Hashienda Farm Limited v Mwaniki (Civil Appeal E063 of 2022)
[2023] KEHC 24192 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E063 OF 2022

FN MUCHEMI, J

OCTOBER 26, 2023

BETWEEN

HASHIENDA FARM LIMITED ..... APPELLANT

AND

JOHN KINYUA MWANIKI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. A. Lorot (CM) delivered on 31st March 2022 in Wang'uru CMCC No. E020 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Wang'uru Chief Magistrate in CMCC No E020 of 2020 in a claim that arose from a road traffic accident whereas the respondent sustained bodily injuries. The parties by consent apportioned at the ratio of 20:80 with the appellant bearing 80%. The respondent was awarded general damages of Kshs 2,000,000/- for pain, suffering and loss of amenities and special damages of Kshs 13,870/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as one that the learned trial magistrate erred in law in awarding Kshs 2,000,000/- as general damages for pain & suffering which amount was manifestly excessive;

3. Parties filed written submissions in disposal of the appeal.

Appellant's Submissions

4. The appellant submits that according to the plaint, the respondent sustained a communited fracture of the right fermur. The injury was confirmed as a fracture of the right fermur, mid-shaft by a report prepared by Dr Wambugu dated 10th February 2021. The appellant contends that the report did not

make any assessment on permanent incapacitation. Therefore, the appellant argues that the conclusion by the trial magistrate that the respondent is fully disabled is unsupported and misinformed.

5. The appellant states that they proposed a sum of Kshs 500,000/-, at the trial court as reasonable compensation for the injuries sustained by the respondent. Having considered inflation factors, the appellant finally proposed a sum of Kshs 800,000/-. To support their contentions, they rely on the case of *Pestony Limited & another v Samwel Itonye Kagoko* [2022] eKLR where the High Court set aside the trial court's award of Kshs 1,400,000/- and awarded Kshs 800,000/- where the respondent suffered a fracture of the left femur (mid shaft) and swollen left tender thigh. Further in *Barnabas v Ombati* (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment) where the High Court upheld the trial court award where the respondent had suffered chest contusion, bruises on his right hand and wrist, fracture of the right femur, fracture of the right humerus and fracture of the pelvic. In the case of *Kiautha v Ntarangwi* (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment) where the High Court set aside the trial court's award of Kshs 2,000,000/- and awarded Kshs 800,000/- as general damages where the respondent suffered bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid-shaft femur fracture.

6. The appellant submits that the respondent is not entitled to costs in the lower court as he failed to serve them with a demand notice.

Submissions

7. The respondent relies on the cases of *Abdi Nassir Nuh v Abdureheman Hassan Halkano & 2 others* [2010] eKLR, *Floris Pierro & another v Giancario Falasconi (as the administrator of the Estate of Santuzza Billioti alias Mei Santuzza)* [2014] eKLR and *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR and submits that the appellant did not attach certified copies of the judgment, certified copy of the lower court proceedings and a certified copy of the decree it intends to appeal, which are a requirement of the law. As such, the respondent submits that there is no appeal since no proper record was lodged and thus ought to be dismissed.

8. The respondent submits that according to Dr Ndigwa's medical report dated 31st August 2020, he sustained a communited right fermur fracture evident on x-ray. The respondent states that the doctor opined that he was rendered totally incapacitated and the degree of incapacity was assessed at 100% total loss of the lower limbs function. Ankylosing of the right hip joint – 50% and ankylosing of the right knee joint – 50%. His prospected future cost of rehabilitation and medication was estimated at Kshs 1,000,000/-.

9. In support of his contentions, the respondent relies on the case of *Charles Wanyoike Githuka v Joseph Mwangu Thuo & 2 others* [2008] eKLR where the plaintiff suffered a fracture of mid shaft of the right femur and was awarded Kshs 2,500,000/- as general damages. In *Frankline Chilibasi Spii v Kirangi Liston* [2017] eKLR the plaintiff sustained compound and communited fractures of the right distal tibia and fibula among other injuries and was awarded Kshs 1,800,000/- as general damages. Further in *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR where the respondent suffered segmental fracture of the right femur mid shaft, among other injuries with recovery expected in 1 ½ years leading to the doctor assessing disability at 30%. The court upheld the award of Kshs 1,500,000/- for general damages. In its submissions, the respondent had proposed general damages for pain and suffering as Kshs2,500,000/-.

10. The respondent submits that the appellant has not presented any evidence that the trial court acted on wrong principles of law and misapprehended the facts or made a wholly erroneous estimate of the damages he suffered.

