Modern Coast Coaches Ltd v Ouya alias Violet Ouya Ongachi (Civil Appeal E073 of 2021) [2022] KEHC 13482 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13482 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E073 OF 2021

DK KEMEI, J

SEPTEMBER 29, 2022

BETWEEN

MODERN COAST COACHES LTD ..... APPELLANT

AND

VIOLET MABLE OUYA ALIAS VIOLET OUYA ONGACHI ..... RESPONDENT

(Being an Appeal against the Judgement and Decree of the Chief Magistrate in Bungoma (the Honourable C.A.S Mutai (SPM)) delivered on 26th November, 2021) in Civil Suit No. 77 of 2020)

JUDGMENT

Background

1. This appeal is against the award of quantum of damages by the trial court in respect of an accident involving motor vehicle registration number KCG 049 D Scania Bus and a motor cycle.

2. The accident occurred on August 1, 2019 and resulted in the plaintiff, who was a lawful paying passenger aboard on the motor cycle,sustaining serious bodily injuries.

3. On July 5, 2021 the parties before the trial court agreed on liability at 75:25 in favour of the respondent and the trial court proceeded to record evidence on quantum.

4. According to PW1, Violet Mable Ouya, she adopted her statement as evidence in chief. She testified that she is from Malaba Town and an employee with Kenya Revenue Authority. She told the court that on August 1, 2019 she was travelling as a pillion passenger on a motorcycle from her house heading to KRA office at Malaba boarder when she was injured in the accident. She was treated at Aga Khan Hospital Bungoma (treatment notes marked as (PMF1 i) and after 1 month attended to at the Kocholia Hospital (treatment notes marked as PMF1III). From Aga Khan hospital, she was referred to Bungoma West Hospital for further treatment (marked PMF1II). She produced the P3 form in court (marked as

PMF1 IV); the police abstract (marked as PMF1 V); receipt for treatment amounting to Kshs 3794/= produced as (exhibit VI); copy of the motor vehicle search marked exhibit VII; receipt for payment of search for motor vehicle produced as exhibit IIX.

5. She testified that Doctor Andai examined her on January 13, 2020 and did a report on the same. She paid him Kshs 8,000/=. The medical report was marked as PMF1 IX and the receipt for the amount paid marked as PMF1 X. She told the trial court that she is not fully healed, cannot run errand as she used to and is still attending treatment. On cross examination, she testified that the she cannot walk for long distances and as per the P3 form the injuries she sustained were classified as harm. She told the court that Dr Andai examined her four months after the accident

6. The appellant, during the defence hearing, produced the 2nd medical report by Dr Walter which indicated that the respondent had fully recovered from her injury with no complications stemming from the accident and that she had resumed both vocational and avocational activities. The doctor confirmed that the respondent suffered a fracture of the proximal phalanx of the right big toe.

7. At the close of the plaintiff and defendant's case, the trial court rendered a judgment on quantum of damages both general and special as follows:

    a. General damages Kshs 540, 000/=

    b. Special damages Kshs 12, 644/=

    Total Kshs 552, 644/=

    e. Less 25% Kshs 138, 161/=

    (Contributory negligence)

    Net award Kshs 414, 483/=

    e. Interests at court rates

    f. Costs of the suit awarded to the plaintiff.

8. Aggrieved by the judgment of the trial court, the appellant filed its memorandum of appeal dated December 9, 2021. The grounds are as follows:

    a. That the learned magistrate erred in law and in fact in adopting the wrong principles on making determination as to the damages payable to the respondent.

    b. That the learned magistrate erred in law and in fact in failing to take into account relevant factors and the medical evidence produced/adduced thereby arriving at an amount in damages that was excessive in the circumstances.

    c. That the learned magistrate erred in law and in fact in awarding general damages to the respondent which were excessive without taking into account comparable authorities and the evidence adduced.

9. The appellant prayed for the: appeal to be allowed; the damages awarded be re-accessed downwards.

10. The appeal was prosecuted by way of written submissions. Both parties duly filed and exchanged submissions.

11. The appellant through its submissions dated June 21, 2022 submits that despite agreeing with the trial court that each case needs to be determined on its own peculiar circumstances and there are not two cases which are identical, comparable injuries should be awarded comparable awards.

12. Counsel submits that the learned magistrate failed to give explanations and/or factors that led to his decision to award the respondent Kshs 540, 000/=as general damages for pain and suffering.

13. Counsel submits that subject to the medical evidence adduced by both parties, the respondent herein only sustained one fracture and the same is fully healed with no complications/disability.

14. Counsel submits that an award of Kshs 150,000/-200,000/- would be reasonable taking into account that the respondent has fully recovered from the injuries sustained with no permanent disability. Counsel relies of the cases of: *Pitalis Opiyo Ager v Daniel Otieno Owino & Another* (2020) eKLR; *Peter Bernard Makau v Prime Steel Limited* (2018) eKLR and *Masinga Ngonga Ndonge v Kualama Limited* (2016) eKLR.

15. It was therefore submitted that this appeal should be allowed with costs to the appellant.

16. The respondent *vide* submissions dated February 2, 2022 submits that it is the duty of this honourable court not to interfere with the awards of the trial court unless it is satisfied that the latter court awarded damages that are inordinately high or too low to amount to an erroneous estimate or that the trial court took into consideration irrelevant issues in assessing damages or that the same assessment was not based on evidence on record.

17. Counsel submits that the trial court acted on the right principles and conducted a proper analysis of the evidence tendered thus reaching the right conclusion on quantum awarded.

18. Counsel submits that the injury sustained due to this accident is severe and the same occasioned the respondent a lot of pain and suffering considering that she was unable to walk for a long time thus loss of earnings as she was not able to report to work. Counsel submits that in their trial court submissions, the respondent relied on the cases of Eldoret HCA No 174 of 2016, *Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another* eKLR and *Dickson Ciuri Wanjiru v Municipal Council of Nakuru & another*, Nakuru civil appeal No 150 of 2017 eKLR.

19. Counsel submits that the medical evidence as per the medical report, P3 form and treatment notes sufficiently proved the degree of injury suffered by the respondent herein thus warranting the award by the trial court. Counsel urged the court to dismiss the appeal with costs to the respondent.

Analysis and determination

20. This is the first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that, unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due to allowance for that disadvantage. See *Selle v Associated Motor Boat Company ltd* (1968) EA 123; *Williamson Diamond Ltd v Brown* (1970) EA 1.

21. In this appeal, it is clear from the appellants' submissions that the appellant is only challenging the quantum of damages on the aspect of pain and suffering since the parties entered a consent on liability. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* 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 have awarded a different figure if it had tried

the case at first instance. The appellate 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."

22. It was therefore held by the same court 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..."

23. Similarly, in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

24. I have considered the evidence tendered before the trial court, the learned trial magistrate's brief judgment, the grounds of appeal, the submissions filed by the parties and all the authorities cited. This being an appeal challenging the trial magistrate's decision on quantum of damages only, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the damages awarded by the trial court. In the celebrated case of *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2)* (1985) eKLR, the Court of Appeal expressed itself as follows; -

> " 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 to be that; it must be satisfied that either that 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...".
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> In *Mariga v Musila* (1984) KLR 251 the same court also stated as follows:
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> "The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...".

25. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned Judgment, it must be fair in the sense of what the claimant suffered. In my view whether at the trial court or on appeal, claimants should not aspire to a perfect compensation. This is because no amount of damages will replace or restore lost or damaged body parts of a claimant and that the damages awarded are merely to try and assuage the victim to some degree.

26. I wish to note that the discretion to award damages by a trial court is always unfettered and the same must be exercised judiciously in accordance with the law considering the relevant facts and circumstances of each case.

27. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of general damages awarded to the respondents in view of the evidence on record.

28. According to the record, the medical report by Dr Charles Andai prepared on January 13, 2020, the respondent sustained the following injuries: -

i. Fracture of proximal phalanx of the right big toe

29. The respondent in the report is said to have been treated at Bungoma West Hospital and Aga Khan Hospital, treatment including application of plaster of Paris boot to the right foot and analgesics, that she still complained of slight on and off pain in the right big toe and that she had pain in the right big toe on palpation. In conclusion, the doctor formed an opinion that the respondent sustained moderate bone injury in the mishap i.e., fracture of the proximal phalanx of the right big toe, the injury is in the process of healing and that he expected it to heal within one year from the date of the report. The respondent was also examined by the appellant's doctor Walter Adero who prepared a second medical examination and vide a report dated February 22, 2021 the respondent's injuries were note do have been fully healed with no complications or permanent disability.

30. I have considered the medical report of Dr Charles Andai and Dr Walter Adero as to the nature of the injuries sustained and the award on damages proposed. I have further considered the authorities cited by the parties herein both in the trial court and the appellant's submissions in this appeal.

31. The court in assessing the general damages has been invited to consider the cases of Eldoret HCA No 174 of 2016, *Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & Another* eKLR where the court made an award of Kshs 600,000/= for pain and suffering. In this case the Respondent sustained brain contusion, deep cut on the left side of the forehead, tender and swollen right forearm and a fracture on the proximal phalanx of the 5th right toe and the case of *Dickson Ciuri Wanjiru v Municipal Council of Nakuru & another*, Nakuru civil appeal No 150 of 2017 eKLR where the court made an award of Kshs 800,000/= to the appellant who sustained a fracture of the 4th and 5th metatarsals, fracture of the proximal phalanx left big toe, cut wound on the left thigh and bruises on the left knee.

32. Relying on the cases of the appellant: *Peter Bernard Makau vs Prime Steel Limited* (2018) eKLR where the respondent had sustained fracture on his toe and soft tissues injuries. On appeal the court maintained on the award of 100,000/= as general damages; the case of *Masinga Ndonga Ndonge v Kualam Limited* (2016) eKLR where the appellant sustained crush injury and fracture on his big toe and soft tissue injuries. The appellate court awarded the appellant Kshs 150, 000/= as general damages for pain and suffering and the case of *Peter Opiyo Ager v David Otieno Owino & another* (2020) eKLR where an award of Kshs 200,000/= for general damages for pain and suffering was maintained. The respondent had sustained dislocation on the neck (stiff neck), injuries on the shoulder, left arm, chest injuries and injuries on the small toe of the left leg with dislocation.

33. As duly noted by the trial court, general awards for pain and suffering is determined in the light of its own peculiar circumstances. This court must ensure that in re-assessing the quantum of damages, the same should not to be too generous to be ridiculous or too meagre so as to not meet the need of the victim.

34. Having considered all the authorities relied by the respondent, I am of the view that they don't have more closely similar injuries to those sustained by the respondent and should not attract a kin award.

35. I have considered the appellant's authorities cited before me and the one closesto the instant case was that of *Masinga Ndonga Ndonge v Kualam Limited* (2016) eKLR where the appellant sustained crush injury and fracture on his big toe and soft tissue injuries. The appellate court awarded the appellant Kshs 150, 000/= as general damages for pain and suffering.Judgement was however delivered on November 4, 2015 which was five years later. Considering the inflationary tendencies, this award will however be inordinately low for this court to consider. It is noted that the said authority was made over five years ago and that the incidence of inflation ought to be factored and hence the award of Kshs 540, 000/ by the trial court was not excessive in the circumstances. Nothing has been shown to the effect that the learned trial magistrate considered irrelevant factors in assessing the damages for pain and suffering. The same is hereby upheld. As there is no contention on the special damages, the same shall remain undisturbed.

36. In the premises, it is my finding that the appeal is devoid of merit. The same is hereby dismissed with costs to the respondent.

    It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER, 2022

D.Kemei

Judge

In the presence of:

No appearance for Appellant

No appearance for for Respondent

Kizito Court Assistant