Gichangi v Winrose (Civil Appeal E014 of 2022) [2022] KEHC 14211 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E014 OF 2022

LM NJUGUNA, J

OCTOBER 19, 2022

BETWEEN

DAVID NYAGA GICHANGI .... APPELLANT

AND

MOSES FUNDI WINROSE .... RESPONDENT

JUDGMENT

1. The appellant herein having been aggrieved by the decision of the lower court filed an appeal *vide* a memorandum of appeal dated February 11, 2022 in regards to the following grounds:

    i. The learned magistrate erred in law and in fact in unduly disregarding the appellant's evidence adduced in trial.

    ii. The learned trial magistrate erred in law and misdirected herself when she failed to consider the appellant's submissions on both points of law and facts.

    iii. The learned trial magistrate erred and misdirected herself as to the exact cause of the accident and the nature of the respondent's injuries and therefore erred in assessing the damages.

    iv. The learned trial magistrate erred in fact and law and misdirected herself in finding that the respondent is entitled to general damages of Kshs 350,000/= which amount is manifestly excessive.

    v. The learned magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the appellant.

    vi. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and further and failed to apply the precedents and tenets of law applicable.

vii. That the learned magistrate erred in law and fact in arriving at her said decision.

viii. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

2. The appellant thus prayed for the following orders to issue;

i. The appeal be allowed.

ii. The judgment of the Honourable Resident Magistrate Ouko on liability and quantum be set aside and the same be heard and assessed afresh.

iii. The costs of this appeal and that of the trial court be awarded to the appellant.

iv. That such further orders may be made by this Honourable Court as it may deem fit to grant.

3. The court directed that the appeal be canvassed by way of written submissions and the parties herein complied.

4. The appellant submitted that the amount awarded by the trial court is way too high in the given circumstances and the same ought to be considerably reduced. That it is trite that assessment of damages in a claim is a discretionary exercise. However, the law has set dimensions for an exercise of discretion and the same must be exercised judicially. Reliance thus was placed on the cases of *Denshire Muteti Wambua v Kenya Power 7 Lighting Co Ltd [2013] eKLR* and *Kigaraari v Aya (1982) 1 KAR 768*. As a result, this court was asked to disturb the determination arrived at by the trial court given that the respondent suffered soft tissue injuries and that there is no permanent incapacity assessed. It was prayed that an amount of Kshs 80,000/= be awarded instead, and the appellant be awarded costs.

5. The respondent submitted that the appeal herein is incompetent and fatally defective for the reason that the appellant did not attach a certified copy of the decree, as is mandatorily required. Reliance was placed on Section 65(1) (b) of the *Civil Procedure Act*. It was submitted that a decree is a primary document and failure to include it in the record is fatal as the same goes to the root of the appeal and jurisdictional aspect of a court. The respondent relied inter alia on the Supreme Court of Kenya decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others[2015] eKLR*; Court of appeal decision of *Abdi Nassir Nuh v Abdureheman Hassan Halkano & 2 Others [201] eKLR*. As such, it was submitted that there is no appeal before this court since no proper record of appeal was lodged.

6. On whether the award on general damages was inordinately excessive and unjustified, it was submitted that the trial court considered the evidence tendered by the plaintiff, written submissions and authorities and thereafter deemed it right to award Kshs 350,000/= as general damages for the injuries suffered by the respondent. That awarding damages is a discretion of the trial court and reliance was placed inter alia on the cases of *Savana Saw Mills Ltd v George Mwale Mudomo(2005) eKLR*, Embu HCCA No 71 of 2016 *Bonface Mugendi & another v Emilio Murimi Njue*. That given the nature of the injuries sustained by the respondent, the amount awarded by the trial court is commensurate to the injuries sustained; and further, there was no evidence provided to the contrary that the trial court acted on a wrong principle of law, misapprehended the facts or made a wholly erroneous estimate of the damages suffered by the respondent. In the end, this court was urged to dismiss the appeal herein with costs to the respondents.

7. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd (1968) EA 123*). However, this court will not ordinarily interfere with findings

of fact by the trial Court unless they were based on no evidence at all, or on misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See *Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278* and *Kiruga v Kiruga & Another (1988) KLR 348)*}. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and that what matters in the analysis is the substance and not its length. [See Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634* and *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR].

8. I have definitely analyzed the evidence which was tendered before the trial court and it is my considered view that the main issue for determination is whether the trial court erred in assessing the general damages.

9. Before I delve into the merits of the appeal herein, I do note that the respondent raised an issue as to the competency of the appeal in that the appellant failed to annex a certified copy of decree being appealed against contrary to the provision of Section 65 (1) (b) of the *Civil Procedure Act*. I will proceed and deal with the issue first.

10. The court has independently read and understood the authority by the Supreme Court as annexed by the respondent herein. My humble view in reference to the case is that the facts and thereafter the determination as reached by the apex court slightly differs with the case herein. I say so for the reason that the court referred to the case before it as incomplete of the requisite documents for the reason that it lacked several documents making the record of appeal. The same had been contested right from the High Court to the Supreme Court and it was determined that despite the appellant having been given several opportunities to make right his pleadings in the record of appeal, he failed to do so.

11. Having perused the record of appeal before this court, I find that the appellant attached the judgement subject of the appeal herein and from it, the court is able to discern the reasons and/or grounds informing the appeal herein. In the court's quest to serve substantive justice, I find guidance in the Court of Appeal decision in the *Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata* Civil Appeal No 63 of 2016 [2017] eKLR where it was held:

> " starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the *Civil Procedure Rules*...
>
> ...the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:
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> "The word "decree" has been defined by the *Civil Procedure Act* cap 21 to include judgment. Infact the *Civil Procedure Act* as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up".
>
> This is the essence of the proviso to the definition of the term "decree". According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court; consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice the Appellant suffered with the omission of the certified copy of the decree in the record of appeal. We do not discern any."

[Also See *Kenya women Micro Finance Ltd v Martha Wangari Kamau*[2020].

12. Whereas it is true that the appellant failed to annex a certified copy of the decree, he did attach a certified copy of the judgment which would suffice in the absence of a certified copy of the decree. Further, it has not been shown what prejudice the respondents suffered by the failure to annex the certified copy of the decree. I therefore find that the appellant's failure to annex the certified copy of the decree cannot be a basis for striking out of the appeal.

13. Turning to the substantive issue herein, the principles upon which an appellate court can disturb assessment of damages by the trial court were set out by the Court of Appeal for East Africa, and subsequently adopted by the Court of Appeal, and restated and applied in *Gitobu Imanyara & 2 others v Attorney-General [2016] eKLR*, where the court of Appeal cited the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia (1982 –88) 1 KAR 727* at p 730 where Kneller JA said: -

> '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 either 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. See *Ilango v Manyoka [1961] E.A. 705, 709*, 713; *Lukenya Ranching and Farming Co-Operatives Society Ltd v Kavoloto [1970] E.A., 414, 418, 419*. This Court follows the same principles.'

14. The Court further made reference to the case of *Gicheru v Morton & Another [2005] 2 KLR 333* where it was stated: -

> 'In order to justify reversing the trial judge's finding 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.'
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> [See *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*].

15. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 in setting out the circumstances under which an appellate court can interfere with an award of damages and held that: -

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. Further, that 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. (See also *Gicheru v Morton and Another (2005) 2 KLR 333*).

16. Therefore, the burden is thus on the appellant to satisfy the appellate court as to the above.

17. Bearing this in mind, I will then proceed to examine damages awarded in each of the limbs so as to determine whether the same ought to be disturbed. I will do this bearing in mind the difficulties that confront a court in assessment of general damages in the context of personal injuries claims as were appreciated by the court in *Ugenya Bus Service v Gachiki (1976-1985) EA 575*, at page 579;

> 'General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.'

18. In *Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No 7 of 2015 [2015] eKLR*, DS Majanja J expressed himself as such: -

> " The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."

19. The trial court awarded Kshs 350,000/= for general damages for pain and suffering ; and from the perusal of the injuries sustained by the respondent on the medical report produced by Dr Ndegwa, I note that the same were as follows:

   i. Marked neck tenderness.

   ii. Cut wounds on the right elbow.

   iii. Bruise on left elbow.

   iv. Right knee bruise.

20. The Court in *Ramadhan Kamora Dhadho v John Kariuki & another* Civil Appeal No 27 of 2015 [2017] eKLR opined thus;

> " There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts."

21. In the case of *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR* where the Court of Appeal revised downwards an award by the High Court of Kshs 700,000/= to Kshs 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.

22. In the case of *Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR*, where the respondent had suffered minor bruises on the back; no fractures on the tibia or fibula area of the right

leg which was hit; tenderness on the right leg, the court proceeded to set aside the amount of Kshs 300,000/= with Kshs 100,000/=.

23. Similarly, in Civil Appeal No 54 of 2016: *Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR* where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Kshs 300,000/= which was reduced to Kshs 100,000/= on appeal.

24. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Kshs 350,000/= as general damages and substituting it with one of Kshs 150,000/=.

25. The upshot of the foregoing is that, the appeal partially succeeds. Judgment is entered for the Respondent against the Appellants' at Kshs 150,000/= and interest at court rates from the date of the judgment of the subordinate court.

26. The appellant did not challenge the special damages. The figure awarded by the trial court remains undisturbed.

27. Each party to bear its own costs of the appeal.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF OCTOBER, 2022.

L NJUGUNA

JUDGE

................................for the Appellant

.............................for the Respondent