Onyancha v Otoki (Civil Appeal E052 of 2021)
[2023] KEHC 20385 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E052 OF 2021

WA OKWANY, J

JUNE 29, 2023

BETWEEN

HENRY OGECHI ONYANCHA ..... APPELLANT

AND

ISABOKE EDWIN OTOKI ..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. W. C. Waswa, RM Nyamira dated and delivered on the 5th day of July 2021 in the original Nyamira Chief Magistrate's Court Civil Case No. 140 of 2019)

JUDGMENT

1. Isaboke Edwin Otoki, the Respondent herein, sued the Appellant before the trial court seeking damages arising out of a road traffic accident that happened on 4th March 2018. The Respondent's case was that he was on the material date walking along Nyamira – Kisii Road when near Omogonchoro area, the Appellant's motor vehicle Registration No. KAQ 678A veered off the road and knocked him down thereby causing him bodily injuries. The Respondent attributed the accident to the Appellant's driver's negligence.

2. The Lower Court heard the case and entered judgment in favour of the Respondent for liability at 100% and general damages of Kshs. 400,000/=.

3. Aggrieved by the said judgment, the Appellant filed the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -

    1. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 400,000/= that was overly in excess in the circumstances of the case.

2. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendants submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.

3. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.

4. The appeal was canvased by way of written submissions which I have considered. In the case of *Kenya Ports Authority v Kuston (Kenya Ltd*, (2009) 2 EA 212 this Court of Appeal stated as follows regarding the duty of first appellate court:

> " This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate 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 that respect..."

5. As can be discerned from the grounds of appeal, the instant appeal mainly challenges the trial court's findings on quantum.

6. The Appellant argued that the award of Kshs. 400,000/= when compared to awards in similar cases is inordinately high. He therefore urged this court to disturb the award and find that a maximum award of Kshs. 50,000/= would be sufficient as general damages given that the Respondent sustained only soft tissue injuries that had healed without any permanent incapacity. The Appellant cited the following authorities: -

   i. HCCA No. 28 of 2012 (Eldoret) *George Kinyanjui t/a Climax Coaches v Equity Bank Ltd* (2016) eKLR (as quoted in) *Patrick Mudava Kweyu v Pan Africa Chemical Ltd* [2016] eKLR), where the High Court reduced an award of Kshs. 650,000/= for soft tissue injuries (including loss of two molars, but not related to the accident) to Kshs. 120,000/= for multiple bruises, severe head injury and trauma to the neck limbo saxral spine, left shoulder and left knee.

   ii. *Eldoret Steel Mills Ltd v Charles Owino* (Civil Appeal No. 81 of 2005) 2012 KLR as quoted in *Patrick Mudava Kweyu v Pan Africa Chemical Ltd* [2016] eKLR), where Court awarded Kshs. 80,000 as reasonable compensation for soft tissue injuries, cuts, bruises and blunt trauma injuries.

7. The Respondent, on his part, urged this court not to interfere with the Lower Court's assessment of award on general damages. He referred to the case of *Catholic Diocese of Kisumu v Saphia Achieng Tete* CA 284/2001 KLR cited in HCCA 42 of 2018 in *Joseph Kivati Wambura v SMM & Another* where it was held that an appellate court is not justified in substituting a figure of its own for that awarded by the trial court simply because it would have awarded a different figure if it had tried the case in the first instance.

8. The Respondent maintained that he suffered serious injuries which included a dislocation of the left shoulder. He relied on the cases of:-

   1. *Francis Ochieng & Another v Alice Kajimba* [2015] eKLR where the court awarded Kshs. 350,000 general damages for soft tissue injuries.

   2. *Patrick Kinoti Miguna v Peter Mburuga G. Muthamia* [2014] eKLR where the court awarded Kshs. 300,000 for dislocation of the left shoulder.

