Mbuta & 3 others v Kavila & 2 others (Civil Appeal 152 of 2019)
[2023] KEHC 3657 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3657 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 152 OF 2019

FR OLEL, J

APRIL 27, 2023

BETWEEN

CHRISTOPHER NDOLO MBUTA ..... 1ST APPELLANT

SAMUEL ESTOK EMBA ..... 2ND APPELLANT

ANNAH KAMENE MBUTA ..... 3RD APPELLANT

RODAH MUNYIVA ESTOK ..... 4TH APPELLANT

AND

JACKSON MUTUA KAVILA ..... 1ST RESPONDENT

ANNAH MBITHE MUTUA ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON C.K. KISIANGANI (S.R.M) DELIVERED ON 25th JULY 2018 IN MACHAKOS CMCC 488 Of 1999)

JUDGMENT

1. The Appellant's was the plaintiff's in the primary suit, where they sued the defendant's seeking general damages for assault, unlawful arrest and malicious prosecution. They also sought special damages of Ksh.139,840/= plus costs of the suit and interest. After hearing the suit the learned trial magistrate did delivered his considered judgment where he awarded the appellant's Ksh.50,000/= each as General damages for malicious prosecution, Ksh.30,000/= each as General damages for assault, special damages of Ksh.128,000/=,plus costs of the suit and interest.

2. The Appellants being dissatisfied by the quantum awarded did file their memorandum of Appeal dated November 27, 2019, where they raised 4 grounds of appeal namely:-

a. That the learned trial magistrate erred both in law and fact by awarding General damages at Ksh50, 000/= as damages for malicious prosecution.

b. That the learned magistrate erred both in law and fact by awarding General damages at Ksh 30,000/= in favour of the 1st, 2nd and 4th Applicants as damages for assault.

c. That the learned magistrate erred in l aw and fact by failing to put into consideration the submissions of the Appellants.

d. That the learned magistrate's erred in both law and fact by failing to consider the authorities relied on by the Appellants in their submissions and sections of the statute therein cited.

3. The Appellant herein therefor prayed that the award of damages be set aside and substituted with an award commensurate with damages suffered. They also prayed for costs of the Appeal.

Background Facts

4. The Appellants alleged that the 1st respondent did make a report at Kibwezi police station to the effect that the appellants had blocked a water canal and were in contempt of court orders dated 25/5/1997, which report he knew to be false and as a consequence the defendants accompanied by police officers came to the canal which belongs to the Appellants. The 1st and 2nd respondents proceeded to unlawfully assault the appellants with iron bars and stones. They further instigated the appellants arrested and were charged with the offence of assault in Machakos PMCR No 3988 of 2007, together with other person. The case was eventually withdrawn on 09.04.1999.

5. PW1 Christopher Ndolo Mbuta testified that they were neighbors with the 1st and 2nd respondents in Mtito Andei. In October 1997 he and the other appellants were assaulted by the 1st and 2nd respondent over a dispute regarding use of a water canal which they shared. The 1st respondent had registered a complaint and they were charged in court Machakos criminal case No 3988 of 1998 which was later withdrawn. He produced the court proceeding and medical treatment notes to show that indeed he was injured and sued the respondents as he was unlawfully assaulted and arrested for no reason. PW2 Rhoda Mumbua Estork also testified that she was beaten by the 1st and 2nd respondents in her father's samba. The 2nd Respondent hit her on the head and she reported the incident to the police and was also treated for the injuries suffered. She prayed for damages for injuries suffered and refund of costs used to defend the suit.

6. PW3 SAmuel Estok testified that he was PW2 husband and he too was assaulted by the 1st and 2nd respondent on 3rd October 1997 and was injured on the head and eye and sought treatment in hospital. He too prayed for damages. PW4 Stephen Mboya Makau testified that he heard noise from the canal and when he went to investigate what was happening, he found that PW2 was bleeding, PW3 too was hurt on the right side of his head. The three persons were assaulted by the 1st and 2nd respondent and were later advised by the police to seek medical treatment at the hospital.

7. PW5 Dr John Mwangi testified that he works at Machakos level 5 hospital. He worked with one Dr Kibore from 1993 and was familiar with his handwriting. The said Dr Kibore was deceased. He produced three medical reports of PW1 , PW2, &PW4 as exhibits.PW1 had a deep cut on the right temporal region, by the time of examination he was well healed though there was a scar.PW2 also had a cut wound on the right side of her face which was 4 cm. The injuries was consistent with assault. PW4 had a wound on top of his head which required stitching and had left a scar of about 4cm. His injury too was consistent with having been assaulted. In cross examination he stated that he worked with the late Dr Kibore for six (6) years and was familiar with his handwriting. The medical reports were dated

November 1999, while the incident happened in October 1997.The report did not state the kind of weapon used to assault the said persons, but the injuries suffered were soft tissue injuries.

