Machogu v Irungu (Civil Appeal E170 of 2021)
[2023] KEHC 22715 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22715 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E170 OF 2021

FROO OLEL, J

SEPTEMBER 29, 2023

BETWEEN

ROGERS OMAMBIA MACHOGU ..... APPELLANT

AND

DICKSON MWANGI IRUNGU ..... RESPONDENT

(Being an appeal from the Judgment and/or decree of the Principal Magistrate court at Mavoko Law Courts by Honorable Benard kasavuli (PM) delivered on 30.09 2021 in Mavoko Civil Suit No.38 of 2021)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Hon. Bernard Kasavuli (PM) dated 30th September 2021 where he awarded the appellant herein Ksh 43,550/= as general and special damages for injuries suffered due to a road traffic accident which occurred on 10th November 2019.

2. The appellant being wholly aggrieved and dissatisfied with the judgment/decree did prefer this appeal against the award on general damages and raised the following grounds of appeal;

    a. That the learned trial magistrate erred in law and in fact and ended up misdirecting himself in awarding extremely low quantum of damages of Kshs 40,000/= for paid and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted to the appellant herein.

    b. That the learned trial magistrate erred in law in making such a low award as to show that the magistrate acted on a wrong principle of law.

    c. That the learned trial magistrate award on damages was so low as to be entirely erroneous.

d. That the learned trial magistrate's award was made without considering the medical evidence before court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by the authorities on comparable awards and hence ended up making a low award in view of the medical evidence presented before the court.

e. That the learned trial magistrate erred in law and in fact in failing to consider the plaintiffs submissions and authorities in making a finding on quantum.

f. The whole judgement on quantum was against the weight of the evidence before court.

B. Brief trial facts

3. PW1 Dr Titus Ndeti did testify that he did examine the appellant and apart from physical examination he relied on the treatment notes and P3 form provided. He produced the medical report into evidence as Exhibit 4. The appellant did sustain soft tissue injuries as a result of a road traffic accident and did suffer blunt injuries to the anterior chest wall, bruises on the left leg, below the knee joint. The injuries were soft tissue injuries and complete healing was anticipated with residual scars.

4. PW2 Rogers Omambia Machogu testified and adopted his witness statement, where he did state that on 10th November 2019 at around 5.00pm he was a passenger in motor vehicle registration Number KAZ 832X (hereinafter referred to as the 1st suit motor vehicle) which was being driven along Nairobi – Mombasa road. On reaching Namaga junction, the driver of the said motor vehicle started to overlap/ overtake carelessly and negligently as a result of which he lost control and violently collided with motor vehicle KAT 329 X (hereinafter referred to as the 2nd suit motor vehicle) and a result of which he sustained bodily injuries.

5. The appellant blamed the driver of the suit motor vehicle for overtaking while it was not safe to do so and for not having regard for his passenger's and other road users. In cross examination he confirmed that the accident was caused by the careless overlapping by the driver of the 1st suit motor vehicle. After the accident he was treated at Bigson health services (care plus) and thereafter reported the incident to the police. He had recovered but still had chest pain.

6. PW3 Cpl Zalphania Amdony did state that he was based at Athi river traffic Base and the appellant was issued with police abstract from the said traffic base, after he was involved in an accident which happened on 10.11 2019 at about 5.00pm involving the suit motor vehicles. The 1st suit motor vehicle failed to give way and had a collusion with the 2nd suit motor vehicle driven by Husein Sarif. In cross examination he stated that the police abstract did not show who was to blame for the accident and was not aware if the driver of the 1st suit motor vehicle was charged.

7. The parties thereafter did adopt a consent on liability as recorded in Mavoko CMCC No 39/2020, where liability as against the respondent was agreed at 100%.

C. Appellants Submissions

8. The appellant did file their submissions on 3rd April 2023 and stated that the trial court did err in law and in fact t0 award him a paltry sum of Ksh.40,000/= as General damage, and wrongly assessed the damages suffered when compared to findings of various courts for similar injuries. The award was manifestly low and constituted an error of principle and a misapprehension of the facts. Reliance was placed on Butt Vs Khan (1977) eKLR 1KAR, West (H) & Sons ltd Vrs Shephard (1964) Ac 326 at 345, From the pleadings and evidence adduced it was submitted that an award of Kshs 250,000/= would be

fair compensation, considering comparable awards. Reliance was placed on Micheal Okello Vs Pricilla Atieno (2021) eKLR & Antony Nyamwaya Vs Jackline Moraa Nyandemo (2022) eKLR

D. Respondents Submissions

9. The Respondent did file their submission on 15th May 2023 and urged this court to dismiss this appeal and find that the award was sound as the trial court had exercised its discretion in a proper manner considering similar injuries. The ward of Ksh.40,000/= was not low as the appellant sustained soft tissue injuries and had healed. Reliance was placed on HB (Minor suing thorough mother and next friend DKM) Vs Jasper Nchonga Magari & Ano (2021) eklr, Kipkere Limited Vs Peterson Ondiekei Tai (2016) eKLR, Buds and blooms ltd Vs Lawrence Emsugut obwa (2016)eKLR, & Samuel Mburu N Ngari Vs Wangiki wangare & Ano (2014) eKLR. Where the courts awarded between Ksh.50,000/= to Ksh. 80,000/=

10. The appeal as filed was totally devoid of merit and the same ought to be dismissed with costs.

E. Analysis & Determination

11. 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.

12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316

13. In Coghlan vs. 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 materials before the judge with such other materials 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 another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, 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 has not seen."

14. Guided by the above cases, and having carefully gone through the entire record of appeal, pleadings filed in the primary suit, the decree appealed against and the submissions filed herein I do find that the only issue for determination in this appeal is whether the quantum awarded was sufficient.

15. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial 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 damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising 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."

16. The Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730, Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 also restated these principles which should guide the court in awarding damages,

17. In Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

18. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted.

19. The appellant was a passenger in the 1st suit motor vehicle which was involved in an accident on 10.11.2019. The plaintiff sustained soft tissue injuries to wit; blunt injury to the anterior chest well, bruises on the left leg and injuries below the knee joint. The initial treatment notes from Bigson Health services also did confirm that the appellant was injured on both legs and chest. Dr Titus Ndeti medical report dated 7.12. 2019 also did confirm the same.

20. The appellant did submit that an award of Ksh 250,000/= would be adequate, while the respondent did maintain that an award of Kshs 40,000/= was adequate. In Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR , Majanja J set aside the lower court award of Kshs. 55,000/= for soft tissue injuries and substituted it with an award of Kshs. 100,000/=. While in Nyambati Nyaswabu Erick Vs Toyota Kenya Limited & 2 others [2019] eKLR, Majanja J did set aside an award of Kshs. 55,000/= for soft tissue injuries and substituted it with one of Kshs. 90,000/=.

E. Deposition

21. I do find that the award of Kshs 40,000/= was extremely low, when considering similar awards for similar injuries, and inflationary rates prevailing as at date of the award. The trial magistrate thus made an error in principle and this court is justified in interfering with the said award.

22. I do therefore set aside the award of Ksh.40,000/= given in by the trial Magistrate In Mavoko CMCC No 38 of 2020 and substitute the same with an award of Ksh.80,000/=.

23. The appellant is awarded half costs of this appeal assessed at Ksh.70,000/= all inclusive.

24. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 29th day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant