Dominic Sisters Registered Trustees & another v Wanyoike (Civil Appeal E1008 of 2022) [2024] KEHC 9061 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1008 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

DOMINIC SISTERS REGISTERED TRUSTEES ..... 1ST APPELLANT

THE CATHOLIC ARCHIDIOCESE OF NAIROBI ..... 2ND APPELLANT

AND

PETER MURIGI WANYOIKE ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Rawlings Liluma Senior Resident Magistrate delivered on on 2nd December 2022 in Milimani Commercial Civil Case No. E1969 of 2019, delivered)

JUDGMENT

1. The appellants herein were the defendants in the lower court while the respondent was the plaintiff. The respondent vide the plaint dated 25th January 2019 sued the appellants claiming general damages for pain and suffering, loss of amenities of life, future medical costs amounting to kshs.150,000/= and special damages kshs. 345,887/= plus costs and interest. The claim resulted from injuries he sustained when he was hit while cycling alongside Gatitu Makongeni road by motor vehicle registration number KBB 554M owned by the 2nd appellant, on 11th January 2018.

2. The parties entered a consent on liability in the ratio of 80:20 in favour of the respondent against the appellants. The court in its Judgment awarded general damages of kshs. 2,000,000/=, future medical expenses kshs. 150,000/= and special damages kshs. 345, 887/=. The plaintiff was also awarded costs and interest.

3. The appellants being aggrieved by the judgment on quantum award lodged this appeal dated 13th December, 2022 on the following grounds: -

i. That the learned magistrate erred in law and in fact in awarding General Damages at kshs 2,000,000/= which award was excessive and unwarranted in light of the evidence adduced and was not commensurate to the injuries sustained.

ii. That the learned magistrate erred in law and in fact in awarding the claim of Special Damages at Kshs 345,887/= which claim was not proved and was excessive and unwarranted in light of the evidence adduced.

iii. That the learned magistrate erred in law and in fact in awarding future medical expenses at kshs. 150,000/= which award was excessive, unwarranted and in light of the evidence adduced.

iv. That the learned magistrate erred in law in not taking into account entirely the written submissions of the appellant.

v. That the learned magistrate's finding and decision were against the weight of the evidence adduced.

4. The Appeal was canvassed through written submissions.

Appellants submissions

5. The appellants' submissions were filed by Masire & Mogusu advocates and are dated 29th February, 2024. Counsel submitted on the grounds as listed in the memorandum of appeal.

6. Regarding the first to fifth grounds, counsel submitted that the award of kshs. 2,000,000/= as general damages by the learned magistrate was excessive, unwarranted and was not commensurate to the injuries sustained by the respondent. Further, that the learned magistrate erred in fact and law by failing to follow the principles and rules of precedents in awarding general damages. He placed reliance on the case of Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another Vs Lubia & another (No. 2) [1985] at page 3, Kneller J.A.

7. He submitted that the trial court failed to rely on the 2nd medical report by Dr. Wambugu P.M dated 18th November, 2019 which clearly indicated that the respondent had recovered from the injuries which were sustained. Further, that the court failed to take into consideration the appellants' submissions where they had relied on the following authorities:

i. Amritlal S. Shah Wholesalers Ltd Another vs. Joshua Ekeno [2012] eKLR wherein Justice Azangalala assessed general damages at Kshs 350,000/= for compound fracture of the right tibia and fibula (lower 1/3).

ii. Tabro Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR, Aroni J (as she then was) set aside judgment of the lower court and awarded Ksh 400,000/= as general damages where the plaintiff had suffered a fracture of the left tibia and fibula.

8. Regarding the second ground, counsel submitted that the trial court erred in law and in fact in not finding that the special damages of kshs. 354,887/= was not proved. On the third ground, counsel submitted that the court erred in law and in fact in awarding future medical expenses at kshs. 150,000/= which award was excessive and unwarranted in light of the evidence adduced and the same ought to be set aside. He thus urged the court to allow the appeal reduce and the award by the lower court.

Respondent's submissions

9. The respondent's submissions were filed by Nelson Kaburu advocates and are dated 21st February 2024. Counsel submitted that an appellate court may set aside an award and damages if it was proved

to be too high or too low. Or in arriving at its decision the court took account of irrelevant factors or failed to take account of relevant factors.

10. He added that comparable injuries should attract comparable awards considering, the nature and effect of injuries, their future effect on the victim and inflation which are all relevant factors. He placed reliance on the cases of Kemfro Africa Limited v Lubia & another [1985] eKLR, Shabani v City Council of Nairobi [1985] eKLR and Agnes Kamene Mulyali v Harvest Limited [2017] eKLR.

11. Counsel submitted further that the cases of Dorcas Wangiti and Michael Murage (page 44 and 45) cited by the respondent were more relevant for the awards of Kshs. two (2) Million. Further, that Dr. Wokabi gave an estimate of Kshs.150,000/= as future medical costs which the respondent sued and pleaded specifically for a medium cost hospital. He added that Dr. Wambugu for the appellant confined his estimate of Kshs.90,000/= to Kenyatta National Hospital. He urged that medical costs increase with time. He thus urged the court to dismiss the appeal with costs.

Analysis and determination

12. This being a first appeal this court has a duty of re-evaluate and re-consider the evidence afresh and arrive at its own conclusion. It also has to bear in mind that it did not see or hear the witnesses and ought to give an allowance for that. See Selle & another V Associated Moto Boat Co Ltd & another [1968] E.A 123.

13. Having carefully considered the evidence on record, grounds of appeal, submissions and cited decisions by both parties, I find only one issue falling for determination. The issue is whether the award on quantum was inordinately high. The issue of liability was sorted out through a consent by the parties in the ratio of 80:20 in favour of the respondent, and the appellants did not raise it as one of the grounds of appeal.

