Onyango v Dockwide Business (K) Limited & another (Civil Appeal 2 of 2022) [2023] KEHC 24086 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 2 OF 2022

DKN MAGARE, J

OCTOBER 25, 2023

BETWEEN

JAMES OCHIENG ONYANGO ..... APPELLANT

AND

DOCKWIDE BUSINESS (K) LIMITED ..... 1ST RESPONDENT

KIPNG'ENO ARAP KILISYO ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of Hon Kiage given on 26/7/2022 in Mombasa CMCC 1480 of 2019.
2. The appellant field 4 grounds of appeal. These grounds are on quantum. The Appellant posits that the award was manifestly low as to amount to an erroneous estimate of damages.
3. The injuries pleaded in the matter were as follows; -
    a. Fracture left pelvis bones
    b. Dislocation/sublocation of pubic symphysis
    c. Multi-level vertebral fracture of the left lumber transverse processes with fragment displacement
    d. Nerve injury left lower limb leading to numbness and loss of muscle power.
    e. Blunt trauma to the abdomen
4. Special damages pleaded were:-_
    a. Payment for the Medical Report Ksh. 2,000.00

b. Payment for the Police Abstract Ksh. 200.00

c. Payment for the P3 form Ksh. 500.00

d. Payment for the Searches Ksh. 1,000.00

e. Medical Expenses to be assessed later

5. The Court awarded as follows: -

a. General damages Ksh1,500,000/=

b. Special damages Ksh 3,700/=

Total Ksh 1,503,700

Less 10% contribution Ksh150,370/=

Sub due Ksh 1,353,330/=

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. In the case of *Mbogo and Another v. Shah* [1968] EA 93 where the Court stated:

> " .... that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " ... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

9. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

10. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. As regards to damages, I am aware that no two cases are the same. The judgment must reflect the individuality and uniqueness of each case within the required parameters where there should be similar awards for similar injuries. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

13. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

16. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

17. So my duty as the appellate court is threefold regarding quantum of damages:-

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

18. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

19. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

20. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

21. The Appeal herein is on quantum. There are 4 grounds raised. They are: -

    i. That the Learned Magistrate erred in law and in fact in awarding a sum that is manifestly too low in General damages compared to the injuries sustained by the Appellant.

    ii. That the Learned Magistrate erred in law and in fact in failing to appreciate and consider the uncontested evidence on Special Damages.

    iii. That the Learned Magistrate erred in law in failing to appreciate the law on the consequence of a party who fails to call any evidence.

    iv. That the Honourable Learned Magistrate erred in law and fact in failing to consider the Appellant Submissions.

Appellants Submissions

22. The Appellant filed submissions that the award was inordinately low. Further, it was submitted that the court erred in failing to award costs.

23. The Appellant analyses the duty of the 1st Appellate court and stated that the award of damages must reflect current trends and comparable awards. They rely on the case of *Mara Teg factory Ltd. v Lolian Bosibori Nyandika* (2021) eKLR as follows: -

> 17. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley*

Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

24. Counsel also relied on the case of *Odinga Jacktone Ouma v Maureeen Achieng Odera* (2016) eKLR to assert that Awards should not be excessive but should be commensurate to the injuries suffered.

25. Counsel submitted that per the injuries sustained an Award of Ksh. 4,000,000/= would be adequate compensation. Reliance was further placed on the cases of *Martha Karoo Kobia v China Zhongxing Construction Ltd* and *Nicholas Njue Njuki v Eliud Mbugua Kahuro* (2014) eKLR.

26. They rely on the injuries submitted and pray that an award of 4,000,00 will suffice and that the Award of Ksh. 1,500,000/= was inordinately low.

27. They rely on *Martha Karoo Kobia v China Zhongxing Construction Ltd* and *Nicholas Njue Njuki v Eliud Mbugua Kahuro* (2014) eKLR. They are o the view that Ksh. 1,500,000 is too low.

28. On special damage's they are of the view that they submitted Ksh. 149,677 as special damages pleaded and proved but which was not awarded.

