Kihara & another v Mwangangi (Civil Appeal 33 of 2018)
[2022] KEHC 15625 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 33 OF 2018

RM MWONGO, J

NOVEMBER 17, 2022

BETWEEN

RUTH WAIRIMU KIHARA ..... 1ST APPELLANT

KIHARA RAGAE ..... 2ND APPELLANT

AND

WILSON NDOLO MWANGANGI ..... RESPONDENT

(An appeal against the judgment of Hon. E. K. Nyutu in PMCC No. 153 of 2015 at Engineer)

JUDGMENT

Background

1. This appeal is one of a series of five appeals emanating from cases in the lower court (CMCC Case Nos 150, 151, 152, 153 and 165 of 2015). The claim in the lower court arose from a road traffic accident that occurred on 12/08/2015 along the Nairobi-Naivasha road at Kariko area at around 8.00am.

2. The Plaintiff/Respondent in the case that relates to this appeal (CMCC No 151 of 2015) was a lawful passenger in motor vehicle GKB 367E Toyota Land Cruiser, when the Defendants' vehicle Reg. No KBZ 799Z Isuzu Canter, was driven so negligently and recklessly by the defendants' driver, that he caused it to collide with the said GKB 367E. This resulted in the plaintiff sustaining serious injury, loss and damage.

3. The driver and other passengers in vehicle Reg No GKB 367E were: Sammy Kiprotich Chebon, Chief Inspector Victoria Mutuku; Sgt Sarah Situma; PC and Rukia Khakasa Namaswa, who, having been injured, also sued. The other suits in the series were CMCC Case Nos 150, 151, 152 and 165 of 2015. It was indicated that CMCC No 150/2015 was the lead file. Mr Khayega was for all the plaintiffs and Mr Ombui was for the defendants. The trial magistrate rendered individual judgments on each file rather than formally consolidating the suits, but liability was determined in CMCC no 150/2015.

4. At the hearing, the plaintiffs in cases Nos 150; 151; 152, 153 and 165 tendered their evidence. It was agreed that the evidence of PC Meshack Ngugi and the driver Sammy Kiprotich Chebon would apply to all the suits. Medical reports filed were provided by Dr WM Wokabi for the plaintiff and Dr M S Malik also filed medical report in respect of the plaintiff herein. The medical reports were produced as exhibits without objection. In each case, the defendants closed their cases without tendering any evidence.

5. It was agreed that liability be dealt with in CMCC No 150/2015. On appeal the same arrangement pertained. Thus, in the appeal therefrom, HCCA No 35 of 2018 Ruth Wairimu Kihara & Another v Sammy Kiprotich Chebon, the question of liability has been discussed in great detail and dispensed with. In the result this court found the driver and the appellants 100% liable for the accident. In the absence of evidence, no liability could be apportioned to the respondent.

6. Following the hearing in No 153/2015, the trial court made an award as follows:general damages, Kshs 600,000/-special damages of Kshs 7,000/- andcosts of the suit and interest.

7. The award was for the following injuries specified in Dr MW Wokabi's report:

    a. Fracture of the left 2nd and 3rd ribs.

    b. Fracture of the right ulna styloid process.

    c. Blunt injury to the chest showing Lung contusion.

    d. Injury to the eye leading to refraction error

    e. Blunt injury to the head causing swelling

The Appeal

8. This appeal challenges the quantum of damages awarded as being disproportionately high.

9. The grounds of appeal are that:

    1. The Learned Trial Magistrate erred in Law and in fact in finding the Appellant liable contrary to the evidence on record.

    2. The Learned Trial Magistrate erred in making a finding and arriving at an award damages which is inordinately high as to represent an erroneous estimate of the damages payable.

    3. The Learned Trial Magistrate erred in applying wrong principles and failing to take into account material facts arriving at an erroneous award.

    4. The Learned Trial Magistrate erred in Law and in disregarding the appellant's submissions and on all points of facts and law in as far as the award of damages is concerned.

    5. The Learned Trial Magistrate erred in Law and in fact in awarding Kshs 600,000/= for general, special damages of Kshs 7000 which are excessive and unrealistic in the circumstances against injuries allegedly sustained.

10. The appellant seeks that the finding of the trial magistrate on quantum be set aside or reviewed.

11. Parties filed written submissions as directed but did not highlight them.

12. The applicable principles for determination of this matter as a first appeal are set out in the case of *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....."

13. The court's duty is further amplified in *Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123*, pursuant to which the court is essentially required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear or see the witnesses who testified. If the court comes to different conclusions it must state them and consider whether the trial court relied on wrong principles or applied principles that were inappropriate.

14. Neither the evidence of the plaintiff nor that of Dr Wokabi was seriously contested. In their brief submissions, the appellants assert that the awards under each head were inordinately and manifestly high. Counsel cited *Tayab v Kinany (1983)* to the effect that comparable injuries should be compensated by comparable awards.

15. Further, the appellants submitted on and relied on the following authorities:*Morris Miriti v Nahashon Muriuki & Anor [2018] eKLR* where the High Court in Meru awarded Kshs 300,000/- for tender chest on the anterior and posterior; multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lug contusionand fracture of the right scapula.*Johnson Mose Nyaundi (Minor suing through father Wilfred adibe Nyaundi) v Petroleum Industries Ltd* Kisumu HCCA No 183 /2010 [2014] eKLR. Here, the plaintiff sustained bruises on the face, chest, contusions, cerebral concussion, bruises on the elbows and fracture of the right tibia and fibula, and was awarded Kshs 180,000/-

16. Counsel for the appellants did not challenge the award of special damages.

17. The question is whether the court will interfere with the findings of fact or the discretion of the trial court. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982 – 88) IKAR 278 stated as follows:

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"

18. As earlier noted, the point of contention in this appeal is the quantum of damages awarded in the lower court, which is viewed as inordinately high by Appellants. The court, in determining the matter will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A M Lubia and Olive Lubia* (1987)KLR 30 where it was held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages."

The same position is found in *Butt v Khan (1981) KLR 349*; *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414*; and *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001 [2004] eKLR.

19. In effect, this court would not be justified in substituting an award of its own for that in the court below simply because it would have arrived at a different figure.

Quantum of damages

20. PW1 Wilson Ndolo gave evidence in chief which was in his witness statement dated November 18, 2015 and filed on November 18, 2015 that was adopted. He testified that he sustained fractures of the right hand, on the 2nd and 3rd ribs, injuries on the left side of the chest and head. He testified that the head injury hampered his sight leading him to wear glasses.

21. He produced copy of treatment notes from Eldama Ravine Hospital marked as Exb 1, discharge summary as Exb 2, sick sheet as Exb 3, CT scan for the brain marked as Exb 4, CT Scan for the chest marked as Exb 5, P3 Form Exb 9, medical report by Dr Wokabi as Exb 10 and receipts as Exb 11.

22. On cross-examination, he testified that he had not healed completely.

23. On the issue of quantum the trial court relied on the medical report by Dr W M Wokabi who examined the plaintiff on October 12, 2015. The court also noted the medical report by Dr M S Malik whose opinion was that the plaintiff suffered soft tissue injuries to his head and chest and an un-displaced crack fracture of the tip of his right ulna styloid. In his opinion the plaintiff suffered total incapacity of a temporary nature for a period of 6 weeks

24. The injuries are not disputed. The trial court took into consideration the doctor's opinion; and noted the fact that the plaintiff proposed general damages of 600,000/- relying on the decisions in *Timothy Kimani Kiarie v Kapchorua Tea Estate & Another* Eldoret HCCC 121 of 2008 and *China Wu Yi Co Ltd v Andrea Githinji Gitonga* Nakuru HCCA No 194 of 2013.

25. The trial court also noted that the defendants proposed an award of Ksh 250,000 general damages in the lower court and relied on the case of *Hassan Noor Mohamed v Tae Youn Ann [2004] eKLR*.

26. The trial court awarded general damages of Kshs 600,000/- having considered the parties' submissions. In so doing, it relied on the following cases:

    a. *Kennedy Kosgey v Kormoto General Agencies [2014] eKLR* where the plaintiff sustained blunt trauma to the chest , fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5% and general damages awarded was Kshs 400,000/- upheld on appeal.

    b. *Haron Cheron v Eastern Produce (K) Ltd [2014] eKLR* where the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and a fracture of the right olecranon of the right ulna at the elbow joint. He was awarded Kshs 350,000/- upheld on appeal.

27. In their submissions on appeal, the appellants reiterated their reliance on the Morris Miriti and Johnson Mose Nyaundi cases (supra).

28. On his part, the respondent relied on the *Timothy Kiarie Kimani* case (supra), and introduced the case of *Joseph Kimanthi Nzau v Johnson Macharia Machakos* HCCA No 198 of 2015 where the plaintiff suffered fracture of the skull, right clavicle, left V and 2nd ribs and multiple soft injuries. Odunga, J,

on appeal set aside the general damages awarded by the subordinate court and awarded the Appellant the sum of Kshs 800,000/- as general damages for pain, suffering and loss of amenities. This decision was made on June 24, 2019

29. I have carefully considered the evidence and documents availed in this matter together with the parties' representations and authorities.

30. It is clear that the injuries in the cases cited by the appellant are less severe than those suffered by the respondent. On the other hand, the injuries in the cases cited by the respondent are far more severe than those sustained by him.

31. I think the trial court's role is to reach a fair balance in its assessment of the damages to be awarded relative to the injuries suffered, and in so doing ensure comparability with injuries and awards in similar prior cases.

32. In this case, the trial court correctly took its guidance from the 2014 cases of Kennedy Kosgey and Haron Cheron case. In the former, the plaintiff suffered blunt trauma to the chest, fracture of the anterior ribs and dislocation to his shoulder. Permanent disability was assessed at 5%. He was awarded 400,000/-, which was upheld on appeal. In the latter case, the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and a fracture of the right olecranon of the right ulna at the elbow joint. He was awarded Kshs 350,000/- upheld on appeal.

33. The plaintiff in the present case suffered fractures of 2nd and 3rd ribs and also right ulna styloid process. Other injuries were blunt injuries to chest head and eye. He sustained only temporary disability.

34. Those cases were determined in 2014, four years before the present case. Thus even assuming a 20% increase in inflation over those years, the Kennedy Kosgey award in 2018 would be around 480,000/-.

Disposition

35. I therefore think the trial court's assessment was on the higher side and I would reduce the award to Kshs 500,000/.

36. Accordingly, I set aside the award of 600,000/- and substitute it with an award of general damages of Kshs 500,000/-.

37. As for special damages, these were not challenged and I would not disturb the award thereon.

38. In the result, the appeal succeeds to the extent shown herein. Each party will bear its own costs of the appeal.

39. Orders accordingly.

DATED AT KERUGOYA THIS 17TH DAY OF NOVEMBER, 2022.

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R MWONGO

JUDGE

In the presence of:

Mr Ombui for the Appellants

Mr Khayega for the Respondent

Quinter Ogutu Court Assistant