Rishi Hauliers Co. Limited & another v Walumbe (Civil Appeal 63 of 2015) [2022] KEHC 13814 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 13814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 63 OF 2015

DK KEMEI, J

JULY 25, 2022

BETWEEN

RISHI HAULIERS CO. LIMITED ..... 1ST APPELLANT

JOSEPH MUKWEMA MASINDE ..... 2ND APPELLANT

AND

PATRICK WEKESA WALUMBE ..... RESPONDENT

(An appeal from the Judgement and decree of Hon. D. Mutai (Resident Magistrate (RM) in Bungoma CMCC No. 560 of 2011, dated and delivered on 26th August, 2015)

JUDGMENT

Background

1. The principal claim in a plaint dated August 30, 2011 was for the award of damages, costs and interest arising out of a road accident which involved the appellants' motor vehicle registration no KAY 173 Q Hauling trailer registration number ZC 0318 New Holland which allegedly knocked down the respondent and his pillion passenger along Mateka-Miyanga rough road at Bunambobi area or there about, resulting in the respondent sustaining serious personal injuries.

2. It is asserted that on or about the January 7, 2011 the respondent was lawfully ridding motor cycle registration number KMCE 611 V TVS Star along Mateka-Miyanga rough road at Bunambobi area or there about when the appellant's motor vehicle registration No KAY 173 Q Hauling trailer registration number ZC 0318 New Holland was negligently and without care driven, by the 2nd appellant in the course of his duty with the 1st appellant, that it lost control and caused an accident in which the respondent sustained serious personal injuries.

3. The respondent sought general damages, special damages, costs of the suit and interest.

4. The appellants in their defence admitted that an accident did occur but denied liability inviting the respondent to strict proof of his claims. In the alternative they averred that he accident was caused by the sole and contributory negligence of the respondent.

5. In the course of the trial court proceedings parties recorded a consent on liability on the November 13, 2013 in the ratio of 70%:30% in favour of the respondent. The trial court thereafter embarked on recording evidence on the assessment of quantum of damages.

6. The plaintiff/respondent testified that on January 7, 2011 he was involved in an accident and was rushed to St Mary's Hospital Mumias. It was his evidence that he was admitted for a period of two years and proceeded to produce his treatment note (exhibit no 1). He paid Kshs 217,000/=and produced the receipts (exhibit no 2(a) and (b)). He further produced his discharge agreement form as plaintiff exhibit 3 and he still went back for checkups at Bungoma District Hospital. He testified that his medical report authored by Dr Cleophas Okubasu who examined him and which was produced as plaintiff exhibit 4 (a) and the receipt for the report produced as plaintiff exhibit 4(b). He produced a radiology request form produced as plaintiff exhibit 5(a) (b) (c) and (d) respectively. He testified that he reported the accident at the police station and was issued with a police abstract which he produced as plaintiff exhibit 6 and the filled p3 form produced as plaintiff exhibit 7.

7. He testified that the injuries sustained were as follows:

    i. Injury on the head;

    ii. Right hand fracture;

    iii. There's a metal plate;

    iv. Right leg fracture;

    v. Stomach operation.

8. He testified that due to the injuries he is unable to work and he has a family to take care of.

9. The trial court proceeded to determine the sole issue of quantum of damages where an award of Kshs 1, 500,000/= in general damages (Kshs 1,050,000/= after 30% contributory negligence deduction), Kshs 77, 500/= in special damages, costs and interests of the suit.

The appeal

10. Aggrieved by the decision on general damages by the trial court, the appellants appealed to this court putting forward five grounds of appeal all of which are pivotal only to the issue whether or not the learned trial magistrate was right in making the award of Kshs 1, 500,000/= in general damages.

11. By directions of the court, the appeal was canvassed by way of written submissions. The appellants' counsel sought for the reversal of the judgement by the trial court and an order be made dismissing the respondent's suit against the appellants. Counsel for the appellants argued cumulatively on the five grounds of appeal and submitted that the trial court was more inclined towards the respondent's side. It was his contention that at the trial the appellant's submissions were not considered and the authorities fronted not relied upon.

12. In this regard, learned counsel submitted that the trial court disregarded the cardinal principals of assessment of damages that comparable injuries should as far as possible be compensated by comparable awards as was held in the case of *Simon Taveta v Mercy Mutitu Njeri* (2014) eKLR.

13. Learned counsel submitted that an award of between Kshs 650,000/= to Kshs 700,000/= would have been reasonable compensation in light of the injuries sustained. Counsel placed reliance on the cases of *Alex Wanjala v Pwani Oil Products Limited & another* (2019) eKLR; *Paul N Njoroge v Abdul Sabuni Sabonyo* (2015) eKLR and *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR.