Respondent's submissions

29. The Respondent did not participate by way of filing submissions.

Evidence

30. The evidence tendered on quantum were as per the report by Dr Kiema dated 18/7/2019.

31. There were receipts from the Coast Provincial General Hospital. These receipts are of no use. The treatment costs were not pleaded particularly in the prayer section and there was no indication of special damages.

32. The Court of Appeal has pronounced itself regarding particularization and proof of special damages. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:
>
> > " ....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
> >
> > > " Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is

what I have lost, I ask you to give me these damages.' They have to prove it"

33. Dr. Kiema stated that the Appellant 50 % disability. Given that the doctor was an expert, his evidence has to be analyzed in the context of all other evidence. In The court will treat the expert report as part of the evidence and analyst its soundness. The court of appeal, quoted with approval a high court decision on expert evidence in the case of

> " Also taken into consideration among numerous others is the case of *Stephen Kinini Wang'ondu v. The Ark Limited* [2016] eKLR from which the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, *inter alia*, as follows: -
>
> > " In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

34. The court in the above matter continued as doth: -

> " In *Shah and Another v. Shah and Others* [2003] 1 EA 290, wherein Ombija, J. expressed himself on this issue, inter alia, as follows:
>
> > " One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law, science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on

the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

35. The Court based its decision on the case of *Nguku v Kiria-ini Farm* (Civil Appeal 267 of 2020) [2022] KEHC 342 (KLR) (Civ) (5 May 2022) (Judgment), where justice C Meoli confirmed an award of Ksh. 1,800,000 in March 2020.

36. I also note that Justice G.V. Odunga (as he then was) awarded Ksh. 1,500,000 in *Daniel Makau Mutinda v Patrick Ngu Mutyetumo* (2020) eKLR, for loss of earning following injuries of the compressed fracture of the thoracic spine and fracture of lumbar spine.

37. In *Kemfro Africa Ltd t/a Meru Express Service & Another v A. M. Lubia & Another* (1987) KLR 30 the Court of Appeal stated that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 a wholly erroneous estimate of the damages."

see also *Butt v Khan* (1981)KLR 349 and Lukenya *Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR

38. In the case of *Gilbert Nicholas Otieno V Oil Crop Development Co. Ltd & another* [2009] eKLR the Court, Nambuye J (as she then was) stated follow:

> " Due consideration has been made by this court of the above words and the same considered in the light of principle guiding the making of an award of damages established by the Court of Appeal and as dutifully followed by the superior courts that this court has judicial notice of normally:
>
> (i) An award of damages is a matter of the courts discretion of the court seized of the matter.
>
> (ii) This discretion has to be exercised judicially and with a reason.
>
> (iii) The discretion to so award damages is unfettered with the only fetter being.
>
> (a) The award should not be too inordinately high or too low.
>
> (b) It should be commonurate to the injuries suffered.
>
> (c) It is not meant to enrich the claimant but to restore him to the position in which he was before the injuries were suffered.
>
> (iv) Awards on past decisions are more guides and each case has to depend on its own merits and facts.

(v) Where past awards are taken into account as guides, then the date when they were decided should be considered taking into account either the depreciating or appreciating value of the purchasing power of the Kenyan shilling as the case may be."

39. Flowing from the above decisions on when the Court may disturb an Award in relation to the injuries pleaded in this case, in the case of *Boniface Njiru v Tohel Agencies & Anor* [2011] eKLR, the Plaintiff who sustained blunt head injury, loss of 4 teeth, fracture of shaft and right tibia was awarded Ksh 1,000,000/-.

40. Similarly, in the case of *Michael Maina Gitonga v Serah Njuguna* [2012] eKLR the Plaintiff sustained multiple fractures to the pelvis and was awarded Ksh 1,500,000/-.

41. In the circumstances, I am of the view that the amount of Ksh. 1,500,000 awarded by the Trial Court for General Damages is slightly on the higher side. However, it is not inordinately high. I will not disturb it. I would have done so if it were inordinately high.

Determination

42. In conclusion, I do not find any merit is the Appeal. The same is accordingly dismissed with no order as to costs.

43. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25TH DAY OF OCTOBER, 2023. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Brian