



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 2 OF 2020

MICHAEL OWUOR OBONYO.....APPELLANT

VERSUS

FELIX ONYANGO OWINO.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon Ondieki (SPM) delivered at Kisumu in Chief Magistrate's Court Case No 198 of 2015 on 10th December 2019)

JUDGMENT

1. In his decision of 10th December 2019, the Learned Trial Magistrate, Hon R. Ondieki, Senior Principal Magistrate, entered Judgment in favour of the Respondent as against the Appellant in the following terms:-

a. Liability at 100% in favour of the Respondent herein

b. General Damages Kshs 500,000/=

c. Special damages Kshs 2,000/=

Plus cost of the suit and interest thereon at court rates.

2. Being aggrieved by the said decision, on 7th January 2020, the Appellant filed a Memorandum of Appeal dated 18th December 2019. It relied on nine (9) grounds of appeal. At the time of submitting, he abandoned Grounds of Appeal Nos 1, 2, 3 and 4 that faulted the Learned Trial Magistrate's finding on liability.

3. The Appellant's Written Submissions were dated 16th March 2021 and filed on 17th March 2021 while those of the Respondent were dated 24th March 2021 and filed on 30th March 2021. The Judgment herein is therefore based on the said Written Submissions that the parties relied upon in their entirety.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

6. As the Appellant had abandoned grounds of appeal that faulted the Learned Trial Magistrate's finding on liability, this court considered the remaining grounds of appeal dealing with the issue of quantum together as they were related.

7. The Appellant relied on the case of **Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) 1 KLRD (sic) at pg 5** where the Court held that an appellate court will not disturb an award of damages unless it was shown that the trial court proceeded on wrong principles or that it

misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low as to represent an entirely erroneous estimate.

8. It was his contention that parties are bound by their pleadings. He argued that whereas in his Pleint the Respondent had pleaded that his injuries comprised of dislocations, he failed to mention the same in his in examination-in-chief. He added that it was upon being cross-examined, that he indicated that he had suffered a dislocated left shoulder, left knee and at the hip joint, which testimony, he asserted was not pleaded in the said Pleint.

9. He added that although treatment notes from Kisumu East District Hospital were filled on the date of the accident and the P3 Form was filled two (2) days post-accident, none of them indicated that the Respondent had suffered any dislocations. He contended that Dr Robert Otieno Omollo (hereinafter referred to as "PW4") who attended to the Respondent immediately after the accident confirmed during his cross examination that the Respondent did not sustain any fracture or dislocation.

10. He asserted that the testimony of Dr Manaseh Onyimbi (hereinafter referred to as "PW3") was that the Respondent sustained dislocation of the right shoulder joint, fracture of two ribs and a dislocation of the right knee joint and right ankle was inaccurate and not supported by any independent source.

11. He was categorical that the Learned Trial Magistrate's award of Kshs 500,000/= as general damages was inordinately high for the reason that the injuries comprised of what he termed as "blunt injuries" with no dislocations and/ or fractures. He faulted the Trial Court of assessing damages without giving the reasons for that finding and failing to buttress its finding with relevant authorities of awards given by other courts in comparable cases. He pointed out that the said award was flawed and thus warranted the interference of this court.

12. He submitted that an award of Kshs 120,000/= was sufficient to compensate the Respondent for the injuries that he sustained. In this regard, he relied on the case of **FM (Minor suing through mother and next friend MWM) vs JDK & Another [2020] eKLR** where the Court awarded the Appellant the sum of Kshs 100,000/= as general damages for injuries similar to the Respondent's herein.

13. On the other hand, the Respondent submitted that the Appellant had not demonstrated that the Trial Magistrate applied a wrong principle of law or that he was misguided by any evidence on record thus the award by the Trial Court was appropriate.

14. He relied on the case of **BB (A minor suing through his next friend and father GON) vs Raga Kamau Kanja [2019]e KLR** where the Court of Appeal in retaining the award on quantum relied on the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M Lubia and Olive Lubia (1982-88) 1 KAR 727 at p 730** held that in deciding whether to disturb an award on quantum of damages by a Trial Court, it was necessary that the appellate court be convinced either that the trial court acted upon some wrong principles of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage to which the appellant was entitled.

15. To buttress his point, he further relied on the case of **Ilango vs Manyoka [1961] EA 705,709, 713** and **Lukenya Ranching and Farming Cooperatives Society Ltd vs Kavoloto [1970] EA 414, 418, 419** and **Gicheru vs Morton & Another (2005) 2 KLR 333** where the court applied the same principles.

16. He was categorical that he produced evidence of the injuries he sustained and noted that the same were not rebutted by any other doctor's examination report which would perhaps have assisted the trial court to mitigate the damages.

17. He also drew the court's attention to Order 17 Rule 4 of the Civil Procedure Rules which states, **"where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."**

18. He also relied on Section 109 of the Evidence Act Cap 80 Laws of Kenya that states that **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

19. In his evidence-in-chief, the Respondent testified that as a result of the accident he sustained injuries on the head, left side ribs, left lip, knee, neck and bruises. He added that his waist is not functioning well. In his cross-examination, he testified that he dislocated his left shoulder, left knee and hip joint. He stated that although x-rays were taken, he did not adduce them in court.