8. The appellants closed their case and the respondents were given several opportunities to present their witnesses to testify but failed to present them. The respondent's case was closed without them testifying on 15/11/2017. The 1st and 2nd respondent later did file an application dated 20/3/2018 seeking to set aside the order closing their defence case. Vide a ruling dated 6th June 2018 the said application was dismissed. The court proceed to consider the submissions filed by the appellants and vide his judgment dated 25th July 2018 entered judgment in favour of the appellants , which has elicited this appeal as the appellants were not satisfied with the quantum awarded.

Appellants Submissions

9. The appellant filed their submissions on 20.01.2023 where they did submit that the court has wide discretion in awarding damages and that each case must be looked at in its peculiar circumstance, more so where injuries suffered differed from person to person.

10. The appellant submitted that the general damages awarded for malicious prosecution being Ksh.50,000/= was inordinately low. The evidence presented before the trial magistrate to prove the ingredients of malicious prosecution were never controverted and thus the award should have been increased to Ksh200,000/=,which would constitute adequate compensation. They relied on the citation of *Risper Nyomenda v George Kenyatta* (2021) eKLR.

11. On General damages for bodily injuries for assault, the appellants submitted that they specifically pleaded in the amended plaint that they were injured by the 1st and 2nd respondent and the injuries sustained were serious and more deserving of a larger award than the Ksh 30,000/= awarded as General damages. Considering the inflation and evaluation of the Kenya shilling, an award of Ksh 250,000/= would be more appropriate for the bodily injuries. They relied on Robinson Njoroge v Daniel Ombasa (2021) eKLR.

Respondents Submissions

12. The respondent opposed this appeal by their submissions filed in court on 08.03.2023. The submitted that the supplementary record of Appeal filed in court on 20.01.2023 was filed without leave of court and the same ought to be expunged form the record. The respondents cited the case of Sammy *Kemboi Kipkeu v Bowen David Kangogo & 2 others* (2018) eKLR

13. Further it was trite law that award of damages is discretionary and the appellant court ought not to interfere with the same unless it is shown that the judge acted on some wrong principles of law, or that the amount awarded was extremely high or so very low as to make the judgment of the court, an entirely erroneous estimate of the damages the plaintiff is entitled too. See *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR

14. It was submitted that the respondent had a valid defense, which raised triable issues, but unfortunately the trial court refused to give the respondent's a chance to offer their testimony, but be that as it may, that did not automatically entitle the Appellants to the prayers sought in the suit. The court ought to have interrogated the evidence presented to find out its truthfulness. The appellants too were obliged to prove their case on a balance of probability whether their evidence was challenged or not. The respondents submitted that the evidence presented did not convince the trial court of their respective entitlements as to damages does not speak to misapprehension of the law or facts, nor was it premised on the wrong principles. The appeal thus lacked merit and ought to be dismissed.

Analysis & Determination

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

16. As held in *selle & another v Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif v Ali Mohammed Sholan(1955), 22 E.A.C.A 270

17. In *Coghlan v Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than the other and that question turns on manner and demeanor, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

18. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

19. Before we deal with the main issues raised in the appeal, the 1st and 2nd respondent's did submit that the supplementary record of appeal was filed out of time and without leave of this court and thus it ought to be struck out. They relied on the citation of *Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others* (2018) eKLR, where the Supreme Court held that by virtue of rule 33(6) of the said courts rules one need to get leave to file the record of appeal after time had lapsed.

20. While it is true that the supplementary record of appeal was filed without leave of court , that is a procedural misstep which can easily be cured by provisions of article 159(d)&(e) which states that

justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of this constitution shall be protected and promoted .

21. Secondly no prejudice will be occasioned upon the respondent even if the supplementary record of appeal is not struck out. All the document's placed in the said supplementary record of appeal are part of the lower court record, which forms part of the proceedings herein. The lower court file has been placed before this court. Even if I were to exercise my discretion to strike out the said supplementary record by reevaluating the evidence placed before the trial court, this court would still peruse the entire trial court file with the very same documents.

22. This court also holds the view that merely because documents are filed late cannot be sufficient ground to expunge a document from the records

In Court of Appeal Nairobi Civil Appael No 75 of 11998 *Central Bank of Kenya v Uhuru Highway Developers Limited & others (unreported*. Bosire JA stated;

> " I am unable to subscribe to the view expressed by Mr.Rebello that documents filed out of time in Response to an application are necessarily invalid and should not be looked at. To my mind the Court is obliged to consider them unless for a reason other than mere lateness it considers it undesirable to do so....."