The appellants urged the court to allow the appeal and set aside the trial court's judgement on quantum and proceed to substitute it with a sum of between Ksh 650, 000/ to Kshs 700,000/.

14. The respondent's counsel submitted that the trial court's judgement ought to be upheld in view of the severe injuries sustained by the respondent. Counsel relied on his submissions tendered before the trial court dated July 17, 2015 and found on pages 37-38 of the record of appeal where three cases had been cited and in which a sum of Kshs 2,000,0000/ was awarded as general damages in each of the cases.

Determination

15. The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of *Shah, Paul v E A Cargo Handling Services Ltd* 1974 EA 75. I also rely on the Eastern Africa Court of Appeal case *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

> " 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] AC 484.
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> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, 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 a particular conclusion (and this is really 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 the trial and especially if that conclusion has been 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 circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (See also

a) Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000: Tunoi, Bosire and Owuor JJA);

b) Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another (Civil Appeal No 345 of 2000: O'Kubasu, Githinji and Waki JJA); Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co Ltd (Kisumu High Court CC No 88 of 2002)."

17. With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination namely:

a. Whether the trial court acted on wrong principles of law in making the award of Kshs 1, 500,000.00/= for loss of dependency.

b. If (a) above is answered to the affirmative, which sum would be sufficient compensation.

17. In dealing with an appeal on quantum, I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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"

17. In the case of *Savanna Saw Mills Ltd v Gorge Mwale Mudomo* (2005) eKLR the court stated as follows: -

> " It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance."

17. Further in the case of *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 the Court of Appeal held that: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga v Musila [1984] KLR 257)."

17. Furthermore, in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that –

> " ...it is firmly established that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. in order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court 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 low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297."

17. In the case of *Gicheru v Morton and another* (2005) 2 KLR 333 the court stated:

> " 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."

17. In the celebrated case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M Lubia & Olive Lubia* [1982-88] KLR 727 the Court of Appeal held:

''The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that 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 damage.''

17. From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made. Upon studying the cited authorities relied upon by the appellants, I note that the injuries herein are more severe in nature than in the relied upon cases. I am therefore not persuaded by the authorities cited by the appellants. The respondent is noted to have sustained several injuries such as brain injury leading to loss of consciousness for one day, fracture of the pelvis, fracture of right ulna, fracture of the humerus, comminuted fracture of the right tibia, multiple cut wounds to the scalp, blunt injury to right hand, elbow joint, right ankle joint and foot. The appellant's doctors vide a medical report dated 8/3/2012 assessed the respondent's resultant permanent incapacitation at ten (10%).

17. The other critical point of convergence for this court is to bear in mind that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the learned trial magistrate which advantage an appeal court by its mode of delivery lacks.

17. I further wish to point out that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered, not to mulch the tortfeasor for the injury he has caused. See the case of *Lim v Camden HA* {1980} AC 174. There is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low-level soft tissue injuries.

17. In view of the foregoing, I am persuaded that the award made by the learned trial magistrate fell within the threshold of other comparable awards, hence there is no need for interference. However, I am not persuaded that the sum suggested by the appellants is reasonable and fair in light of the injuries suffered and the current economic inflation rate. Further, it is noted that the cases cited by the respondent were decided several years ago. For instance, in *Edward Nzamili Kalama v CMC Motors Group Ltd* [2006] KLR (Mombasa HCC No 70 of 1997 a sum of Kshs 2million was awarded to a plaintiff in 2008 who sustained head injury leading to a concussion, fracture of scapular, compound fracture dislocation of left elbow, chest injuries, fractures of 5th ,6th and 7th ribs. Again in *Mary Wanjah Gachomba v Jacinta*

Adhiambo Ogana [2021] eklr an award of Kshs 2,000,000/ was upheld on appeal for a plaintiff who sustained fracture of right humerus, fracture of tibia and fibula, chest contusion, cuts and bruises. I find the trial court's award of Kshs 1,500,000/= to be reasonable and adequate to compensate for the injuries suffered by the respondent as the same is not inordinately high as to represent an erroneous estimate of the damages. it is noted that the respondent spent a long period in hospital due to the injuries.

17. The test to be applied in an award of special damages is clearly articulated in the cases of *Mariam Maghema Ali v Jackson M Nyambu T/A Sisera Store* Civil Appeal No 5 of 1990 and *Idi Ayub Shaban v City Council of Nairobi* 1982 – 1988 IKAR 681 which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the Respondent had clearly proven the amount pleaded as special damages and as such I find no reason to vary the learned magistrate's decision on that.

17. Accordingly, I find no merit in this appeal. The same I s dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF JULY, 2022

D.KEMEI

JUDGE

In the presence of :

Mrs Ouma for Miss Odhiambo for Appellants

Shiku for Mwebi for Respondent

Kizito Court Assistant