20. PW3 testified that the Appellant sustained on the head with damage to RHT parental aspect pamelas (sic), sprain of the spine of the neck, dislocation of right shoulder joint, dislocation of the right knee joint and right joint ankle, dislocation of right hip joint chest injury, fractured two ribs which led to the prolonged bleeding, blunt abdomen injury and multiple cut wounds on both limbs.

21. He added that the severe chest pain caused the Appellant difficulty in breathing, the dislocation joints caused him painful sensation, inability to stand or walk for long and inability to actively engage in normal duties. He testified that his report was based on Kisumu District Hospital treatment notes and physically saw the patient. He classified the said injuries as grievous harm.

22. PW4 filled the P3 Form. He testified that upon examining the Respondent he concluded that he had sustained multiple bruises on the right leg, right thigh and right hip, chest pain. He classified the injuries as "harm".

23. According to the Pleint dated 27th April 2015, the Respondent was said to have sustained a dislocation of the right ankle joint, dislocation of the right knee joint, blunt injury to the right ribs, dislocation of the right hip joint and bruises on both the lower and upper limbs.

24. His Witness Statement that was dated 27th April 2015 did not make reference to any specific injuries. He merely stated that he was seriously injured and taken to hospital by good Samaritans and that he had not fully healed from his injuries.

25. The Respondent was treated at Kisumu East District Hospital on 9th November 2014. The treatment notes showed that he suffered injuries on the lower and upper limbs and on the chest. The P3 Form indicated that he had sustained multiple bruises on the right leg, right thigh and right hip joint. He had also complained of chest pains. He was given analgesic and his wounds dressed. His injuries were classified as “harm”.

26. It is trite law that a party is bound by his or her pleadings. Notably, the Respondent pleaded dislocation of the ankle joint, knee and hip joint. He did not plead any fracture. It was immaterial that he did not specifically mention the word “dislocation” in his examination-in-chief as he was a layman.

27. Having said so, the evidence of PW3 and PW4 evidence differed significantly. Whereas PW 3 was the one who initially handled the Respondent herein, the treatment notes made no reference to the serious injuries that he testified the Respondent herein suffered. He did not adduce any x-ray and/or documentary evidence to show that indeed the Respondent sustained the dislocations and fractures as he had asserted. Notably, PW 4 relied on the same treatment notes in filling the P3 Form and he made no mention of the dislocations and/or fractures.

28. As the Respondent correctly submitted, Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

29. Whereas the standard of proof in civil cases is on a balance of probabilities and it is not as strict as the standard of proof in criminal cases which is beyond all reasonable doubt, the onus was still on him to demonstrate that he did sustain fractures and dislocations as he had contended. He did not adduce any proof to that effect. In the absence of any proof, this court took the firm position that it could only rely on the injuries that were shown in the initial treatment notes and P3 Form.

30. Notably, it must be understood that money can never really compensate a person who has sustained any sort of injury. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents.

31. Further, this court had due regard to the case of **Kigaraari vs Aya (1982-88) 1 KAR 768** where it was held that:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

32. This court thus considered the injuries the Respondent sustained vis-a-vis decided cases where plaintiffs suffered similar and/or comparable injuries and found and held that the quantum that was awarded by the Learned Trial Magistrate in the sum of Kshs 500,000/= was manifestly excessive as to warrant interference by this court as there was no proof of fracture and neither did the Plaintiff plead any fracture or proof that he sustained any dislocations or fractures.

33. The Appellant’s proposal of Kshs 100,000/= was, however, inordinately low. Taking inflationary trends and the impact of huge awards on quantum into consideration, this court came to the conclusion that a sum of Kshs 200,000/= would be reasonable compensation.

34. In arriving at this figure, this court had due regard to the following cases:-

1. Michael Okello v Priscilla Atieno [2021] eKLR

In 2021, the court therein set aside an award of Kshs 500,000/= and replaced the same with an award of Kshs 225,000/= where the respondent therein had sustained injury to the right shoulder, injury to the chest, injury to the back and injury to the left leg with haematoma.

2. Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR

In 2020, the court therein set aside the quantum of Kshs 650,000/= and replaced the same with a sum of Kshs 400,000/= general damages where the respondent therein had sustained bruises on the scalp, neck, abdomen, lower back, cut wound on the left thumb, left palm and left foot near the ankle joint, subluxation of the left shoulder joint and fractures 3rd and 9th ribs.

DISPOSITION

35. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 7th January 2020 was merited. The effect of this is that the Judgment of the sum of Kshs 502,000/- that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgement that be and is hereby entered against the Appellant herein for the sum of Kshs 202,000/= made up as follows:-

a. General Damages Kshs 200,000.00

b. Special Damages **Kshs 2,000.00**

Kshs 202,000.00

Plus costs and interest thereon at court rates. Interest on special damages will be from date of filing suit while interest on general damages will be from the date of judgment of the lower court.

36. Although the Appellant was successful in its Appeal in which case costs should follow the event, this court deviated from the general principle that costs follow the event for the reason that the Respondent had suffered a reduction of the quantum that he had been awarded by the Trial Court. Accordingly, this court hereby directs that each party bear its own cost of this Appeal.

37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE