Ena Investment Limited v Judy Mong'are Kemunto (Civil Appeal E069 of 2021) [2023] KEHC 25914 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E069 OF 2021

WA OKWANY, J

NOVEMBER 30, 2023

BETWEEN

ENA INVESTMENT LIMITED ..... APPELLANT

AND

JUDY MONG'ARE KEMUNTO ..... RESPONDENT

(Being an appeal from the Judgment/Decree in Nyamira CMCC No. E003 of 2020 by the Honourable W.C. Waswa - Resident Magistrate dated & delivered on 12th August 2021)

JUDGMENT

1. The Appellant herein was the Defendant before the trial court where it was sued for damages arising out of a road traffic accident. The Respondent's case was that she was, on or about the 12th day of July 2020, lawfully travelling as a pillion passenger on a motorcycle Registration No. KMEU 831U along Miruka-Nyamira Road. The Plaintiff claimed that upon reaching Rangenyo area, the Appellant's (Defendant's) driver, servant of agent negligently drove, managed and/or controlled the defendant's motor vehicle Reg No. KCR 616W thereby permitting it to violently collide with the said motorcycle as a consequence of which she sustained injuries and suffered loss and damage. She stated that the defendant was vicariously liable for.

2. After hearing the case, the trial court rendered a judgment in which it found the Appellant 100% liable for the accident and awarded the Respondent Kshs. 750,000/= in general damages, Kshs. 6,500/= special damages together with costs of the suit.

3. Dissatisfied with the judgment of the trial court, the Appellant instituted the present Appeal through the Memorandum of Appeal dated 25th August 2021 wherein it listed 3 grounds of appeal as follows: -

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. 750,000/= 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 the decisions filed alongside the Defendant's 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 Appellant seeks orders to set aside the judgment of the trial court. The Appellant also seeks the costs of the Appeal.

5. This Appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The Appellant disputed the Respondent's claim that she suffered a fracture of the rib and dislocation of the ankle as no x-rays were conducted. It was submitted that the only injury that was proved was the pelvic fracture. It was the Appellant's case that the award of general damages was too high considering the nature of the Respondent's injuries. The Appellant opined that the sum of Kshs. 400,000/= would be adequate compensation for the injuries. Reference was made to the case of *Power Lighting Company Ltd & Another v Zakayo Saitoti Naingola & Another* (2008) eKLR in which the case of *Jennifer Mathenge v Patrick Muriuki Miana* (2020) eKLR was cited where the court outlined the principles for awarding damages. The Appellant further cited the cases of *Mariqueta Nkoyai M'Thiringi v Shadrack Mwendwa & Another* (2020) eKLR, *Anthony Keriga Mogesi v Florence Nyomenda Tumbo* (2015) eKLR and *Lilian Wanja v Cyprian Mugendi Igonga & 2 Others* (2016) eKLR where the courts awarded Kshs. 500,000/=, 600,000/= and 500,000/= respectively for similar injuries as those sustained by the Respondent.

7. The Respondent, on the other hand, highlighted the principles governing instances where an appellate court may interfere with the trial court's award of damages. It was submitted that damages must be within limits set out by previous comparable cases. It was the Respondent's case that the trial court's award on damages was not inordinately high. She urged this court ought to rely on the initial treatment notes in determining quantum since there were contrasting medical opinions relating to the Respondent's injuries. Reliance was placed on the decision in the case of *Easy Coach Ltd. v Joyce Moraa Asiago* (2021) eKLR.

8. The Respondent further cited Kisii HCCA No. 39 of 2021 *Wilfridah Nyakundi v the Board of Management Friends Mukuyu Secondary School* and *George Njenga & Another v Daniel Wachira Mwangi* (2017) eKLR where an award of Kshs. 800,000/= general damages was made where the claimant sustained a fracture of the pelvis and soft tissue injuries. She urged the court to dismiss the appeal.

9. I have considered the Record of Appeal and the parties' submissions. I note that the Appellant did not challenge the trial court's finding on liability. I therefore find that the only issue for determination is whether the trial court made the correct assessment of damages.

10. It is trite that the duty of a first appellate court is to analyse and re-evaluate the evidence tendered before the trial court afresh with a view to arriving at its own conclusion while bearing in mind the fact that

it did not see or hear the witnesses testify first hand. This principle was espoused in the case of *Pandya v Republic* (1957) EA 336 thus:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence."

11. It is also a well-established principle that an appellate court will not ordinarily interfere with a trial court's assessment of damages unless it is satisfied that same was based on a wrong principle or that the award is inordinately high or low as to amount to a wrong estimate. In the case of *Gicheru v Morton and Another* (2005) 2 KLR 333, it was held as follows: -

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be 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 the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

12. The Plaintiff (Respondent) pleaded that she sustained the following injuries in the accident: -

    1. Cut wound on the upper lip
    2. Cut wound with bruises on the face and occipital area
    3. Lower back pain
    4. Chest contusion
    5. Multiple bruises on the trunk and abdomen
    6. Fracture of the right side of the ribs
    7. Bruises on the upper limbs bilaterally
    8. Cut wounds on the right arm
    9. Fracture of the pelvic
    10. Dislocation of the left ankle joint
    11. Multiple cut wounds on the left lower limb.

13. The Respondent produced a P3 Form and medical report which confirmed the said injuries. I note that the medical report authored by Dr. Ombati indicated that he examined the Respondent about a month after the accident. The said report indicates that she suffered fractures and had scars that were healing. The doctor assessed permanent disability at 20%.

14. There were medical reports dated 20th May 2021 which were prepared by Dr. Kouko and Dr. Jennifer Kahuthu. The said reports indicated that the claimant suffered pelvic fractures and soft tissue injuries that had healed with no expected permanent disability.

15. I have considered the fact that there were two sets of conflicting medical reports. It is noteworthy that the second set of reports by Dr. Kouko and Dr. Kahuthu were prepared over one year after the accident and were intended to confirm the Respondent's injuries. It is to be expected that the claimant would have healed considerably within the span of one year.

16. Dr. Chamwage, who testified as DW1, confirmed that the initial treatment notes indicated that the Respondent had suffered a fracture of the ribs and dislocation of her ankle joint. He added that there was a possibility of such fracture uniting and healing after 10 months, thereby making it difficult to confirm whether there was a dislocation. Evidently, the second medical reports could not confirm or ascertain whether the left ankle had been dislocated as the re-examination was done without the initial x-rays which showed the initial dislocation.

17. It is my finding that the initial medical reports provided sufficient proof of the Respondent's injuries and formed the basis upon which the trial court could assess general damages.

18. It is trite that similar awards should be made in comparable cases where claimants suffer almost similar injuries. This is the position that was adopted by the Court of Appeal in *Stanley Maore v Geoffrey Mwenda*, NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR as follows: -

> " 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."

19. It is also trite that damages should not be aimed at enriching claimants but should be fair and just compensation for injuries suffered. This was the determination of the court in *Kigaraari v Aya* (1982-88) 1 KAR 768 where it was held that: -

> " Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

20. I have considered the cases that the parties cited in respect to their respective proposals on quantum of damages. Having found that the Respondent suffered soft tissue injuries, fracture of the ribs and pelvis together with a dislocation of her ankle joint, I find that the trial court's award of general damages of Kshs. 750,000/= was not excessive as alleged by the Appellant. I therefore find no reason to interfere with the said award. I am guided by the decisions in following cases: -

    a. *George Njenga and Another v Daniel Wachira Mwangi* NYK HCCA No. 1 of 2015 [2017] eKLR where the plaintiff who sustained a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterior aspect of the left leg was awarded Kshs. 800,000/- as general damages which was upheld on appeal.

    b. *Catholic Diocese of Meru v RMM (Minor suing thro' her father & next friend JMM* HCCA No. 18 of 2003 where the claimant sustained blunt injuries to the chest, blunt injury to the stomach and fracture of the pelvic bone and the court awarded Kshs. 962,320/= as general damages.

    c. *Timothy Kiarie Kimani v Kapchorua Tea Estate & another* [2012] eKLR the claimant suffered blunt injuries to the chest, fractures of the 11th & 12th ribs, fracture of the right humerus, dislocation of the right ankle, dislocation of the right wrist, dislocation of the spinal column and soft tissue injuries to the right arm. He was awarded Kshs. 600,000/= as general damages.

21. In conclusion, I find that this appeal lacks merit and I therefore dismiss it with costs to the Respondent.

22. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 30TH DAY OF NOVEMBER 2023.

W.A. OKWANY

JUDGE