Ruso v Njiriri (Civil Appeal 35 of 2023)
[2024] KEHC 11349 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11349 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 35 OF 2023

CM KARIUKI, J

SEPTEMBER 26, 2024

BETWEEN

PETER MURERI RUSO ..... APPELLANT

AND

JESSY WENDO NJIRIRI ..... RESPONDENT

JUDGMENT

1. The appeal herein arose for the judgement delivered by Hon. Barasa on 11/04/2023 in Engineer CMCC E006 of 2022 whereby the plaintiff was awarded Kshs. 900,000/- in general damages and Kshs. 200,000/- as future medical expenses and the defendant was held 100% liable.

2. Being aggrieved by the aforesaid judgment, the Appellant instituted an appeal dated 2nd May 2023 on account of the quantum award based on the following grounds: -

    I. That the learned trial magistrate erred in law and in fact in not according sufficient regard to the applicant's medical documentary evidence and hence arrived at inordinately low award.

    II. That the learned trial magistrate erred in law and in fact in awarding the applicant inordinately low general damages in the circumstances of this case.

    III. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's evidence on record and written submissions in arriving at her judgement.

    IV. Reasons wherefore the Appellant prays that:-

    V. The appeal be allowed with costs

    VI. The learned judgment delivered on 11/04/2024 be set aside and be substituted with a reasonable award.

3. The costs of this appeal be borne by the Respondent.

On the other hand, the Respondent filed a cross appeal dated 23/05/2023 also on the issue of quantum. Their memorandum of cross appeal was based on the following grounds: -

I. That learned trial magistrate erred in law and in fact by awarding Kshs. 900,000/- as the general damages, future medical expenses at Kshs. 200,000/- which award is excessive in view of the injuries sustained.

II. That the learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

III. That the learned trial magistrate erred in law and fact by failing to consider the nature of the injuries suffered by the Respondent thus arriving at a wrong finding.

IV. That the learned magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.

V. That learned magistrate erred in law and in fact when he over relied on the Respondent's submissions and erroneous principles of law in arriving at an excessive award on quantum.

4. Reasons wherefore they proposed to ask the court for the following orders, that: -

I. This cross appeal be allowed with costs.

II. The judgement on quantum delivered on 13th April 2023 by Honourable H. Barasa Senior Principal Magistrate be set aside and the same be assessed and/or reviewed and substituted with a fresh award.

III. The cost of this appeal be borne by the Respondent.

IV. Any such further orders may be made by this honourable court may deem fit to grant.

5. Appellant's Submissions, not available at the time of drafting this judgement.

Respondent's Submissions

6. The Respondent stated that the plaintiff suffered the following injuries: -Fracture of the lateral, malleolus of the left ankle jointFracture of the distal, mid proximal end of the right tibia and fibulaBlunt injury to the head leading to soft tissue injuriesSoft tissue injuries of the right leg

* Soft tissue injuries of the left ankle joint

* Soft tissue injuries to the head

7. It was stated that a reevaluation of the quantum would be prudent seeing as the plaintiff suffered injuries that were properly managed and have since healed. Reliance was placed on the case of Kigaraari vs Aya [1982-88] 1 KAR 768 as quoted by Kamau J in Godfrey Wamalwa Wamba & Another v Kyalo Wambua [2018] eKLR

8. The Appellant urged the court to disturb the award of Kshs. 900,000/- in general damages and the award for future medical expenses as the same is so high to be an erroneous estimate inconsistent with the plaintiff's injuries. That the honourable trial magistrate erred in law hence he disregarded the directions of the Respondent's doctor on the status of the injuries and proposal of future medical

expenses. That from the, medical report it is clear that upon 2nd re-examination, the fractures suffered by the plaintiff has healed and proposed that an award of Kshs. 600,000/- for the injuries is reasonable.

