Irungu v Muthoka (Civil Appeal E203 of 2023)
[2024] KEHC 10717 (KLR) (Civ) (22 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10717 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E203 OF 2023

REA OUGO, J

AUGUST 22, 2024

BETWEEN

BENJAMIN KIMANI IRUNGU ..... APPELLANT

AND

THOMAS MUTHOKA ..... RESPONDENT

(Being an appeal against the Judgment/decree of the Chief Magistrate's Court at Milimani delivered on the 30th September 2022 in Milimani CMCC No E12862 of 2021 by Honourable S.N Muchungi (Mrs.) S.R.M)

JUDGMENT

1. This appeal challenges the judgment of the trial magistrate on the damages awarded. The respondent in his plaint alleged that he was travelling in motor vehicle KBJ 849H. The appellant was the owner of the motor vehicle registration number KCD 207C. It was alleged that on 28/12/2020 the appellant was driving carelessly and negligently and caused a collision with motor vehicle KBJ 849H. The liability issue was settled by consent in the ratio of 80:20 in favor of the respondent.

2. The only issue before the subordinate court was whether the respondent proved that he sustained the injuries pleaded and what the damages were awardable. According to the respondent in paragraph 6 of his plaint, he suffered a fracture dislocation of the right elbow, and back and chest pain. He also sought special damages of Kshs 10,550/-. The appellant denied the respondent's claim on injuries. The trial magistrate in her judgment found that the plaintiff sustained the injuries sustained and found that an award of Kshs 500,000 was reasonable as general damages. She also found that the amount of Kshs 10,550/- as special damages were pleaded and proved.

3. The appellant is dissatisfied with the judgment of the trial magistrate and has filled this instant appeal on the following grounds:

1. That the learned trial magistrate erred in law and fact by awarding the respondent general damages against evidence that the respondent had not sustained any injuries from the accident at all.

2. That in any event, the learned trial magistrate erred in law and fact by awarding the respondent the manifestly excessive quantum of damages in the sum of Kshs 500,000/- payable by the appellant to the respondent.

3. The learned trial magistrate erred in law and in fact by basing her decision on irrelevant matters and failing to basis his said decision on the facts and evidence on record and thereby making an award in general damages that is not supported by any fact and/or the law.

4. The learned trial magistrate erred in law and fact by ignoring and disregarding the overwhelming evidence on record and basing her decision on a bias consideration of the evidence of general damages and consequently arriving at an erroneous decision.

4. The appellant sought that the decision of the trial magistrate be quashed. The appellant also sought an order that additional evidence be submitted and the two medical doctors be cross-examined on the evidence of the alleged injuries.

5. The appeal was canvassed by way of written submissions. The appellant in his submissions argues that the medical report by Dr. Cynthia W. Muriithi and Dr. Ashwin Madhiwala were produced into evidence without calling the makers. The medical report by Dr. Ashwin contained factual evidence that required interrogation by the court. In Amalgamated Saw Mills Ltd v Daniel Waire Gikaruri [2006] eKLR, the court observed that the trial magistrate should have considered both medical reports produced by consent. In this case, the appellant submits that the trial magistrate failed to take into account the medical report by Dr. Ashwin Madhiwala which indicated that the respondent had not sustained any injuries as a result of the accident.

6. The appellant further submitted that the subordinate court was wrong in awarding Kshs 500,000/- yet there was evidence that the respondent did not sustain any injuries. He submitted that if the respondent proved the alleged injuries in his plaint, he is only entitled to Kshs 300,000/-. He cited the case of Gogni Rajope Construction Company Limited v Francis Ojuok Olewe [2015] eKLR where the court made an award for Kshs 350,000/- where the plaintiff sustained a fracture of the left distal ulna and radius, fracture and dislocation of the left elbow joint and soft tissue injuries.

Analysis and Determination

7. The factors under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR as follows:

> 'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...'

8. The appellant has challenged the injuries sustained by the respondent and the injuries awarded by the trial court. The respondent relied on the medical report from Ole Osiligi Medical Services. According to the report he sustained a fracture dislocation of the right elbow and POP was applied. The medico-legal report by Dr. Cynthia W. Muriithi was that the respondent sustained a fracture dislocation of the right elbow and moderate soft tissue injuries. The report by Dr. Ashwin Madhiwala indicated that the

respondent denied visiting any clinic, hospital, or advocate's doctor. According to the second report the respondent had no injury, but only damage to his car.

9. In this case, I have carefully gone through the record and indeed the parties by consent settled the issue of liability at 80:20. The parties agreed to have medical documents admitted without calling the makers. However, I note that both parties failed to call any witnesses and therefore it was not possible to cross-examine the makers regarding the contents of the reports. Before the court can make an award of damages, the plaintiff must ascertain that he sustained injuries and the court must consider the gravity of the injuries. The respondent had the duty of proving on a balance of probabilities that he sustained the injuries pleaded. Sections 107 and 108 of the *Evidence Act* provide as follows:

> " 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

10. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

11. I have considered both reports before the subordinate court. According to the report by Dr. Ashwin, his opinion was formed from what the plaintiff stated. I agree with the trial magistrate that it was rather strange that the plaintiff would abandon his claim once he visited Dr. Ashwin but not withdraw his case altogether. In any event, I find that the findings by the Dr Ashwin Madhiwala were not supported by the medical report of Ole Osiligi Medical Services where the respondent sought treatment. In his report, he did not consider any X-rays to conclude that there was no fracture. In essence, the basis of the report is hearsay evidence. I also note that the parties, by way of consent adopted by the subordinate court, elected to dispense off with calling the makers of documents, therefore the relief by the appellant that additional evidence be adduced by way of cross-examination cannot be entertained.

12. The report by Dr. Cynthia W. Muriithi dated 4.4.2021, considered that an X-ray was done on the respondent's right elbow and it revealed a fracture dislocation. The appellant was given analgesics and POP was applied. The opinion of Dr. Cynthia W. Muriithi was consistent with the treatment administered to the respondent at Ole Osiligi Medical Services dated 28.12.2020. I agree with the trial magistrate that given that there was no evidence impeaching the medical reports by the respondent, he had proved his case to the required standard.

13. The appellant proposed the award of Kshs 300,000/- however, that award has been made by courts where the plaintiff sustains only soft tissue injuries and a dislocated elbow. The appellant also relied on the case ofGogni Rajope Construction Company Limited is a 2015 case and very dated as it is a

2015 decision. In*Chilaga & another v Gude (Civil Appeal 85 of 2021*) [2023] KEHC 25309 (KLR) (6 November 2023) (Judgment) the plaintiff sustained soft tissue injuries anddislocation of the right elbow and the court affirmed the award of Kshs 300,000/-. In Onesmus Kinyua Muchudu v Mishi Kambi Charo & another [2021] Eklr the plaintiff is awarded Kshs. 450,000/- general damages after he sustained soft tissue injuries andposterior dislocation of the right elbow. Disability was assessed at 8% and the plaintiff therein stood the risk of developing osteoarthritis.

14. In this case, the appellant sustained a fracture dislocation of the right elbow. This in my view is much more serious than a simple dislocation. The court in Penina Waithira Kaburu v LP [2019] eKLR stated that:

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

15. The current awards for dislocated elbows range between Kshs 300,000 – Kshs 450,000 depending on the severity of the injuries. In this case, the respondent also sustained a fracture, and an award of Kshs 500,000/- cannot be described as inordinately high.

16. In conclusion, the appeal is without merit and is dismissed. The respondent shall have the cost of the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 22ND DAY OF AUGUST 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Ochieng -For the Appellant

Respondent - Absent

Diana -C/A