Issues for determination

11. The main issues for determination are:-

    a. Whether the appeal is fatally defective for failure to attach decree, certified copy of judgment and proceedings;

    b. Whether the award on general damages is manifestly excessive.

The Law

12. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 into account of particular circumstances or probabilities materially to estimate the evidence."

13. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & another* [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

15. It is therefore the duty of this court to examine the evidence and factual details and revisit the facts as presented before the trial court, analyse and evaluate them and arrive at its own independent conclusions, but always remembering and giving allowance that the trial court had the advantage of hearing the parties.

Whether the Appeal is fatally defective for failure to attach a decree, judgment and copy of proceedings.

16. The appellant submits that the appeal is fatally defective for failure by the appellant to attach a decree, certified copy of proceedings and judgment in the Record of Appeal which renders the appeal incurably defective. The record of appeal shows that the appellant included a copy of the judgement therein which indeed is a good guide to this court on the final orders of the magistrate and which are the basis of the main issues in this appeal. This appeal was admitted as required under Order 42 of the

Civil Procedure rules. The original file and the lower court record are before this court. In the case of *South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro* (2010) eKLR, the court stated:-

> In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of the overriding objectives of the *Civil Procedure Act* as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.

17. In dealing with the same issue, the Court of Appeal in the case of *Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata* [2017] eKLR held that:-

> According to the Judge, the record of appeal. Before him had a certified copy of judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.
>
> We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

18. I have perused the file and noted that it is the record of appeal filed on 8th February 2023 that had some documents missing. However, the appellant filed an Amended Record of appeal consisting of all the documents required to be included under Order 42. As such the issue is now settled.

Whether the award on general damages is manifestly excessive.

19. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate 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 awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages 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 factor 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."

20. Similarly in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on

> a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

21. The plaint filed on 8th October 2020 shows that the respondent sustained the following injury:-

    a. Communited right femur fracture.

22. The trial magistrate awarded a sum of Kshs 2,000,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The appellant urges the court to award Kshs 800,000/- relying on the cases as cited above. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

23. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr Humphrey Ndigwa in his report dated 31st August 2020. The said report was to the effect the respondent had a known history of disability which on the left lower limb a deformity and loss of function. The doctor classified the respondent's injuries as grievous harm and concluded that he had been rendered totally incapacitated. He further assessed the degree of permanent incapacitation as follows:-

    a. 100% - total loss of lower limbs;

    b. 50% - ankylosing of the right hip joint

    c. 25% - ankylosing of the right knee joint.

24. The appellant in his submission before this court and the court below stated that the respondent underwent a second medical examination on 10th February 2021 by Dr Wambugu. I have perused both the record of appeal and the trial court record and found no such report. Parties recorded a consent on 13th July 2021 admitting the respondent's list of documents filed on 8/10/2020 without calling the makers. There is no mention of the medical report by Dr Wambugu. Further I have perused the appellant's pleadings and noted that it only filed a Memorandum of Appearance and Statement of Defence on 9th November 2020. The judgment of the magistrate court does not mention the medical report by Dr Wambugu. Accordingly, the appellant is precluded from making submission on the said document for it is not part of the court record.

25. The appellant faulted the trial court for drawing the conclusion that the respondent is fully disabled as the same is unsupported and misinformed. The medical report by Dr Humphrey Ndigwa indicates that the respondent is totally incapacitated and therefore this is what the trial magistrate relied on when making his award on general damages.

26. In my view, the decisions relied on by the appellant are indicative of injuries that are less severe than those the respondent suffered herein whereas the ones cited by the respondent are more comparable in the circumstances. Furthermore, the learned trial magistrate in arriving at the award of Kshs 2,000,000/- took into account the submissions by the parties, the fact that the respondent was 100% incapacitated, the severity of his injuries and the duration the respondent had to spend in hospital. He further took into consideration that the respondent underwent not only surgery but physiotherapy and occupational therapy for quite a period of time. Thus it is my considered view that the trial court did not apply any erroneous principles while arriving at the award and find that Kshs

2,000,000/- as general damages for pain suffering and loss of amenities is reasonable compensation in the circumstance.

27. The appellant said it was not served with a demand letter and as such, the respondent is not entitled to costs of this appeal. I have perused the proceedings and judgement of the court below and noted that this issue was not brought to the attention of the said court. As such, the issue cannot be entertained as a subject of this appeal.

Conclusion

28. Consequently, I find that the appeal lacks merit and dismiss it with costs to the respondent.

29. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October, 2023