Ochieng v Ahmed & another (Civil Appeal E969 of 2022)
[2024] KEHC 11718 (KLR) (Civ) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E969 OF 2022

REA OUGO, J

SEPTEMBER 27, 2024

BETWEEN

MARTINE ISAIAH OCHIENG ..... APPELLANT

AND

AHMED MOHAMED AHMED ..... 1ST RESPONDENT

JOSEPH MERENGO ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. S.G Gitonga (MRS) (RM) Adjudicator – (RM), delivered in the Small Claims Court; SCCC No E2668 OF 2022 on the 11th November, 2022)

JUDGMENT

1. The appellant appeals against the judgment of the subordinate court entered in default as the respondents despite being served failed to enter appearance and file their defence. The appellant's case at the lower court was that on 21st April 2022, he was walking as a pedestrian along Suna Road when the respondent's motor vehicle registration number KCY 557U veered off the road and knocked the appellant. The appellant sustained serious injuries. The appellant sought general damages, special damages, and costs.

2. The respondents were served but failed to enter appearance and file a statement; therefore, a default judgment was entered. The learned magistrate held that the appellant sustained a bimalleolar fracture of the right ankle lower ends of the tibia and fibula. He awarded general damages of Kshs 180,000/-, Kshs 8,100/- special damages and costs.

3. The appellant filed the memorandum of appeal dated 23/11/2022 challenging the award on general damages on the following grounds:

1. The learned trial magistrate erred in law and in fact in finding that the appellant was entitled to general damages of Kshs 180,000/- which was too much on the lower side in view of the injuries suffered by the appellant that it presented a miscarriage of justice.

2. 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.

3. The learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.

4. The learned trial magistrate erred in law and in fact when making her award by failing to consider the passage of time and incidence of inflation.

4. The appellant in his submissions has not challenged the lower court's finding on the injuries he sustained. According to the treatment notes, medico-legal report and P3 Form, the appellant suffered a bimalleolar fracture of the right ankle (lower ends of the tibia and fibular).

5. The appellant submits that the Kshs 180,000/- award as general damages was on the lower side and Kshs 850,000/- would be fair. He relied on the case of HCCC No 4706 of 1992 *Salome Munagi Ojonga v Henkel Kenya Limited* where the plaintiff sustained a bimalleolar fracture of the left ankle joint with displacement fracture and was awarded Kshs 300,000/- as general damages. In *Twiga Construction Company Limited v Vincent Muruli* [2021] eKLR the court in that case considered two reports, one by Dr Mwaura that found the plaintiff to have sustained a fracture of the tibia/fibular with disability assessed at 25% and the other by Dr.Wambugu who was the opinion that he suffered a bimalleolar fracture of the right ankle joint. Although the court in *Twiga Construction Company Limited case* (*supra*) did not make a finding on the injuries sustained by the plaintiff therein, it upheld the award of Kshs 600,000/-.

6. The appellant further submits that the trial magistrate relied case of *Michael Kipchumba v Channan Agricultural Contractors* [2018] eKLR where the plaintiff suffered a simple fracture of the ankle however in this case the level of expected permanent disability to be sustained by the appellant was assessed at 5%.

7. The respondents did not file submissions to the appeal despite being served.

Analysis And Determination

8. In *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457 the court held that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made"" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

9. Although the trial magistrate considered the Michael Kipchumba case (supra) in arriving at its decision, it failed to factor in that the plaintiff therein suffered a fracture of the left tibia and fibula with no permanent disability and was awarded Kshs 200,000/-. The trial court concluded that the injuries sustained by the appellant herein were less severe than those in the Michael Kipchumba case (supra), though the evidence suggests otherwise.

10. The Court of Appeal in *Coastal Kenya Enterprises Limited v Muchiri* (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated:

> " In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & others v Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd v Shephard* [1964] AC 326 at 345 that:
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> > "Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional."

11. I agree with the submissions of the appellant that the trial court fell into error in awarding Kshs 180,000/- as general damages. The Court in *Karanja v BA (A Minor Suing through the Father and the Next Friend MMP) & another* [2022] KEHC 15287 (KLR) where the respondent suffered a compound/bimalleolar fracture of the left ankle joint with permanent incapacity was assessed at a degree of 2% found that Kshs 500,000/- was sufficient compensation. In *Hussein Sambur Hussein v Shariff A. Abdulla Hussein, Alwi A. Hassan Sharrif & Ali Shariff Alwi* [2022] KEHC 2341 (KLR) the plaintiff sustained the following injuries: fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and he complained of pain in the injured areas and a permanent incapacity of 18%; and the court awarded Kshs 600,000/- as general damages.

12. The injuries sustained by the claimants in the above authorities are comparable to those sustained by the appellant, therefore the award by the trial magistrate was inordinately low. In conclusion,the award by the trial court is set aside award of Kshs 180,000/- general damages is substituted with an award of Kshs 500,000/-.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA TEAMS THIS 27TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Owour h/b Mr. Gomba -For the Appellant

Respondent - Absent

Wilkister -C/A