REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 1 OF 2020

AMANI SAFARI NZAI.....APPELLANT

VERSUS

HASSAN MOHAMED HASHIM AYUB.....1ST RESPONDENT

ALI HASSAN.....2ND RESPONDENT

INNOCENT ODERA.....3RD RESPONDENT

(Being an appeal from the Judgment of the Hon. D.Wasike - Resident Magistrate Court at Malindi dated and signed and delivered on the 30/10/2019 in Malindi CMCC No. 405 of 2018)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the Appellant

Hassan Mohamed Hashim Ayub, Ali Hassan

and Innocent Odera – Respondents in person

J U D G E M E N T

Background

On or about 21.6.2018 the Appellant was involved in a road traffic accident along Mombasa-Malindi Road while driving motor-vehicle registration No. KTWB 202L(tuk tuk) when the 3rd respondent negligently, drove, managed motor vehicle registration number KBG 005M that a collision occurred in which the appellant sustained severe injuries consequently the appellant instituted a claim for negligence against the respondents in the Chief Magistrate's Court at Malindi seeking damages and other reliefs for personal injuries sustained. The particulars of negligence outlined in the paragraph 4 of the plaint constituted the basis upon which liability was founded against the respondents. The respondents who were dutifully served failed to enter appearance or defence. An interlocutory judgement was entered on 22.2.2019 and thereafter in compliance with procedural law a formal proof on the issues was scheduled by the Court.

Appellant's Case

At the trial, the Appellant stated that he was involved in the aforesaid accident, while lawfully driving motor vehicle registration number KTWB 202L (tuk tuk) while joining the road from BP Petrol Station. That the accident was as a result of high speed and negligent overtaking by the respondent's motor vehicle at the time being driven by the 3rd respondent. It was due to the collision the appellant suffered injuries involving a fracture of the left tibia, leg bone, cut on the right elbow and cut on the right knee. He placed relevance in support of these on the P3 form produced as exhibit 2 – treatment notes, police abstract and the medical legal report by Dr Adede dated 7.11.2018.

Having heard, the evidence and submissions, the learned trial magistrate on 30.10.2019 delivered her judgement awarding the damages premised as follows;-

a) General damages of Kshs.200, 000/=.

b) Special damages of Kshs.8, 400/=.

c) Costs of the suit and interest on (a), (b) above

Being aggrieved with the findings made on assessment of damages, the appellant lodged an appeal to this court, challenging the decision. The following are the grounds of appeal;-

> ***1) The learned trial magistrate erred in law and in fact in finding that the plaintiff was entitled to general damages of Kshs.200,000/= which was so inordinately low in view of the injuries suffered by the appellant that it presented a miscarriage of justice.***
>
> ***2) The learned trial magistrate erred in fact and in law by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arrived at an erroneous figure on quantum.***
>
> ***3) The learned trial magistrate erred in law and in failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.***
>
> ***4) The learned trial magistrate erred in law and in fact when making her award she failed to consider the passage of time and incidence of inflation.***

Any proper analysis of the grounds of appeal boils down to the one sole grievance that the learned trial magistrate assessment of damages for personal injuries was inordinately low.

The Appellants Submissions

Mr Wambua, counsel for the appellant, relying on the grounds of appeal argued the grounds of appeal together and therefore made what I call global submissions. In his quest to persuade this court counsel submitted that for purposes of this appeal, the award of general damages by the learned trial magistrate was not in consonant with similar awards in the previous cases. The learned counsel argued that in light of the decisions in ***Nyambati Nyaswambu Erick V Toyota Kenya Ltd & 2 others HCCA No. 66 of 2018*** and an occurrence of the award of Kshs.800,000/= for similar injuries, the assessment by the learned trial magistrate for the applicant remains inordinately low. Furthermore, learned counsel cited the case of ***Clement Gitau V GKK HCCA No. 512 of 2012 Nairobi***, where the respondent who suffered a fracture of the libia and bruises on the neck was awarded Kshs.600, 000/=. Finally relying on the case of ***Vincent Mbogholi V Harrison Tunje Chilyalya HCCA No. 32 of 2015***, it was the appellant counsel contention that the least such injuries would attract is in the range of 500,000/-.

The question remains whether the appellant has placed before the court sufficient material and legal perspectives in regard to the exercise of discretion by the learned trial magistrate on assessment of damages.

Discussion and determination

It is trite that on first appeal the court has the jurisdiction to review the trial court record in its entirety in order to determine whether the conclusion arrived at by the learned trial magistrate was erroneous or a misdirection of the law and assessment of the evidence to the facts of the claim. That jurisdiction to review comes with a safeguard and cautionary clauses, on observation made by the trial court on the demeanor and credibility of witnesses, being an advantage only accorded that other court.

