Mwau v Kamathi (Civil Appeal E104 of 2023)
[2024] KEHC 11033 (KLR) (22 August 2024) (Judgment)

Neutral citation: [2024] KEHC 11033 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E104 OF 2023

LW GITARI, J

AUGUST 22, 2024

BETWEEN

RACHAEL MWELU MWAU ..... APPELLANT

AND

DOUGLAS KAMATHI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment in Senior Principal Magistrate's Court at Githongo and Civil Case No. E017 of 2021. The suit was filed by the appellant vide a plaint dated 27/5/2021 where she was claiming damages for pain, suffering, and loss of amenities as well as special damages arising from injuries she sustained in a road traffic accident. The claim against the defendant was based on the facts that he was registered beneficial and possessory owner of motor vehicle registration number KCW 826B Toyota Hiace Van. The appellant was travelling in the said motor vehicle on 8/3/2021 when the driver negligently drove the motor vehicle as a result of which it was involved in an accident and the appellant suffered serious bodily injuries. Her contention was that the defendant's driver was solely to blame for the accident.

    1. The respondent denied the claim and filed a defence. The matter proceeded to hearing and in a Judgment delivered by the learned trial magistrate liability on the respondent was assessed at 100% general damages at kshs.80,000/-special damages of Kshs.59,550/- and costs of the suit. The appellant was dissatisfied with the Judgment and filed this appeal based on the following grounds:-

        1. That the learned trial magistrate erred in law and fact in awarding the appellant Ksh.80,000/- in general damages for pain, suffering and loss of amenities which award is so inordinately law that it represents an erroneous estimate of the damages that she was entitled to.

2. That the learned trial magistrate misapprehended the Appellant's injuries thereby arriving at an ward that was inordinately low.

3. That the learned trial magistrate erred in law in failing to consider precedents in arriving at the quantum of damages and as a consequence her assessment was arbitrary.

2. The appellants prays that the appeal be allowed, the trial courts Judgment be set aside, and review the Judgment upwards. The appellant's case was that she sustained injuries as follows:-

i. Bruising on the head

ii. Bruise on anterior chest wall

iii. Bruise and tenderness over the left clavide area

iv. Bruise on the left arm and forearm

v. Bruises on the left leg anteriorly.

3. A medical report by Doctor Macharia which was produced in court as exhibit- 4- by consent. In his opinion the doctor stated that-

> " As a result of the accident, Rachael Mweru sustained soft tissue inflammation) These were managed and have healed with scarring. She still has pains but these are expected to ease with time."

4. The appellant has submitted hat the appeal is limited to the trial court's finding on quantum. He has cited the case of Catholic Diocese of Kisumu-v- Sophia Achieng Tete (20024) eKLR where the court laid down the principles upon which an appellate court can interfere with findings of fact by the trial court on quantum. He submits that the trial magistrate did not take into account that the appellant sustained serious multiple soft tissue injuries and had been admitted in hospital for three days and hence left out relevant evidence thus arriving at very low figure. The appellant has relied on Mc. Gregor on damages 15th Edition 1988 Paragraph 153 where it was stated:-

> " Pain and suffering is now almost a term of art. In so far as that can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it. Suffering on he other hand denotes the mental or evidential distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like, it is not however, usual for the Judges to distinguish between the two elements.
>
> Whereas loss of amenity is deprivation of the plaintiff of the capacity to do the things which before the accident he was able to enjoy, and due to the injury he is fully or partially prevented from participating in the normal activities of life."

5. The appellant has cited the following cases and submits that comparable injuries should as far as possible be compensated by comparable awards, these are Lake Naivasha Growers –v- Muigai Thuka (2020) eKLR, Michael Okelle-v- Prisca Otieno (2021) eKLR 250,000/-. He urges the court to review the learned magistrate's Judgment and award Ksh.300,000/-

2. The respondent did not file written submissions despite having been given an opportunity to do so.

6. I have considered the appeal. The duty of this court as the first appellate court is to consider the evidence which was adduced before the trial court, evaluate it and draw its own conclusions bearing in mind

that it did not see the witnesses and leave room for that. See Selle & Another –v- Associated Motor Boat Company Limited & Others (1968) E.A 123.

7 I have considered the appeal. I take the view that the appeal is not opposed. The principles under which this court may interfere with findings of fact by the learned magistrate are that it must be shown that the learned magistrate misapprehended the evidence and acted on wrong principles in arriving at inordinately low or High award. See Bhut –v- Khan (1977) 1 KAR.

8. It is the law that the assessment of damages is at the discretion of the trial court and the appellate court will not interfere with that exercise unless it is shown that wrong principles were applied by taking into account irrelevant factors of leaving out of account some relevant one, misapprehended the evidence and arrived at a figure so inordinately low or high as to represent an entirely erroneous estimate. See Kitavi –v- Coast Bottlers Limited (1985) KLR 470.

9. In this case the learned magistrate relied on Mohammed Jabane –v- High Stone Tongoi Olenya Civil Appeal No.2/1986 she further stated that all he authorities cited by the rival parties are relevant. She concluded that the injuries by the plaintiff were (appellant) were not severe and had healed within a span of one month. She found that though the appellant stated that she still experienced pain, she never visited the doctor at anyone time after she was discharged from Hospital. I find that the learned magistrate applied the correct principle in arriving at the quantum of damages. In deed from the doctors evidence, the injuries were not severe and were bruises which were treated with pain killers and anti-Tetanus drugs.

10. In the lower court the appellant had relied on the authorities where the damages awarded were ksh.250,000. The respondent had cited HB (Minor Suing thro' mother & Next Friend DKM –v- Jasper Nchonga Magari & Another (2021) eKLR where the lower court had awarded Ksh.60,000/- for soft tissue injuries and the same was upheld by the High Court. The respondent had also cited several authorities where the plaintiffs were awarded 50,000- 70,000/- for soft tissue injuries. It is trite law that damages are awarded to compensate a party for the pain and suffering but not for unjust enrichment. In this case I entirely agree with the learned trial magistrate that injuries sustained were not severe. The injuries healed and the doctor stated that the pain will ease with time.

11. It is my view that the learned magistrate acted on the correct principles and properly address her mind to the law and the facts. The award was not in-ordinately low.

12. In the circumstances I find no reason to interfere with the exercise of discretion by the learned trial magistrate in assessing the quantum of damages.

Disposition:

13. The appeal is without merits and is dismissed.

Costs of the appeal to the respondent.

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

L.W. GITARI

JUDGE