Climax Coaches Limited & another v Nyambura (Civil Appeal E24 of 2021) [2023] KEHC 1287 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 1287 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E24 OF 2021

DKN MAGARE, J

JANUARY 27, 2023

BETWEEN

CLIMAX COACHES LIMITED .... 1ST APPELLANT

EVANS WAFULA LOKOKHE LUKOKHE EVANS WAFULA ..... 2ND APPELLANT

AND

CHARLES NDIRITU NYAMBURA AKA CHARLES NDIRANGU AKA NYAMBURA CHARLES NDERITU .... RESPONDENT

(Being an Appeal against the Judgment by Honourable J.B. KALO (Senior Chief Magistrate) in NAKURU CMCC No. 602 of 2019 read on the 15th February, 2021))

JUDGMENT

1. This matter came up for hearing of an Appeal from the Judgment of Hon. J. Kalo Chief Magistrate given on 15th February, 2021 in Nakuru CMCC 602/2019.

2. The matter had not proceeded for some time and was placed before me due to the ongoing Rapid Results Initiative to reactivate the same.

3. The said appeal is on quantum only. Miss Mwangi argued the appeal before me stating that this damages of Kshs,200,000/= was excessive. The Court ought to have awarded between Kshs.100,000/= to Kshs.150,000/=. To her this was erroneous and as such should interfere with the decision of the Court below.

4. Despite being served, the Respondent did not attend court. Nevertheless, this court, being a court of record is bound to consider evidence and arrived at a decision, notwithstanding the absence of some of the parties.

Determination

5. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and LawJJA, in the *locus Classicus* case of *Selle & another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> "An appeal from the High Court is by way of re-trial and the Court of Appeal is not bond to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

6. The Court is to bear in now that if need her seen the witnesses.it is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017)eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

8. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

9. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

10. I have the original Court file before me with typed proceedings. I note that the said arose from all accident on 20th April, 2019 involving Motor Vehicle KCK 979k, Man Bus/Coach and Motor cycle Registration No. KMEM 543 KTv liability for the accident is not subject of this appeal.

11. The Respondent pleaded to have sustained the following injuries.

    (a) Severe soft tissue. Injuries of the left knee joint resulting into knee effusion.

12. He also pleaded special damages of Kshs.5550/= which are not subject of the appeal.

13. The medical Report dated 13th May, 2019 written by Dr. Wellington Kiamba and produced as exhibit 6, indicated the injuries as pleaded. Dr Kiamba classified the injuries as harm and was of the opinion that it was to take at least 2 months to heal. The Respondent must have healed at the time of trial which took place on24/9/2020, long after the 2 months were over.

14. The injuries were not contested since on cross examination of the Respondent was asked whether he suffered a fracture, which he answered in the negative.

15. In its Judgment given 15th February, 2021 the Court awarded General damages of Kshs.200,000/= for general damages, for pain suffering and loss and amenities. He indicated to have considered the rival submissions, although I cannot see the consideration on the record. This is not a proper way of reviewing evidence and submissions. The court needs to indicate the actual review of evidence and submissions, albeit in a summary manner on record.

16. The duty of the Appellate Court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah v Mbogo & another* Version Shah (1968) EA 93, held as doth;-

> "The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

17. In one of the decisions used by the Appellant in the Lower Court, Justice D.S Majanja on 21st February, 2019 in *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019)eKLR held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

18. It is thus settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

19. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ......is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

20. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

21. The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd v Meru Express Servcie v. A.M Lubia & another* 1957 KLR 27 as follows: -

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

22. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages :-

> "The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure

of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…"

23. Therefore, for me as an appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

14. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

25. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

26. In *FM (Minor suing through mother & next friend MWM v JNM & another* (2020eKLR) the Court awarded Kshs.100,000/= on 30th December, 2020 for similar injuries.

27. In *Michael Okello v Priscillah Atieno* 2021eKLR, the Court awarded Kshs.250,000/= for slightly more serious but comparable injuries.

28. In *Lilian Onyango Otieno v Philip Mugoya Ogila* 2022eKLR the Court awarded Kshs.150,000/= in lien of Kshs.100,000/=these had been hitherto awarded.

29. It is therefore clear that for soft tissue the awards oscillate about Kshs.150,000/= to Kshs.200,000/= with slight variations both ways.

30. It is my view therefore that to reduce the award from Kshs.200,000 to Kshs.150,000/= as requested by Counsel will not be curing an excessive award but substituting with my own assessment. The award may appear to be slightly higher but it is not inordinately excessive as to amount to an erroneous estimate of damages.

31. After considering the medical report by Dr. Wellington Kiamba, comparable authorities, I find and hold that the award is not excessive as to amount to an erroneously estimate of damages suffered by the Respondent.

32. The court cannot ignore unchallenged evidence that the Respondent was to be awrded temporary incapacity of 2 months

Disposition

33. The Appeal, herein being on quantum only and having found that the award of Kshs.200,000/= is not excessive, I hereby dismiss the Appeal with costs.

34. Pursuant to Section 27 of the *Civil Procedure Act*, I hereby award costs of Kshs. 60,000/= to the Respondent payable within 30 days in default, execution do issue.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, NAIROBI

In the presence of

For Appellant.......absent

For Respondent.......absent

Court Assistance Nancy Bor