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Karimi & another v Mutunga (Civil Appeal E062 of 2021) [2024] KEHC 16639 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL E062 OF 2021

CW GITHUA, J

DECEMBER 19, 2024

BETWEEN

MARTIN MWENDE KARIMI .... 1ST APPELLANT

RUNGA KANGWIRIA FRIDAH .... 2ND APPELLANT

AND

PETER MBITHI MUTUNGA .... RESPONDENT

(Being an appeal from the judgement and decree of Hon. E. Mutunga (PM), in Kandara PMCC No.211 of 2020 delivered on the 7th of October, 2021)

JUDGMENT

1. This appeal challenges the quantum of damages awarded to the respondent by the lower court in Kandara PMCC No. 211 of 2020.
2. The background to the appeal is that the respondent, then the plaintiff, instituted suit against the appellants and two other defendants seeking general and special damages as a result of personal injuries sustained in a road accident involving motor vehicle registration No. KBT 286 L in which the respondent was travelling as a passenger and motor vehicle registration No. KCF 393 M allegedly owned by the appellants. Liability was entered in favour of the respondent against the appellants at 100%.
3. In the impugned award, the respondent was awarded the following damages;
   i. General damages for pain and suffering Kshs 1,700,000.
   ii. Loss of amenities Kshs 100,000
   iii. Future medical expenses Kshs 500,000

iv. Special damages Kshs 545,825

The respondent was also awarded costs of the suit and interests at court rates.

4. In their memorandum of appeal dated 29th October 2021, the appellants advanced eleven (11) grounds of appeal most of which were duplicated. In the main, the appellants complained that the learned trial magistrate erred in law and fact by: finding that the appellants did not file their written submissions and thus failed to consider the same and the authorities cited therein in support of their case; awarding Kshs. 1,700,000 as general damages for pain and suffering which was excessive and not commensurate with the nature of injuries sustained by the respondent; failing to consider comparable awards made for similar injuries when assessing damages awarded to the respondent.

5. The appellants also faulted the learned trial magistrate for awarding the respondent damages for loss of amenities in addition to general damages for pain and suffering and for awarding special damages in the sum of Kshs. 545,825 which was not strictly proved by the evidence adduced before the court.

6. The appeal was prosecuted by way of written submissions which both parties duly filed. The submissions were highlighted before me on 26th June 2024.

7. This being a first appeal, it is an appeal on both facts and the law. I am well aware of my duty as the first appellate court which as succinctly captured by the Court of Appeal in Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira T/A Machira & co Advocates [2013] KE CA 208 (KLR) is to

> ''...re-evaluate, re-assess and re-analyse 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''

8. Guided by the aforesaid duty, I have carefully considered the grounds of appeal, the evidence presented before the trial court and the written submissions filed on behalf of both parties. I have also read the Judgement of the learned trial magistrate.

   Having done so, I find that two key issues emerge for my determination in this appeal which are;

   i. Whether the learned trial magistrate erred by failing to consider the submissions allegedly filed by the appellants and whether his finding that the same were not actually filed was erroneous.

   ii. Whether the learned trial magistrate erred in law or fact when making the impugned award on both general and special damages.

9. On the first issue, the appellants submitted that they filed their written submissions electronically through the lower court's email address on 20th September 2021 at 9.58 a.m; that the learned trial magistrate erred in his finding that the submissions were not filed; that failure by the trial court to consider their submissions was prejudicial as it denied them their right to a fair hearing which was quaranteed under Article 50 of *the Constitution*.

10. In my view, the question that must be answered in order to resolve this issue is whether the learned trial magistrate erred in his finding that the appellants failed to file their written submissions because if they did not file their submissions, there was nothing for the court to consider.

11. I have thoroughly read the record of appeal. I note that at pages 60-62 thereof, the appellants have included the submissions they allegedly filed electronically through the trial court's email address. The appellant's did not however include in the record of appeal any evidence to prove that they had in

fact filed the said submissions as alleged, by for instance, exhibiting the email address to which the submissions were sent and the email that forwarded the said submissions to the trial court.

12. Further, I have perused the original record of the trial court and the only written submissions I have seen on record are the submissions that were filed by the respondent. The record does not contain any submissions filed by the appellants.

13. In the absence of evidence to prove that the appellants did in fact file their submissions as alleged and since the lower court's original record does not confirm that such submissions were filed, I am unable to fault the learned trial magistrate for his finding that the appellants did not file their submissions. The learned trial magistrate could not therefore have considered what was not placed before him.

14. Regarding the complaint on the award of general damages, the appellants submitted that the award made in favour of the respondent was exorbitant in view of the injuries sustained by the respondent; that the award was so high as to be a wholly erroneous estimate of the damage suffered by the respondent.

    Relying on the persuasive authority of *Boniface Nzioka Malundu V Jeremiah Kariuki Mwaniki HCCA No 43 of 2015*, the appellants urged me to set aside the award of Kshs 1,700,000 and substitute it with an award of Kshs 500,000

15. As would be expected, the respondent supported the trial courts award arguing that it was fair and should not be disturbed. In his submissions, he relied on several persuasive authorities including those of Mwaura Muiruri V Suera Flowers Limited & Another [2014] eklR and Margaret Wothaya Kirweya & Another V James Muchai Muchira [2020] eKLR.

16. It is settled law that an appellate court should be slow to interfere with an award of damages made by the trial court principally because the assessment of damages is at the discretion of the trial court. An appellate court would not be justified to interfere with the trial courts award just because it would have awarded a different amount if it had tried the case in the first instance.

17. An appellate court would only be justified to interfere with the lower court's award if it was satisfied that in arriving at the award, the learned trial magistrate applied wrong legal principles or considered irrelevant factors or failed to take into account relevant ones. The court would also be entitled to intervene if the award was either inordinately low or high as to lead to an inference that it was an erroneous estimate of the damage suffered.

    See: Catholic Diocese of Kisumu V Tete [2004] eklR; Douglas Kalafa Ombeva V David Ngama [2023] eklR.

18. In the assessment of damages, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards. However, it is important to note that no two cases have identical facts and therefore, each case must be decided on its own merits in light of the injuries sustained.

19. The injuries sustained by the respondent in this case are not disputed. In paragraph 5 of the further amended plaint, the respondent claimed that he had sustained the following injuries;

    a. Fracture of the right tibia lower 1/3 and mid 1/3.

    b. Fracture of upper 1/3 femur right (neck of femur)

    c. Degloving injury on the right leg.

20. The respondent's injuries were confirmed by two medical reports authored by Dr. George K. Karanja and Dr Maina Ruga who were both in agreement that the respondent had suffered severe injuries which caused him permanent disability.

It is noteworthy that Dr. Karanja examined the respondent on 21st November 2020 about three years after the accident while Dr. Maina Ruga examined him on 16th August 2021, about an year later.

21. The two doctors noted in their reports that the respondent had been admitted in three different hospitals, namely, Thika Level 5 Hospital, Nairobi Women's Hospital and Coptic Hospital where he had undergone several surgical operations including one for total hip replacement. But at the time of examination several years after the accident, his injuries had not healed.

His right leg, which had shortened, had an infection which was discharging pus. He required to undergo further surgery for exchange tibial nail and elongation of tendon achiles.

Dr. Maina assessed his degree of permanent incapacity as 25% while Dr. Karanja opined that it was 15%.

22. In making his award, the learned trial magistrate was guided by the case of Mwaura V Suera Flowers Limted & Another [2014] in which the claimant was awarded Kshs 1,450,000 general damages for multiple soft tissue injuries on the face and chest cage; commuted fracture of the right humerus, upper and lower thirds of the tibia and compound double fractures of the right leg upper and lower 1/3rd tibia fibula. The injuries led to deformity of his left leg and right arm.

Though not similar, the injuries suffered by the claimant in the above case were comparable to those suffered by the respondent in this case.

23. On my part, I find the case of Joyce Olweya V Pauline Akinyi Ojoo & another [2021] eKLR relevant. In that case, the plaintiff suffered a fracture on her right hip and at the right fibula. Her right leg had shortened and she had also undergone a total hip replacement. She was unable to walk without crutches. Her permanent disability was assessed at 25%. On appeal, the trial court's award of Kshs. 2, 500,000 was set aside and substituted with an award of Kshs. 1, 700, 000.

24. The main objective of awarding damages for pain and suffering is to compensate the plaintiff for the pain and anguish both physical and mental endured as a result of injuries sustained in an accident. This objective is expounded in Halsbury's laws of England 4th Ed, Vol 12 (1) page 348 at paragraph 883 as follows:

> ''.....damages are awarded for physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement or suffering caused by anxiety that the plaintiff's condition may deteriorate....."

25. From the evidence on record, it is clear that the respondent in this appeal underwent immense pain which had not eased by the time of examination by Dr. Maina Ruga about 3 ½ years after the accident. As stated earlier, he had been admitted in three hospitals for a total period of 4 months and underwent several surgical operations including one for hip replacement. The injuries had caused him deformity in his right leg

that would require him to use a walking stick for support for the rest of his life.

26. Given the severity of the respondent's injuries and guided by the authority of Joyce Olweya V Pauline Akinyi, Ojoo & Another [Supra] which was decided on 21st April 2021 only a few months before the

trial court made its decision, I am persuaded to find that the award of Kshs. 1,700,000 was fair and adequate compensation for the pain and suffering the respondent had endured as a result of injuries sustained in the accident.

27. Given the objective of awarding general damages in personal injury claims as stated above, I am unable to agree with the appellants submissions that the award made by the trial court was inordinately high as to lead to an inference that it was based on an erroneous estimate of the damage suffered by the respondent. The award was fair and reasonable and it is consequently upheld.

28. Another complaint made by the appellants was that the award of Kshs. 100,000 as damages for loss of amenities was erroneous as it was made in addition to the award of general damages for pain and suffering; that awarding damages under the two heads amounted to double compensation.

29. In Peninah Mboje Mwabili V Kenya Power & Lighting Company Limited (2016) eKLR , the court when discussing whether damages for loss of amenities should be made as a distinct award separate from an award of general damages expressed itself as follows;

> "…..General damages connotes a generic term for the different heads of claims, which are monetary awards but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages. A claim for loss of amenities is thus encompassed and/or is included in a claim for general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein."

30. On my part, I associate myself fully with the above holding and i am thus unable to agree with the learned trial magistrate that the respondent was entitled to damages for loss of amenities to compensate him for the residual permanent incapacity assessed at 15-25 %. The residual incapacity was a relevant factor that ought to be considered in the award of general damages. It is therefore my considered view that a claim for loss of amenities should be subsumed in an award for general damages for pain and suffering and should not be made as a separate and distinct award. The practice of awarding claimants damages for loss of amenities in addition to general damages for pain and suffering should be discouraged as it amounts to double compensation.

31. It is consequently my finding that the learned trial magistrate erred by awarding the respondent damages for loss of amenities as a separate award in addition to the award made for general damages. The award of Kshs. 100,000 as damages for loss of amenities is hence set aside.

32. As regards the appellant's claim that the learned trial magistrate erred by awarding special damages which had not been specifically pleaded and proved, the record shows that the respondent had pleaded special damages as follows:

    Medical report - Kshs 3,000

    Search certificate fees - Kshs 550

    Medial expenses - Kshs 542,275

    Total - Kshs 545,825

33. It is an established legal principle that special damages must not only be pleaded but must also be specifically proved.

In this case, though the respondent produced many receipts to prove transportation costs incurred when commuting between Kithimani and Nairobi for undisclosed purposes, this cost was not pleaded in the further amended plaint dated 9th July 2021. Since the claim was not pleaded, the receipts produced in support thereof were worthless and inconsequential.

34. With the exception of the receipts produced in support of transportation costs, I have painstakingly calculated the amounts indicated in all the other receipts produced by the respondent in the lower court and I have come to the conclusion that the special damages which were specifically pleaded and proved amounted to a total of Kshs. 358,305. This is the amount that ought to have been awarded to the respondent as special damages. The learned trial magistrate therefore erred in awarding the respondent Kshs. 545,825 which was not pleaded and specifically proved as required by the law.

35. For the foregoing reasons, this appeal partially succeeds to the extent that the award of Kshs. 100,000 as damages for loss of amenities is set aside while the award of special damages is reduced from Kshs. 545,825 to Kshs. 385,305.

    The award of general damages in the sum of Kshs 1,700,000 is confirmed save to add that it is an award for pain and suffering and loss of amenities.

36. The award of general damages will accrue interest at court rates from the date Judgement was delivered in the lower court until payment in full.

    The award of special damages will attract interest at court rates from 26th July 2021 when the further amended plaint was filed until payment in full.

37. Since the appeal has partially succeeded, each party will bear its own costs of the appeal but the appellant will pay the respondents costs in the lower court.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF DECEMBER, 2024.

HON. C. W. GITHUA

JUDGE

In the Presence of:

Ms. Ondieki for the Appellants

Mr. Chiuri for the respondent

Ms. Susan Waiganjo, Court Assistant