14. It is trite law that an award is a discretionary exercise by the trial court. A superior court on Appeal will only interfere with that discretion if it finds that the trial court considered irrelevant factors and/or did not consider relevant factors as it made the award. This was the holding in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini V A. M. Lubia and Olive Lubia (1985) I KAR 727 where the Court of Appeal stated:

> " 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 that 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 inordinately high that it must be a wholly erroneous estimate of the damage".

15. It is evident from paragraph 4 of the plaint what injuries the respondent sustained. The appellants argued that the award of kshs. 2,000,000/= as general damages was excessive, unwarranted and did not commensurate to the injuries sustained by the respondent. Further, that the trial magistrate erred in law and in fact in not finding that the special damages of kshs. 354,887/= was not proved. That the award for future medical expenses at kshs. 150,000/= was excessive and unwarranted in light of the evidence adduced.

16. The respondent on his part argued that he cited authorities which supported the award of Kshs.2,000,000/=. And in addition, Dr. Wokabi gave an estimate of Kshs.150,000/= as future medical costs which were pleaded specifically for a medium cost hospital. He added that Dr. Wambugu for the appellants confined his estimate of Kshs.90,000/= to Kenyatta National Hospital.

17. The trial magistrate in his judgment observed that the authorities cited by the respondent were comparable to his case and were more recent. However, the proposal he gave of 3,500,000/= was too high and so he awarded kshs 2,000,000/=. He noted that for future medical expenses the same was pleaded and the medical report produced was sufficient proof of the same.

18. The appellants in their submissions at the trial court relied on the case of Amritlal S. Shah Wholesalers Ltd Another vs. Joshua Ekeno (supra) and Tabro Transporters Ltd v Absalom Dova Lumbasi (supra) where the plaintiffs therein were awarded kshs. 350,000/= for compound fracture of the right tibia and fibula (lower 1/3) and kshs. 400,000/= for fracture of the left tibia and fibula respectively.

19. The respondent on his part relied on several cases among them the cases of; Rebecca Mumbua Musembi v Lucy K Kinyua [2014] eKLR, where the plaintiff was awarded kshs. 2,700,000/= for compound fractures of tibia and fibula necessitating reconstruction through surgery and use of metal plates; Michael Murage v Dorcas Atieno Ndwala [2019] eKLR, where the plaintiffs were awarded kshs. 2,000,000/= for compound fractures of tibia and fibula and fracture of femur.

20. The appellants have contested the award of Ksh 2,000,000/=. There is no dispute that the respondent suffered the injuries complained of. He was admitted at Kenyatta National Hospital for 175 days as he underwent treatment (pg 21 of the record of Appeal). This must have been a very painful and traumatizing moment for him. Dr. Wambugu's report confirms that there was residual shortening of the respondent's left leg and he would thus benefit from a shoe-heel raise to obviate the uneven weight distribution axes. Further that he was unlikely to ever fully exert himself using the left lower limb. He assessed his permanent incapacitation at 10% while Dr. Wokabi put it at 18%.

21. Upon considering all the above in comparison with several decisions among them:

    i. Patrick Kinyanjui Njama V Evans Juma Mukwenyi [2017] eKLR

    ii. Michael Murage V Dorcas Atieno Ndwala [2019] eKLR

    iii. Dorcas Wangithi Nderi V Samuel Kiburu Mwaura & Another [2015] eKLR.

    I find that the trial magistrate exercised his discretion judicially in assessing the damages. Though he did not reduce the award by 20% liability. Besides that, I find no reason to make me interfere with the award.

22. This court takes note of the fact that at no point will two accidents ever result in exactly similar injuries, in totality. The two medical reports by Dr. Wokabi and Dr. Wambugu confirm that the respondent suffered several fractures to both his lower and upper limbs. The 2nd report which was by Dr. Wambugu shows that the healing process was good. The fractures had united, and the metal implants were to be electively removed at a charge of Ksh 90,000/= at Kenyatta National Hospital. Dr. Wokabi had given a figure of Ksh 150,000/= at a medium hospital for the same exercise.

23. The receipt at pg 21 of the record of appeal shows that the respondent received his full treatment at Kenyatta National Hospital where he was admitted for quite some time. There would therefore be no good reason for him to go to a more expensive facility for removal of the metal implants. Therefore, for future medical expenses the reasonable figure should be Ksh 90,000/= in place of Ksh 150,000/=.

24. The appellants further submitted that the respondent did not adduce any evidence to support the claim for special damages. First and foremost, the respondent specifically pleaded special damages at paragraph 4 of the plaint. The special damages were for:

    a. Copy of records - Kshs 500/=

b. Medical report - Kshs 2,000/=

c. Medical debt - Kshs 343, 337

Total - KSh 345,887/=

25. On 27/06/2022 when the consent Judgment on liability was entered the trial Magistrate directed that "Documents by both parties be produced without calling the makers and parties to the submissions". All this was by consent.

26. All the receipts in respect of the copy of records, medical report and medical debt were filed by the respondent. They are found at pages 17, 15 and 21 of the record of appeal respectively. They are full proof of the special damages.

27. Based on the above findings I find the appeal merited on two items only. The awards shall therefore be as follows:

a. Liability at 80:20 in favour of the respondent.

b. General damages – Ksh 2,000,000/= less 20% = Ksh 1,600,000/=

c. Future Medical expenses Ksh 90,000/=

d. Special damages Ksh 345,887/=.

I therefore set aside the lower court Judgment and enter Judgment for the respondent for Ksh 2,035,887/= (two million, thirty five thousand eight hundred and eighty eight shillings plus costs and interest from the date of Judgment in the lower court. Cost of the appeal to be borne by the appellants

28. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE