Stejes Agencies Ltd v Makali (Civil Appeal E060 of 2021)
[2023] KEHC 22809 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E060 OF 2021

FROO OLEL, J

SEPTEMBER 29, 2023

BETWEEN

STEJES AGENCIES LTD ..... APPELLANT

AND

EDWARD NYANGI MAKALI ..... 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 1 st April 2021 in Mavoko Civil Suit No.957 of 2019)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Hon. Bernard Kasavuli (PM) dated 1st April 2021 where he awarded the respondent herein Ksh.400,000/= damages for injuries suffered, Ksh.5,000/= as special damages plus cost and interest of the suit.

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 in awarding the Respondent a sum of Ksh.400,000/- on General damages which award is inordinately excessively high considering the injuries sustained by the Respondent and existing court awards in comparable injuries.

    b. That the learned trial magistrate misdirected himself by failing to consider sufficiently, the appellants submissions, the medical reports on record, the treatment notes, the pleadings and the evidence thereby arriving at the wrong decision on General damages which has occasioned miscarriage of justice.

c. That the learned trial magistrate grossly misdirected himself by ignoring the principles applicable and relevant authorities on general damages cited in the written submissions presented and/or filed by the appellant.

d. That the learned trial magistrate proceeded on wrong principles when assessing the general damages to be awarded to the Respondent and failed to apply precedents and tenets of the law applicable thereby arriving to a figure which is manifestly excessive.

e. That the learned trial magistrate erred in law and in fact in applying a high inflation rate thereby arriving at an erroneous award in general damages that is inordinately excessive for such injuries.

f. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances occasioning miscarriage and justice by deviating from existing and established judicial principles on accident claim.

g. That the learned magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

3. There was a test suit being Mavoko CMCC no.876 of 2019 where the issue of liability had been determined and the appellant was held to be 100% liable. The Respondent herein thus only testified as to his injuries and also called his doctor to give his professional assessment of the injuries suffered.

B. Brief Facts

4. PW1 Edward Nyingi Makali did testify that on 16th September 2019 he was driving motor vehicle KCM 074Z (herein after referred to as the 1st suit motor vehicle), along Nairobi – Mombasa road when near National Oil or thereabout the appellants driver , agent, employee carelessly, recklessly and/ or negligently drove Motor vehicle KCQ 181Z (hereinafter referred to as the 2nd suit motor vehicle), lost control and violently caused the 2nd suit motor vehicle to collide with the 1st suit motor vehicle as a result of which he sustained severe injuries.

5. The respondent did testify that as a result of the said collusion he sustained the following injuries; cut wound on the forehead right side/ bruises to the face, blunt injuries to the forehead with formation of hematoma, deep cut wound on the anterior chest wall, blunt injuries on the lower back, fracture of the proximal phalangeal bone of right little finger, multiple bruises on the lower limbs and bruises on the upper limb. He was taken to Shalom Hospital and later to Machakos Level 5 Hospital. He had not fully recovered from the injuries and his fractured finger needed to be operated on.

6. PW2 Dr. Titus Ndeti testified that he did examine the Respondent and also relied on the medical treatment notes and P3 form provided to make his medical report which he produced as P-Exhibit 1(a) and receipts P-exhibit 1(b). The nature of injuries suffered by the respondent was main and skeletal. The little finger was healing with difficulty and required to be operated on. It was still deformed.

7. The appellant did not call any witness and closed their case.

C. Appellants Submissions

8. The appellant did file their submissions on 20th February 2023 and stated that the trial court did err in law and in fact t0 award the respondent a sum of Kshs 400,000/= as General damage for the injuries sustained as the same was inordinately excessive considering the injuries sustained by the respondent and also while comparing the same with comparable awards. Both the medical reports had confirmed the extend of the injuries suffered and the second medical report by Dr Jaob Bodo

had further confirmed that the respondents finger had healed well and it had no permanent disability. Reliance was placed in Odinga Jacktone Ouma Vs Moureen odera(2016)Eklr , Hassan Farid & Another Vs Sataiya Ene Mepukori & 6 others (2018) eKLR& Mara Tea Factory ltd Vs Joshua Makworo onkoba (2021)

9. The appellate court was to be careful not to interfere with the trial courts discretion unless the said decision was arrived at in error. i.e it was inordinately high or low in the estimate of damages. From the pleadings and evidence adduced it was submitted that an award of Ksh.200,000/= would be fair compensation, considering comparable awards and thus the award of Kshs 400,000/= was excessive and ought to be reduced.

D. Respondents Submissions

10. The Respondent did file their submission on 20th February 2023 and faulted the appellant for attempting to introduce new issues through the backdoor. Parties were bound by their pleadings and as liability was not contested the court could not consider any submissions made as regards the same. The Respondent had suffered severe soft tissue injuries and the medical report of Dr T. Ndeti had confirm the seriousness of the injuries suffered and thus the award of Ksh 400,000/= was justified.

11. The respondent did further submit that it had not been shown the error in principal which the court failed to consider or the irrelevant factor considered which made the court arrive at a wrong decision or estimate. Reliance was placed on Ahmed Butt Vs Uwais Ahmed Khan (1982 -88) KAR . The appeal as filed was totally devoid of merit and the same ought to be dismissed with costs.

E. Analysis & Determination

12. 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.

13. As held in Selle & Another Vs 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

14. The same position was also appreciated in Peters –vs- Sunday Post Limited [1958] EA 424:

> " Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate

court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

15. 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.

16. 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."

17. The Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 also restated these principles which should guide the court in awarding damages, where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured.

18. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

19. 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."

20. 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.

21. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award. It need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between

the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion.

22. The appellant was the driver of the first suit motor vehicle and suffered sever bodily injuries which he pleaded as follows; cut wound on the forehead right side/ bruises to the face, blunt injuries to the forehead with formation of hematoma, deep cut wound on the anterior chest wall, blunt injuries on the lower back, fracture of the proximal phalangeal bone of right little finger, multiple bruises on the lower limbs and bruises on the upper limb. He had not fully recovered from the injuries and his fractured finger needed to be operated on.

23. The Respondents injuries was confirmed by the medical reports adduced into evidence especially Dr Titus Ndeti medical report marked as Exhibit P 1(a). The appellants on the other hand relied on the report of Dr Bodo. Though they submitted it was admitted by consent on 28th January 2021, the court proceedings of the said date do not confirm the same.

24. In the case of Samuel Kariuki Kinya Vs Makenzie & Another HCC 520 of 1987, the plaintiff suffered soft tissue injury, a fractured his right index finger and had deep abrasions of the arm and was awarded Kshs 100,000/=. While in Mogaka Sydney Vs Faith Ndunge Nyundo H.C.C.A No 29 of 2017 for similar injuries the award was reduced from Ksh.450,000/= to 300,000/=. In Micheal Okello Vs Priscilla Atieno H.C.C.A NO 45 of 2019 the appellant was awarded Ksh.250,000/= for sever soft tissue injuries.

25. In Patrick Odhiambo obiro Vs The catholic Diocese of Nakuru HCCC No 177 of 1995 the plaintiff sustained a cut on the thumb, cut on the 3rd and 4th ring left hand, fracture of the middle Phalanx of the left hand and soft tissue injuries and was awarded Ksh.400,000/=.

26. In Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR the Plaintiff sustained the following injuries; severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger, soft tissue injuries on the chest wall. The trial court made an award of Ksh.600,000/= which was reduced to Ksh.350,000/= on appeal.

27. The Respondent was the driver of the 1st suit motor vehicle, and on impact of the accident did suffer severe injuries all over the body. Apart from the soft tissue injuries, which would have attracted less quantum, the Respondent suffered head injuries with him sustaining injuries to the forehead with formation of haematoma, cut would on anterior chest wall, fracture of the proximal phalangeal of the right little finger.

E. Deposition

28. While the appellant did submit that an award of Ksh.200,000/= would have been appropriate, considering similar injuries for similar awards and inflationary trends I do find that the award of Kshs 400,000/= was slightly on the higher side and reduce the same to Kshs 350,000/=.

29. The award of general damages of Hon Bernard Kasavuli (PM) in Mavoko CMCC NO 957 OF 2019 is reduced from Ksh.400,000/= to Ksh.350,000/=. Special damages were not challenged and remains as awarded at Ksh.5,000/=.

30. The appellant will bear costs of the primary suit, but each party shall bear their own costs of this Appeal.

31. It is so ordered.

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