Nzioki v Mwangi (Civil Appeal E011 of 2022)
[2024] KEHC 10625 (KLR) (Civ) (30 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E011 OF 2022

CJ KENDAGOR, J

AUGUST 30, 2024

BETWEEN

MARGARET MUENI NZIOKI .... APPELLANT

AND

JACOB IRINGU WANJAGI MWANGI .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G. Sogomo, Principal Magistrate, delivered on 30th November, 2021 in Milimani C.M. Civil Suit No. E5842 of 2020)

JUDGMENT

1. The Respondent, a motorcyclist, got involved in a road traffic accident on 5th July, 2019 while crossing Harambee Avenue in Nairobi. He was knocked down by a motor vehicle registration Number KBT 598K belonging to the Appellant. He sustained several injuries and sued the Appellant by instituting Milimani Commercial Courts Civil Case Number E5842 of 2020, under which he claimed damages for pain, suffering, and loss of amenities.

2. On 28th October, 2021, parties recorded consent on liability in the ratio of 85:15 in favor of the Respondent as against the Appellant. The consent also settled that the injuries sustained by the Respondent be deemed as:-

   (a) Right shoulder rotator cuff tear,

   (b) Blunt injury on the right knee, and

   (c) 16.5% permanent incapacity.

3. The trial court awarded the Respondent general damages for pain and loss of Kshs.1,000,000/=; and general damages for diminished capacity of Kshs.500,000/=. After subtracting the Respondent's 15%

contribution, the court awarded him Kshs.1,279,632.50/=. The Appellant, being aggrieved by the said judgment, appealed to this court through a Memorandum of Appeal dated 13th January, 2022 in which she listed four grounds, namely;

a. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent herein, if any, and failed to apply precedents and tenets of the law applicable.

b. That the learned trial magistrate erred in law and, in fact, by awarding a sum in respect of general damages which was inordinately high in the circumstances occasioning a miscarriage of justice; and

c. The Learned Trial Magistrate erred in law and, in fact, in finding that the plaintiff was entitled to general damages of Kshs.1,500,000/= which was manifestly excessive in view of the injuries suffered by the respondent.

d. The Learned Trial Magistrate erred in Law and, in fact, by failing to consider the Appellant's submissions and judicial authorities on quantum, thereby arriving at an erroneous figure on quantum.

4. The appeal was canvased through written submissions, for which this court gave due consideration.

The Appellant's Case

5. The Appellant submitted that the damages awarded by the trial court were not commensurable with the injuries sustained. She proposed that this court quash the award of Kshs.1,500,000/= as general damages and reduce it to Kshs.400,000/= as general damages. She submitted that 400,000/= reflects the nature and gravity of the injuries in this case and the circumstances. She relied on Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR, John Wambua v Mathew Makau Mwololo and Another [2020] eKLR, and Patrick Kinoti Miguna v Peter Mburunga Muthama [2014] eKLR, where the Appellant courts awarded accident victims Kshs. 300,000/=, Kshs. 120, 000/=, and Kshs. 300 000/ = respectively.

The Respondent's Case

6. The Respondent submitted that the award made was reasonable based on the evidence on record. Accordingly, he submitted that there is no basis to disturb the award and urged this court to affirm the awards. He further submitted that re-evaluating and re-assessing the evidence and proceedings on record would show that the trial court appreciated the evidence adduced and applied the correct principles.

Issue for Determination

a. Whether the award of general damages of Kshs.1,500,000/= in light of the injuries is inordinately high to persuade the court to interfere with it.

Analysis and Determination

7. This being the first appellate court, it has a duty to re-evaluate the evidence and come up with its conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied

the wrong principles in reaching its findings. The exercise of this duty must be within the principles set out in Selle and another v Associated Motor Boat Company Ltd and Others [1968] 1 EA 123:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

8. Further, this being an appeal on quantum, the court is guided by the principles set out by the Court of Appeal in Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another v Lubia & Another (No 2) [1985] eKLR

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

9. These principles were later restated by the Court of Appeal in Catholic Diocess of Kisumu v Sophia Achieng Tete- Kisumu Civil Appeal No. 284 of 2001, where the court held as follows:-

> "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 present an entirely erroneous estimate."

10. In the case of Morris Mugambi v Isaiah Gitiru [2014] eKLR, the Court of Appeal stated as follows:

> "........we wish to state that in assessment of damages the general method of 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."

11. After reviewing the cases cited by the parties, I noted that the authorities referenced by the Appellant involve less severe injuries compared to those in the current case.

    In Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR, the accident victim had suffered a dislocation of the right shoulder joint.

    In John Wambua vs Mathew Makau Mwololo and Another [2020] eKLR, the plaintiff sustained a blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers.

    Lastly, in the case of Patrick Kinoti Miguna v Peter Mburunga Muthama [2014] eKLR, the Plaintiff suffered bruises on the right parietal region, loose lower incisors, a dislocation of the right shoulder, a cut on the left leg, a bruise on the right leg, and a bruise on the dorsum of the right hand.

12. I reviewed the court's decision in Roy Mackenzie v Cartrack Kenya Limited & Another [2012] eKLR, where the High Court awarded the plaintiff Kshs.700, 000/= as general damages. A comparison between the two cases (Roy Mackenzie and the current case) shows that the victims in both instances suffered similar injuries and underwent similar medical procedures. In Roy Mackenzie's case, the victim sustained an injury to his left shoulder and a tear of the rotator cuff tendon that required urgent arthroscopic correction. In the current case, the Respondent went through the same experience. According to the medical opinion dated 30th July, 2020, and produced in court by consent of the parties, the Respondent's MRI 'showed major abnormalities of the right shoulder rotator cuff.....and underwent repair of the rotator cuff through arthroscopy.'

13. I also reviewed the decision of the High Court in Erick Nyarangi Ondora & another v JMO & 3 Others [2019] eKLR. In this case, the court awarded the plaintiff Kshs.1,200,000/= in general damages. Liability was apportioned 85:15 in favor of the Respondent/Plaintiffs, with 16.5% permanent disability. The two cases can be differentiated. In the Erick Nyarangi Ondora case, the victim had suffered a compound fracture and was expected to incur future medical expenses and costs of Kshs.100,000/=. In contrast, the Respondent in the current case suffered less severe injuries. In addition, he is not expected to incur future costs concerning the injuries, and if anything, he did not plead for future expenses in the plaint.

14. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained, the degree of permanent incapacity, and the inflationary trends, I find that while the learned trial magistrate considered comparable authorities, the award arrived at fell on the higher side and ought to be interfered with. I find that an award of Kshs.700,000/= would be reasonable in the circumstances.

Damages for Diminished Capacity

15. In the Plaint dated 13th October, 2020, the Respondent pleaded damages for reduced/diminished earning capacity. He stated;

> "6. As a result of the accident, the Plaintiff sustained incapacitating injuries at the age of 40 years and due to the said injuries he can no longer engage effectively in any economic venture and his ability to compete effectively in the labour market has been severely curtailed and he claims damages for reduced/ diminished earning capacity."

16. In the case of Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR it was stated as follows on the method of awarding diminished earning capacity:-

> "The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors."

17. I have perused the trial court's record, and it appears that the Magistrate erred by referring to the wrong percentage of permanent incapacity in determining damages for diminished capacity. In the consent terms recorded by the parties on 28th October, 2021, one of the mutually agreed terms was that the injuries sustained by the plaintiff be deemed as 16.5% incapacity. The records of the lower court reads:

> "By Consent, ...(2) The injuries sustained by the plaintiff be deemed as: (c) 16.5% permanent incapacity."

18. In the judgment, however, the magistrate quoted a different percentage. The court said:

> "Going by opinions in the medical records aforesaid, the court observes that the Plaintiff suffered 18% permanent incapacity of right shoulder."

19. The Court did not have to revisit the issue of the percentage of permanent incapacity because that issue had been settled by consent. The essence of the consent was that the parties had moved away from their pleadings and had recalibrated and narrowed the scope of the dispute to the issue of damages.

20. I adopt the decision of the High Court in SNI v AOF [2020] eKLR, where the court observed as follows;

> "Prudence, indeed will dictate that parties legal effect deprived from the consent orders should be deliberately be bound unless there is evidence that every material fact in their possession was invariably mistaken or misrepresented to warrant a variation or complete setting aside the order. It is integral as the Court held in Flora N. Wasike v Destinno Wamboko [1988] eKLR that:
>
> "It is now settled law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out. (See the decision in J. M. Mwakio v Kenya Commercial Bank Ltd CA No. 28 of 1982)."

21. Similarly, the Court in the case of Windsor Commercial Land Company Ltd & others v Century National Merchant Bank Trust Ltd. SCCA 114/2005:-

> "The Court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would include mistake, misrepresentation, duress, and undue influence."

22. Thus, the Magistrate applied the wrong facts in assessing the damages for diminished capacity to the extent that she referred to the wrong percentage. I therefore set aside the 500,000/= damages awarded for diminished capacity.

23. In determining the amount of damages to award in this category, I refer to the case of *Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021)* [2023] KEHC 1593 (KLR) where the court awarded the plaintiff, who had suffered permanent incapacity of 32.5%, Kshs.800,000/= as damages for diminished capacity. In the case, the Judge observed that the percentage of permanent incapacity was a factor in determining the amount of the damages. It held;

> "I would thus award an additional global figure of Kshs 800,000/- bearing in mind what he used to earn before the accident and considering that the two doctors' assessment of permanent incapacity varied and ranged between 15% to 50%."

24. In the current case, the Respondent suffered permanent incapacity of 16.5%, half of what the Plaintiff in Nyatogo v Mini Bakeries Limited had suffered.

25. I also refer to the case of Ndung'u & Another v Mbau [2023] KEHC 26167 (KLR), where the High Court awarded the Plaintiff, who had suffered 37.5% permanent incapacity, Kshs.500,000/- as damages for diminished capacity. Taking into account these distinguishing factors, I find that Kshs. 300, 000/ = in damages for diminished capacity will be reasonable.

26. Accordingly, I allow this appeal on quantum and set aside the award of Kshs. 1,500,000/- general damages awarded to the Respondent by the trial court and substitute it with an award of Kshs. 1,000,000/= plus special damages as proved and not challenged on appeal in the sum of Kshs. 5,450/=. Liability is apportioned in the parties' agreed-upon ratio of 15%.

    a. General damages

        I. Pain and suffering - Kshs.700,000/=

        II. Diminished capacity - Kshs.300,000/=

        Sub-total I - Kshs.1,000,000/=

        Less 15% contribution - Kshs.150,000/-

        Sub-total II - Kshs.850,000/=

    b. Special damages - Kshs.5,450/=

        Total- Kshs.855,450/=

27. Costs are at the court's discretion and, in any event, to a successful party. However, in this case, I order that each party bear its own cost of this Appeal as the appeal was only on quantum and the fact that the Respondent's costs, as awarded in the trial court, are considerably reduced because of the reduction of the general damages by Kshs.500,000/= in this appeal.

    Orders accordingly.

DELIVERED. DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON 30TH AUGUST, 2024.

C. KENDAGOR

……………………………

JUDGE

In the presence of :

Court Assistant: Hellen

Advocate for Appellant: Adv. Kimanzi

Advocate for Respondent: Adv. Kiiru holding brief for Adv. Munga