calling any witnesses or producing any documents. Thus, where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

20. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
>
> (See *Kirugi and Another v Kabiya and Others* [1983] eKLR).

21. The respondent despite the absence of evidence from the appellants was obligated to prove its case on a balance of probabilities.

22. In my humble view, the injury in the nature of tooth fracture in terms of visibility and pain on the victim would make it a discoverable injury on a first glance such that the same would be included in the initial treatment notes. I am not persuaded that the respondent stayed with two teeth fractures for 3 weeks prior to them being discovered by CW3 Dr. Morebu. Further, save for the P3 form and

medical report both filled by Dr. Morebu, there was no other documentary evidence adduced by the respondent in support of his claim that he sustained a fracture on his teeth.

23. In my view, the respondent failed to prove on a balance of probability that he sustained a fracture to the right and left lower last molar teeth. The same was not proved by the respondent. In the circumstances it is my view that the injuries sustained by the respondent were soft tissue in nature with no fracture. In my view, the respondent may have sustained the fracture in different circumstances other than the material accident. Furthermore, it was not even shown that the said teeth cracked and or fractured from the cracks following the accident.

24. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards, time lapse since those past awards were made and inflationary trends. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* Nyr CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

25. The appellants impugned the trial court's award of Kshs. 300,000 as general damages on the grounds that the same was inordinately high and were not reflective of the injuries sustained by the respondent.

26. Having found that the respondent sustained soft tissue injuries, it is clear that the trial court erred in awarding the quantum of damages as it did. I have similarly considered the authorities relied on by the parties herein and I find that those relied on by the appellant are more comparable to the injuries sustained by the respondent herein.

27. In the case of in the case of *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others* [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000 for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back, injuries that were soft tissue in nature, and substituted it with an award of Kshs. 100,000.

28. Having eliminated the most serious injury allegedly suffered by the respondent but which was not proved on a balance of probabilities, I thus find that an award of Kshs. 100,000 would suffice as general damages in the circumstances.

29. It is my finding that this appeal is meritous and I thus proceed to set aside the trial magistrate award of Kshs. 300, 000 for general damages and substitute it with an award of Kshs.100, 000 general damages which will earn interest at court rates from date of judgment in the lower court until payment in full.

30. As the general damages have been substantially reduced, I order that each party bear their own costs of the appeal.

31. I so order.

32. This file is closed

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JUNE, 2024.

RE. ABURILI

JUDGE