Secondly, the review of evidence should not be an automatic power on appeal to substitute the court's decision with that of the trial court (For these see ***Peter v Sunday Post Ltd [1958] EA 429***. The extent of this court's jurisdiction in reviewing the evidence on factual evaluation has also been stated in the case of ***Mbogo v Shah [1968] EA 93*** at 96;-

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless, it is satisfied that the judge in exercising his discretion has misdirected himself in the matter, and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result has been a misjustice."(****See also* ***G.V.Odunga Digest on Civil Law and procedure 3rd Edition Vol 2). What this principles construe is the fact of the legal disposition earlier on explained in Peters V Sunday Post (supra)."***

The appeals court has therefore to be satisfied that the decision of the trial magistrate cannot be explained by or reasons, in my view given are inconsistent. So far as it stands without evidence of the witnesses, the decision of the trial magistrate being challenged is purely on assessment of general damages in the case of ***Gitobu Imanyara & 2 others V Attorney General [2016] Eklr*** is instructive to the standard guidance required of judges of appeal in that exercise of jurisdiction thus;-

> ***"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 judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.(See also Butt V Khan [1981]eKLR 349, Kemfro Africa Ltd T/A Meru express Service Gathogo Kanini V A.M.Lubia and Olive Lubia[1982] 88 IKAR 727."***

The important consideration as the authorities above make it plain no interference of a trial court decision should be entertained on appeal unless on intelligible and sufficient reasons laying the basis for the court's decision.

In summary, the well-established approach of appeals in cases of this nature is to bear in mind that any assessment of damages by a trial court is a discretionary function giving effect to claim as founded by the appellant. The burden of proving that the trial magistrate exercised her discretion wrongly, capriciously or arbitrary rests with the appellant. All that is required to justify an award of damages for pain and suffering is the importance of underpinning the assessment on the time honored principles in ***Cornilliac V St Louis[1965]7 WIR 491*** to wit;-

a) The nature and extent of the injuries sustained

b) The nature and gravity of the resulting physical disability

c) The pain and suffering which had to be endured

d) The loss of amenities and the

e) The extent to which, consequentially the claimant's pecuniary prospects have been materially affected.

Admittedly the concept of pain and suffering also includes the mental distress that goes with the physical examination, with respect on proof of existence or non-existence of this fact as expressly stated in section 107(1) of the Evidence Act. The Courts seem to place reliance on the admissible evidence from the claimant on how he or she suffered and endured pain following occurrence of the accident. The testimony may also include any eye or indirect witness who observed him or her in that condition of pain and distress. It is usually followed by the medical examination from a qualified physician, based on physical examination, his or her objective symptoms displayed and other medical phenomena likely to influence a fact of pain and suffering. Of course, under section 119 of the evidence Act the court may presume existence of any fact on the alleged pain and suffering as tangible and likely to have occurred to the claimant.

The difficult arises in this regard for matters that scientifically the symptoms associated with pain and suffering are not measurable. There is absolutely no person in the world who knows the existence or intensity of the pain being felt by the claimant or for that matter, the appellant in this appeal. While the fundamental rule of law is to award damages as nearly as possible to compensate the claimant and put him in a position he or she was before the injury occurred, that standard to fix the estimate is compounded on account of pain and suffering with a differential from one individual to another. The threshold of the means of measurement being the variables in the similar past awards assessed by the Courts.

It is an important duty of a judge or trial magistrate to bear in mind that an exact compensation applying similar and past awards principle is impossible. Generally, it is trite law that judges and magistrates only endeavor to make a reasonable or sane estimate. It must be understood this process has practical considerations as the level of mainstreaming discretion in decision making is influenced by the peculiar facts of each case and the methodology of reasoning used by judges or magistrates which may be distinct giving rise to the variations in the assessment of damages. What is intriguing is whether the principles were consistent with the laid down principles.

In light of the above propositions examined it underscores a critical reality which ought to be appreciated in this jurisprudential question that the law relating to damages for pain and suffering is extremely uncertain and the assessment of it is highly unpredictable. On a balance pecuniary damages reproduce inequality and that is the reality displayed in the tort branch of law and assessment of damages meant to appease the victim fails in that regard.

Reverting to the grounds of appeal and submissions by counsel for the appellant the amount of award made by the trial court for pain and suffering cannot be held to be inordinately low. In answer to this issue on assessment I have taken the liberty to scrutinize the evidence by the appellant as corroborated with the documentary exhibit of treatment notes, P3 form and finally the medical report by Dr Adede, it is discernable the discretion exercised factored in such credible strands of evidence. The learned trial magistrate did not stop there she had to consider other awards within our jurisdiction as canvassed by the appellant counsel at the trial of the case. As stated elsewhere this is not a precise science or where the mathematical formulae might reign supreme in order to get the best estimate.

As a whole in the instant appeal appellant counsel invited the court to go deeper into the cited authorities in order to faulter the decision by the learned trial magistrate. Having also considered the nature of the injuries sustained and the plethora of cases in similar circumstances I am of the opinion that I see no error, or irrelevant material, or wrong principles having been taken into account by the learned trial magistrate to render the assessment erroneous or inordinately low. Therefore upon these findings of fact alluded by the appellant, what is exactly meant by an inordinate low award without compelling evidence leaves the court with no excuse to interfere with the judgement.

In my view the appellant clearly failed in that duty of unpacking the evidence and the impugned judgement in circumstances to bring the appeal within the scope of ***Mbogo V Shah(supra).*** Therefore the decision to dismiss the appeal resonates well with the principles in ***Wells v Wells [1998] 3 ALL ER 481*** that;-

"The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the Court's best estimate of the plaintiff's general damages."

In conclusion, compensation is generally the main objective of pain and suffering damages. Primarily as expressly stated in ***Cornilliac V St Louis (supra)*** factors such as the nature, duration, intensity of the pain and the seriousness of the injury contribute greatly to the correct assessment of damages. In my view the subsequent appeal did not demonstrate the approach taken by the learned trial magistrate did not incorporate this criteria explicitly or implicitly in categorization of general damages. Accordingly, the appeal to this court is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 25TH DAY JUNE, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.