9. Reliance was placed on the case of Nashon Nyambaro Nyadega vs Peter Nyakweba Omboya [2021] eKLR, Daniel Otieno Owino vs Elizabeth Atieno Owuor [2020] eKLR, Nyambura v Njuguna & Another (Civil Appeal E025 of 2022) [2024] KEHC 418 KLR

10. On the award of future medical expenses, it was stated that it becomes hard to understand why the honourable magistrate decided to rely on the report of Dr. Jenipher Kahuthu, the Respondent's witness only for him to disregard her opinion on the cost of future medical expense. That no clarification was given to explain the need for Kshs. 200,000/- for future medical expenses and that it ought to be reduced to Kshs. 80,000/- as advised by Dr. Jenipher Kahuthu.

11. In conclusion, the Respondent urged the court to uphold their cross appeal and dismiss the Appellant's appeal and that he be awarded costs.

Analysis and Determination

12. Having carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the cross-appeal; the judgment of the learned trial magistrate and the written submissions filed herein together with all the authorities cited, the main issue that arises for determination from both the Appellant's and Respondent's case is on quantum.

13. In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, the Court of Appeal stated that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect"

14. Further, in Peters v Sunday Post Ltd [1958] EA 424, the Court held that;

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

15. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

16. The appeal herein emanates from a road traffic accident claim in in Engineer CMCC E006 of 2022, where it was the plaintiff's case that on or about the 19th of February 2021, he was lawfully on duty as a traffic police officer off the road along the Nairobi-Naivasha Road at the viewpoint area when the defendant's driver so carelessly and/or negligently lost control of motor vehicle registration number KCW 690X and hit the plaintiff and as a result of which he sustained severe injuries. The plaintiff was

awarded Kshs. 900,000/- in general damages and Kshs. 200,000/- as future medical expenses and the defendant was held 100% liable. The issue of liability being uncontested shall remain undisturbed by this court.

17. That being the case, I turn to the main issue for determination that is the quantum of damages awarded.

18. I stand guided by the case of Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR where the Court of Appeal stated that in an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined thus:

> 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 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.

19. On the issue of quantum, the Court of Appeal's decision in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, held that :-

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
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> > 'An appellate court will not disturb an award of 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."

20. Further, in dealing with the appeal on quantum I will rely on the decision of the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5 where the court held that;

> "An appellate Court will not disturb an award of 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"

21. Additionally, In the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR the court stated as follows:

> "It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

22. In the instant appeal, The Appellant argued that the learned trial magistrate erred in law and in fact in not according sufficient regard to the applicant's medical documentary evidence and hence arrived at inordinately low award whilst the Respondent, in the cross appeal contended that the learned trial magistrate erred in law and in fact by awarding Kshs. 900,000/- as the general damages, future medical expenses at Kshs. 200,000/- which award is excessive in view of the injuries sustained.

23. Notably, from the trial court proceedings there were three medical reports produced before the trial court. The report dated 14th January 2022 by Dr. Obed Omuyoma set out the injuries sustained by the Appellant to be as follows: -Fracture of the lateral, malleolus of the left ankle jointFracture of the distal, mid proximal end of the right tibia and fibulaBlunt injury to the head leading to soft tissue injuriesSoft tissue injuries of the right legSoft tissue injuries of the left ankle jointSoft tissue injuries to the head

24. He also opined that the Appellant suffered a permanent disability of 10%.

25. Additionally, there was another report by same doctor dated 10th May 2022 in which he assessed permanent disability at 20% and he estimated the cost of future medical treatment at Kshs. 200,000/-. He assessed the Appellant's injuries as follows: -Fracture distal end of the right tibia and fibulaSegmental fracture mid shaft right tibia and fibulaFracture lateral malleolus of the left ankle jointFracture medial malleolus of the left ankle jointBlunt injury to the head leading to soft tissue injuriesSoft tissue injuries of the right legSoft tissue injuries of the left ankle joint

26. Notwithstanding, the Appellant also underwent medical examination by the Respondent's doctor, Dr. Jenipher Kahuthu who prepared the medical report dated 23rd May 2022. She stated that the Appellant's middle and distal tibia diaphyseal fracture were healed as well as the fibula fractures and the left tibia/fibula plate. Further, she stated that the screws seen were adequately reducing tibia fractures and there was normal ankle joint alignment.

27. Her recommendations were that the Appellant has right/tibia fibular fractures and left distal tibia fractures. Additionally, Dr. Jenipher did not find any physical disability resulting from the injuries and she assessed the cost of future medical treatment at Kshs. 80,000/-

28. Having thoroughly assessed the three reports, it is clear that Dr. Obed Omuyoma is the one who first assessed the Appellant's injuries on 14th January 2022. In his first report he indicated that the Appellant suffered two fractures but interestingly in his second report he listed that the Appellant had suffered four fractures. Further, in his first report he assessed permanent disability at 10% but later increased it to 20% in his second report.

29. On the other hand, Dr. Jenipher indicated that the Appellant only suffered two fractures similar to Dr. Omuyoma in the first report. It is my considered opinion and in agreement with the trial magistrate that the Dr. Omuyoma's second report may have been exaggerated in terms of the injuries suffered by the Appellant and therefore it is safe to assume that the Appellant suffered two fractures and the soft tissue injuries as indicated in Dr. Omuyoma's first report. Evidently, Dr. Jenipher may have not seen and/or included them in her report as she saw the Appellant later in May 2022.

30. Furthermore, I agree with the trial magistrate's finding that since the Appellant suffered fractures and still had metal implants that needed to be removed, she did not see why Dr. Jenipher did not find that he had permanent disability. Having already stated that Dr. Omuyoma's second report was exaggerated, I shall go by his finding on permanent disability in his first report placing it at 10%.

31. Having gone through the authorities relied on the Appellant and the Respondent in the trial court as presenting comparable awards, I agree with the trial magistrate that the authorities cited by the Respondent were more comparable and closer to the injuries sustained by the Appellant.

32. She further stated that the awards made in those authorities range between Kshs. 450,000/- to Kshs. 700,000/- and noted that the decisions were rendered five years ago and considering that inflation has had a toll on the Kenyan shilling, the trial court is not expected to give the same awards that were given then. She then asserted that she would have awarded the plaintiff the sum of Kshs. 700,000/- but having considered the effect of inflation and the changed economic situation since the said decisions were made, and doing the best she can in the circumstances of the case, she assessed the damages due to the plaintiff at Kshs. 900,000/-

33. Whilst I agree that the court in in making an award for general damages must always consider the prevailing inflation as was held in the case of Charles Oriwo Odeyo vs Appollo Justus Andabwa [2017] eKLR, I find that the award for general damages given by the trial court was excessive having evaluated the cases relied on by the Respondent. Further, in the case of *Karanja & Another v Mwachala (Civil Appeal E749 of 2021*) [2024] KEHC 7171 (KLR), the Respondent therein sustained a compound (open) fracture of the left tibia and compound (open) fracture of the left fibula and disability was assessed at 10%.

34. The court having considered the current awards, the rate of inflation and the injuries sustained by the Respondent herein as well as the fact that disability was assessed at 10% found that the award of 900,000 as general damages was excessive and reduced it to Kshs. 700,000/-

35. Similarly, and considering the circumstances of this case, I revise the award downwards to Kshs. 700,000/-. I also find that the award for future medical treatment was reasonably assessed at Kshs. 200,000/- as well as special damages which were pleased and proved at Kshs. 19,550/-

36. To that extent therefore, the cross appeal succeeds partially succeeds on the reduction of general damages to Kshs. 700,000/- and order that each party bear their own costs of this appeal. Thus, the final orders are;

    I. The appeal by the appellant is dismissed.

    II. The cross-appeal succeeds partially on the reduction of general damages to Kshs. 700,000/-

    III. That an order be and hereby issued to the effect that, each party bear their own costs of this appeal.

JUDGMENT DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER 2024.

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CHARLES KARIUKI

JUDGE