9. The Respondent produced medical documents at the trial as exhibits to wit, Clinic Attendance Card, X-Ray Film, Discharge Summary, P3 Form and Medical Report. I however note that the said exhibits were not included in the Record of Appeal.

10. Be that as it may, I have perused the said exhibits from original lower court file which forms part of this court's record. A perusal of the initial treatment notes from Kisii Teaching and Referral Hospital reveals that the Respondent suffered pain on the left shoulder joint with some rashes, tenderness of the left elbow joint. The Medical Report and P3 Form, which were both prepared by Dr. Morebu Peter Momanyi on 17th September 2019, over 1 year after the accident, show that the Respondent sustained the injuries pleaded in the plaint.

11. The contest that arose before the trial court was over whether the Respondent sustained a dislocation on the left shoulder as alleged in the plaint. The trial court held as follows over the said issue of dislocation: -

> The medical report by doctor Morebu dated 17th September, 2019, concurs with the contents of the P3 Form. Doctor Morebu notes that the dislocation may complicate later with post traumatic osteoarthritis.
>
> According to the medical report by Doctor Kahuthu dated 22nd March, 2021, the plaintiff suffered no fracture or dislocation. The plaintiff merely sustained soft tissue injuries.
>
> This court notes that Doctor Kahuthu examined the plaintiff herein on 4th February, 2021. The accident herein occurred on 4th March, 2008. This means that the said doctor examined the plaintiff almost three (3) years after the accident. Definitely, the injuries would have healed by 4th February, 2021.
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> The discharge summary shows that there was an x-ray of the shoulder done. The x-ray film was produced in court as Plaintiff Exhibit No. 1 (b) and Doctor Morebu confirmed that it proved the dislocated shoulder. Doctor Kahuthu merely noted that the same was undated. She did not comment on the contents of the same. The report by Doctor Kouko is not on record. The same was not produced before this court.
>
> Due to the foregoing reasons, this court finds that the plaintiff suffered a left should dislocation with multiple soft tissue injuries."

12. I have analysed the treatment notes from Kisii Teaching and Referral Hospital and I note that nowhere in the said notes is it indicated that the Respondent sustained a dislocation of the shoulder. My finding is that the mere fact that the x-ray film of the shoulder was produced as one of the exhibits does not necessarily connote that the Respondent sustained a dislocation of the shoulder. My take is that if indeed the Respondent sustained a dislocation of the shoulder, then nothing would have been easier than for the hospital to include the said injury in the initial treatment notes. I am therefore satisfied that the contested dislocation of the left shoulder was proved to the required standards.

13. My above findings on the Respondent's injuries lead me to the conclusion that the Respondent suffered only soft tissue injuries that had healed well without any major complication or permanent incapacity. Dr. Morebu, when filling the P3 Form, assessed the degree of injury as "harm".

14. The principles governing the award of damages were discussed in in *Kemfro Africa Ltd v Lubia & Another* (1987) KLR 30 where the court of Appeal laid down the principles upon which the Court would be justified in interfering with the exercise of such discretion as follows:

> " 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 wholly erroneous estimate of the damage."

15. In the above cited case, this Court stated that an appellate court should only be inclined to disturb the findings of a trial judge as to the amount of damages where it is convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

16. Having regard to the principles governing the assessment of damages, the comparable cases cited by the parties and considering that the Respondent's injuries were only soft tissue in nature, I find that an award of Kshs. 200,000/= will be sufficient compensation in general damages. I am guided by the decision in

17. For the reasons stated in this judgment, I find that the instant appeal is merited and I therefore allow it and set aside the award of Kshs. 400,000/= general damages and substitute it with an award of Kshs. 200,000/=.

18. I uphold the trial court's award of Kshs. 7,450/= as the same was not contested. The general and special damages shall attract interest, at court rates, from the date of the judgement before the lower court till payment in full.

19. I make no orders as to the costs of the appeal.

20. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE 2023.

W. A. OKWANY

JUDGE