23. Finally by virtue of provisions of article 50 (1) of the *Constitution of Kenya*, 2010 every person has a right to fair trial and public hearing by a Court of law. The said Article also allows parties to adequately prepare and adduce evidence to challenge the case against them. Under provisions of order 1A, 1B, 3 and 3A of the *Civil Procedure Act* nothing limits the inherent powers of this Honourable Court to make such orders as maybe necessary for the ends of justice (In this instance fair hearing and both parties being heard).

24. It would thus be just and prudent to allow this matter to proceed for full hearing without striking out the supplementary record of appeal. There no real or perceive prejudice which the 1st and 2nd respondent will suffer should the documents remain on record.

see *Essanji and anor v Solanki* (1968) EA Pg 224 the Court stated that;

"The key principle in the administration of justice is that where possible all dispute should be heard on merit and an error should not deter a litigant from pursuing his/her right.

25. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

26. Similarly, in *Woodruff v Dupoint*(1964) EA 404 it was held by the East Africa court of Appeal that:-

> " The question as to quantum of damages is one of the facts for the trial court judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them.....The quantum of damages being a question of fact for the trial judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff but whether the damages awarded are "such as may fairly and reasonably be considered as arising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

27. It was also held by the court of appeal in *Epantus Mwangi & ano v Duncan Mwangi* Civil Appeal No 77 of 1982(1982 -1988} 1KAR 278 that;

> " A member of an appellate court is not bound to accept the learned Judge's finding of fact if it appears either that (a) he has clearly failed on some point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. Finally in the decision of *West(H) and Sons Limited v Shepherd* [1964] AC 326 at 345 it was appreciated that ;-

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

29. The Appellant submitted that taking into account similar award for similar injuries the award of general damages for malicious prosecution should be increased to Ksh.200,000/=. While the award for general damages for injuries sustained during the assault should be increased to Ksh.250,000/=.The Respondents on the other hand in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld as there is no misapprehension of the law or facts, or application of wrong principles which has been identified by the appellant to warrant interference with the said awards.

30. The appellants no doubt proved their case on a balance of probability as they present uncontroverted evidence that they were assaulted by the 1st and 2nd respondent, they had had to seek treatment for injuries sustained, they were charged with the offence of assault before Machakos PMCC NO 3988 of 1997 which case was later withdrawn. Without any evidence rebutting the same from the respondent's, both legal and evidentiary burden of proof was discharged. Even though the respondent's claim they

were unfairly lock out from giving their evidence, they did not appeal as against the ruling refusing to reopen the case and cannot be heard to cry wolf at this point.

31. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the appellants. It is clear that they suffered suffered soft tissue injury on the head and on their face. As at 1999 when the medical report was prepared the wounds had fully healed and only scars remained.

32. The question which then arise if for the award of damages of Kshs. 50,000/= for malicious prosecution for each appellant and Ksh.30,000/= as general damages for each applicant was adequate or was it excessive.

33. The appellant's should not lose sight of the fact that this injuries and the incident occurred in 1997, a cool 30 years ago. Why such a simple matter delayed in court for this long is a story for another day, what remains undisputed is that the award of damages cannot be given based on the current trends. The comparable awards cited by the appellants are irrelevant as the inflationary trends and current awards are given based on different parameters. For damage's for malicious prosecution I do not find any basis for interfering with the award of damages. For the soft tissue injuries I do agree with the appellant that the general damages awarded were relatively low and this court would be justified to interfere with the same. I do set aside the award of Ksh.30,000/= award to each appellant and increase the same to Ksh.60,000/= for each appellant.

34. A sample of the similar awards for similar period would be;

    a. HCCC 2048 of 1996 (Nairobi)- *Veronica Turkwell v Attorney General*; Ksh 60,000/= was awarded for the cuts to the forehead, injury to the left arm and bruises to the right leg.

    b. HCCC 4084/1983(Nairobi) *Daniel Nkume v Constatino Thomas & another* ; Ksh 100,000/= awarded for blunt injuries to the head, chest right knee together with multiple bruises and cuts

    c. HCCC 116/2008(Machakos)- *KPLC v Samson Makori*; Ksh.80,000/= was opined to be a fair award for soft tissue injuries to the face, chin, ribs cage and knee

35. In arriving at this award, I have considered the respondents injuries , all the medical reports , the comparable citations by the appellant as submitted in the lower court and those filed in this appeal as well as inflationary trends .

Final Disposition

36. The upshot is that this appeal partially succeed. The award of Ksh.30,000/= award as general damages for pain, suffering and loss of amenities for each appellant is hereby set aside and the same is increased to Ksh.60,000/= for each appellant.

37. The appellant will get half costs of this appeal which is assessed at Ksh.75,000/= all inclusive.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF APRIL, 2023.

In the presence of;

.....for the Applicant

.....for Respondent

.....Court Assistant