Chebii v Korir (Civil Appeal 58 of 2020) [2022] KEHC 12135 (KLR) (22 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 58 OF 2020

OA SEWE, J

JUNE 22, 2022

BETWEEN

DAVID KIPROP CHEBII .... APPELLANT

AND

TIMOTHY KEMBOI KORIR .... RESPONDENT

(Being an Appeal from the Judgment and Decree of SRM's Court at Iten (Hon. Caroline R. T Ateya SRM, delivered on the 9th March, 2020 in Iten SPMC No. 12 of 2019)

JUDGMENT

1 Vide a plaint dated May 23, 2019, the respondent sued the appellant in Iten SPMCC No. 12 of 2019: Timothy Kemboi Korir v Winfred Jepkemboi Kipyekomen & David Kiprop Chebii, claiming special damges of Kshs. 7,230/= along with general damages for injuries sustained in a road traffic accident that took place on 11th April 2019. The respondent had alleged that he was a pillion passenger on Motor Cycle Registration No. KMDC 956P and was travelling along Iten-Eldoret Road when, at Finland Area, the said motor cycle was hit by Motor Vehicle Registraion No. KCL 181H belonging to the 2nd defendant; and which was then being driven by the 1st defendant.

2. The respondent had alleged negligence on the part of the 1st defendant; particulars whereof were supplied at paragraph 6 of the Plaint. As the 1st defendant failed to enter appearance, judgment was entered against her in favour of the respondent at 100% on 30th September 2019. The parties thereafter entered into a consent on liability as against the 2nd defendant in the ratio of 80:20 before the matter proceeded for assessment of quantum of damages payable. In addition to interest and costs, the learned magistrate then awarded the respondent the following sums in damages:

General Damages Kshs. 500,000

Special Damages Kshs. 7,630

Less 20% contribution (Kshs. 100,000)

Net Award Kshs. 407,630

3. Being aggrieved by that outcome, the appellant filed this appeal on August 5, 2020 impugning the judgment of the lower court on the following grounds:

   (a) That the learned magistrate misdirected herself by applying the wrong principles, resulting in an award of Kshs. 500,000/= for soft tissue injuries, which amount is manifestly excessive in the circumstances;

   (b) That the learned magistrate erred in law and in fact by failing to consider the appellant's written submissions on quantum of damages;

   (c) That the learned magistrate erred in law and in fact by taking into account irrelevant factors and or failing to take into account relevant factors, thereby arriving at an erroneous judgment;

   (d) That the learned magistrate misapprehended the evidence with regard to the injuries sustained by the respondent, thus making a wrong determination of the quantum of damages to be awarded to the respondent;

   (e) That the learned magistrate erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record;

   (f) That the judgment of the learned magistrate, in the circumstances, is unfair and unjust.

4. In the premises, the appellant prayed that his appeal be allowed and that the judgment and decree of the subordinate court be set aside and substituted with a proper finding of the Court. He also prayed that the costs of the appeal be awarded to him.

5. The appeal was canvassed by way of written submissions, pursuant to the directions of the court dated May 11, 2021. Thus, Mr. Mwangi, learned counsel for the appellant, proposed the following issues for determination in his written submissions dated May 26, 2021 in line with the grounds of appeal:

   (a) Whether the learned magistrate misapprehended the evidence with regard to the nature of the injuries and applied the wrong principles in awarding damages;

   (b) Whether the learned magistrate erred in law and fact by failing to consider the submissions of the appellant; and thereby took into account irrelevant factors on quantum; and,

   (c) Whether the judgment of the learned magistrate is unjust in the circumstances.

6. In respect of the first issue, Mr. Mwangi faulted the lower court in so far as it relied on the case of *Patrick Kinoti Miguna v Peter Mburunga G. Muthamia* [2014] eKLR in which the plaintiff sustained shoulder dislocation, left and right leg injuries, injury to the forehead, two loose teeth and injury on the left chest area as well as right knee, and yet in the case before the court the only injuries suffered by the respondent were injury to the back and left ankle joint dislocation. Counsel was consequently of the view that the learned magistrate misapprehended the evidence on record and thereby arrived at the wrong conclusion.

7. Secondly, it was the submission of Mr. Mwangi that the learned magistrate should not have relied on the Medical Report by Dr. Sokobe, which was produced as the Plaintiff's Exhibit 3A or the P3 Form produced before the lower court as the Plaintiff's Exhibit 4; the same having been improperly admitted into evidence. He challenged the fact that the documents were produced before the subordinate court by the respondent, contrary to the provisions of section 35 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. He relied on *Koran Isaac v Mariam Hamed* [2014] eKLR to the effect that, except with

the consent of the parties or the existence of the circumstances set out in the proviso to Section 35, a medico-legal report ought to be tendered by its maker, because such a report falls in the category of expert opinion.

8. On the second front, Mr. Mwangi faulted the judgment of the learned magistrate on the ground that she failed to consider the submissions filed on behalf of the appellant; including the authorities cited in support of those submissions. He relied on *Mohamed Gulab Hussein & Benson Kariuki v Felistus Lenah Muema* [2016] eKLR and *Millicent Atieno Ochuonyo v Katola Richard* [2015] eKLR for the proposition that damages must not only be within the limits set by comparable decided cases but also within the limits the Kenyan economy can afford.

9. Counsel then urged the court to note that the appellant had cited the following authorities, which the learned magistrate failed to take into account:

   (a) *Bhupinder Singh Bhangra v Joel Tuwei Koech* [2008] eKLR wherein the court awarded Kshs. 170,000/= to a plaintiff who sustained swollen scalp and tender forehead with bruises, as well blunt trauma to the neck, chest, lumbar spine region, swollen right shoulder, dislocation of the left shoulder joint, swollen left elbow, left knee, right ankle and foot, with bruises and lacerations;

   (b) *Jacob Omulo Onyango & 2 Others v Jubilee Jumbo Hardware Limited* [2017] eKLR wherein the court awarded Kshs. 220,000/= as general damages to the 2nd appellant in the matter, who had sustained a knock to his head, chest injuries, bruises on his hand and a dislocation of his right shoulder;

   (c) *Arrow Car Limited v Elijah Shamalla Bimono & 2 Others* [2004] eKLR wherein the court awarded Kshs. 150,000/= to the 1st appellant, Elijah Shamalla, who sustained a deep cut wound to the scalp, contusion on the neck and the right side of the chest, deep cut wounds on the left leg, and dislocation of the left ankle joint;

   (d) *Patrick Mudava Kweyu v Pan Africa Chemical Ltd* [2006] eKLR wherein the plaintiff was awarded Kshs. 250,000/= as general damages for dislocation of the left elbow joint and loose lower incisor teeth.

10. Thus, it was the submission of Mr. Mwangi that, had the learned magistrate taken into account the submissions filed by the appellant and the authorities aforementioned, she would probably have arrived at a different sum as quantum for general damages. He discounted the two authorities cited by counsel for the respondent, arguing that they involved far more serious injuries than those suffered by the respondent herein. He consequently urged the Court to find that the entire judgment of the lower court should be set aside for being unjust and unfair and be substituted with a reasonable award by this Court.

11. On behalf of the respondent, Mr. Keter filed his written submissions on 24th June 2021. He defended the lower court's decision on quantum and cited the case of G*itobu Imanyara & 2 Others v the Attorney General* [2016] eKLR and *Kemfro Africa Ltd T/A Meru Express Service & Another v Olive Lubia* [1982-1988] 1 KAR 727 as to the principles applicable in the assessment of damages. He therefore urged the court to find that no error of principle was made by the lower court as the award was within the range of current award for comparable injuries.

12. Mr. Keter further urged the court to take into account the current state of the economy and the effect of inflation on the Kenya Shilling. In rooting for the dismissal of the appeal with costs, he relied the

following authorities in which the sums awarded fell in the range of Kshs. 400,000/= to Kshs. 500,000/= for comparable injuries:

(a) Kisumu HCCA No. 4B of 2009: Robert Ghouli Kimani v

(b) David Bwire Khisa & Another v [2013] eKLR, and

(c) Nairobi HCCA No. 17 of 1983: Lucy Nabuka v Benard Mtwiri & Others [2007] eKLR

13. This being a first appeal, it is the duty of the Court to consider and re-evaluate the evidence adduced before the lower court with a view of making its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. (see Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123). And, as was observed by Sir Kenneth O'Connor in Peters vs. Sunday Post Limited [1958] EA 424:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

14. The appeal is basically on quantum, and therefore, arising from the grounds of appeal, the single issue for determination is whether the trial court applied the wrong principles in assessing the quantum of damages payable to the respondent herein. I must reiterate, at the outset, that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In H. West & Son Ltd vs. Shephard [1964] AC 326, for instance, it was held that:

> " ...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."

15. Hence, in Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, the Court of Appeal held that:

> " ...We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled..."

16. The same position was reiterated by the Court of Appeal in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR, thus:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low

as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

17. Thus, the approach taken by Hon. Wambilyanga, J. in HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf, which I find useful, was thus:

> " The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

18. Additionally, in Stanley Maore vs. Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> " …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. With the foregoing in mind, I have looked at the evidence of the respondent as to the exact nature of his injuries. At page 37 of the Record of Appeal he is recorded as having told the lower court that he sustained injuries on the back and leg as well as a dislocation. He produced the Medical Report prepared by Dr. Sokobe as the Plaintiff's Exhibit 3A and the P3 Form prepared by the same doctor as his Exhibit 4 and added that he had not healed fully as he still felt occasional pain when lifting heavy loads as well as pain on his ankle.

20. Counsel for the appellant took issue with the fact that the two Medical Reports were produced by the respondent as opposed to their maker, Dr. Sokobe. While his argument is sound, it is noteworthy that no such objection was taken before the lower court. Nowhere in the proceedings before the trial court did the Appellant's Counsel raise the issue of inadmissibility of the Medical Report and therefore the learned magistrate had no reason to touch on the issue in her judgment.

21. It is trite law that the court has discretionary powers to allow a party to raise a new point on appeal if the circumstances of the case so dictate. In the Court of Appeal of Securicor (Kenya) Ltd v EA Drapers Ltd & Another [1987] eKLR, it was held:

> " …Certainly the cases show that the discretion must be exercised sparingly. The evidence must all be on the record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below…"

22. In this case, it is manifest from the record that the respondent did not call Dr. Sokobe to produce the two Medical Reports; and therefore that the two expert opinion documents were instead produced by the respondent; yet Section 35 of the *Evidence Act* which states:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

23. From the record, no justification was made as to why Dr. Sokobe was unable to attend court to personally produce the two Medical Reports; and therefore, there was no proof that the circumstances contemplated in the provisio to Section 35 (1) of the Act existed so as to exempt the maker from testifying in court. The Court of Appeal, in the case of Thuranira Karauri vs Agnes Ncheche [1997] eKLR, took the view that:

> " ...the medical report prepared by Dr. Maina Ruga was produced by the plaintiff herself in breach of the clear provisions of section 35 of the *Evidence Act* (Cap 8 Laws of Kenya). It was not produced by consent. Dr. Ruga should have been called to produce it. The Judge clearly erred in admitting it..."

24. It is therefore clear, that unless there is consent by the parties or the existence of the circumstances in the provisio to Section 35, a medical report must be tendered by its maker. For this reason, I would agree with counsel for the appellant that the learned magistrate fell into error when she allowed the respondent to produce the subject medical reports prepared by Dr. Joseph Sokobe.

25. The foregoing notwithstanding, there was no controversy before the lower court as to the injuries suffered by the respondent; namely a blunt injury to the back and a left ankle joint dislocation for which he was treated at Iten Level 5 Hospital. He produced the x-ray film as an exhibit before the lower court. The respondent also produced receipts in proof of the payments he made at the said hospital. On the basis of that evidence, it is manifest that an award of Kshs. 500,000/= was manifestly excessive for the injuries sustained by the respondent.

26. I have looked at the record of the lower court and confirmed that counsel for the appellant did file written submissions dated 25th November 2019 and drew the attention of the lower court to certain authorities which his counsel deemed comparable to the facts hereof. Those authorities have been replicated at paragraph 9 herein above. On the other hand counsel for the respondent relied on the following authorities:

(a) Lucy Ntibuka v Bernard Mutwiri & Others [2007] eKLR wherein the plaintiff suffered head injuries, lacerations on the lateral side of the right eye and lacerations and cut wounds on the

left arm. He also suffered concussion that rendered her unconscious and was experiencing headaches long after the accident due to the concussion. She was awarded Kshs. 500,000/=;

(b) Robert Ghonzi Kimani v David Bwire Khisa & Another [2013] eKLR, in which the appellant was awarded Kshs. 400,000/= as general damages for a dislocation of right shoulder, chest injuries, injuries to the right hip, bruises on right knee and head, including unconsciousness.

27. It is manifest therefore that the injuries in the authorities cited by counsel for the respondent were far more serious than those sustained by the respondent. I have further taken into consideration the following decisions:

(a) Lamu Bus services & Anor –vs- Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kshs. 200,000/= was reduced to Kshs.130, 000/= on appeal.

(b) Veronicah Mkanjala Mnyapara v Charles Kinanga Babu [2020] eKLR where the claimant suffered dislocation of the left ankle joint, dislocation of the left wrist joint, deep cut wound on the forehead, chest contusion as well as bruises on the face, hands and ankle joints and the court on Appeal maintained an award of Kshs. 300,000.00/= issued by the trial court.

28. After taking into consideration the injuries sustained by the respondent, the awards by courts on similar injuries and the issue of inflation, it is my finding that an award of Kshs. 250,000/= would be reasonable in the circumstances as general damages for the the respondent's pain, loss and suffering. The special damage component was not challenged on appeal and is therefore left undisturbed.

29. Accordingly, I find merit in this appeal on quantum. The same is hereby allowed and the lower court's award of Kshs. 500,000/= in general damages is hereby set aside and substituted with an award of Kshs. 250,000/= less 20% plus special damages in the sum of Kshs. 7,230/=. The sums due to the respondent are re-adjusted as hereunder:

General damages Kshs. 250,000.00

Less 20% (Kshs. 50,000.00)

Subtotal Kshs. 200,000.00

Special damages Kshs. 7, 230.00

Total Kshs. 207, 230.00

30. [30] In the result, the judgment of the lower court is hereby set aside and substituted with judgment in favour of the respondent/Plaintiff in the sum of Kshs. 207,230/= together with interest from the date of the award by the lower court, together with costs of the lower court suit. As the appeal is partially successful, the respondent is hereby awarded only half of the costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 22ND DAY OF JUNE 2022.

....

OLGA SEWE

JUDGE