Ondieki v Marwa (Civil Appeal E018 of 2024)
[2025] KEHC 2831 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E018 OF 2024

DKN MAGARE, J

MARCH 3, 2025

BETWEEN

PETER OYONGO ONDIEKI ..... APPELLANT

AND

IMMACULATE NYASEBA MARWA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. S.N. Abuya (CM) on 21.2.2024 in Kisii CMCC No. E319 of 2023.

2. The appeal is on quantum only. The Appellant lodged the Memorandum of Appeal dated 23.2.2024 raising the following grounds of appeal:

    a. The learned magistrate erred in law and fact in awarding general damages that were inordinately low.

    b. The learned magistrate erred in law and fact in failing to award Ksh. 200,000/= for future medical expenses.

    c. The learned magistrate erred in law and fact in failing to consider relevant legal principles.

Pleadings

3. In the Plaint dated 26.4.2023, the Appellant claimed damages for an accident pleaded to have occurred on 30.12.2022 along Kisii – Migori road at Kerina area involving the Appellant's motorcycle registration No. KMFC 077C and motor vehicle Registration No. KBS 346V driven by the Respondent or his agent. The Appellant set forth particulars of negligence and injuries and pleaded special damages. The injuries were pleaded follows:

    i. Right tibia (medial malleolus) fracture

ii. Right fibula (lateral malleolus) fracture

iii. Blunt trauma to the lower back

iv. Bruises on the right upper limb

v. Chest contusion

vi. Blunt trauma to the abdomen

vii. Bruises to the left upper limb.

4. The special damages were also pleaded as follows:

Treatment expenses Ksh. 179,462/=

Medical report Ksh. 5,000/=

Demand Ksh. 140/=

Doctor's attendance Ksh. 6,000/=

2nd Medical examination Ksh. 3,000/=

Future medical expenses Ksh. 200,000/=

5. The Respondent filed her defence dated 19.5.2023. She denied the particulars of negligence as pleaded by the Appellant and blamed the Appellant for the accident. The lower court considered the matter and awarded reliefs as follows:

i. Liability agreed at 70:30 as agreed

ii. Special damages Ksh 384,462/=

iii. General damages Ksh. 350,000/=

Evidence

6. PW1 was Dr. Morebu Peter Momanyi. He relied on his medical report produced in evidence. He testified that the Appellant needed surgery to remove metal implants at Kshs. 200,000/-. On cross-examination, he testified that the Appellant had two fractures on the right tibia and right fibula.

7. PW2 was the Appellant. He relied on his witness statement and bundle of documents filed in court and produced the documents in the list. He testified that he paid Kshs. 5,000/= for the medical report. He was not fully healed. The right leg had metal implants fixed.

8. By consent, the parties agreed on liability at 70:30 in favour of the Appellant. The 2nd medical report by Dr. E.O. Oluoch, dated 6.6.2023, was also produced in support of the Respondent's case, and parties then would file submissions on the issue of the quantum of damages.

Submissions

9. The Appellant submitted that an award from Ksh. 850,000/= - 1,400,400/= would have been adequate as regards the injuries herein while the Respondent submitted that Kshs. 350,000/= was adequate. They stated that a proper award was Ksh. 200,000/=. However, since there was no cross appeal, they will live with the said amount. The Appellant relied on Kimani v Tunje (2023) eKLR and Mwangi v Siloma (2023) eKLR. The Respondent relied inter alia on Simon Mutisya Kavii v Simon Kigutu Mwangi (2013) eKLR.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held 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 re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

13. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

14. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

15. The appeal herein is on quantum. There is the medical report by Dr. Morebu dated 30.12.2022. The medical report found the injuries as pleaded and a permanent disability of 20%. It also estimated the cost of removing metal implants at Kshs. 200,000/-. The Respondent relied on the medical report dated 6.6.2023 by Dr. E.O. Oluoch. Therein, there was no permanent disability suffered by the Appellant but there was temporal disability of 23%. The plates and screws were still in situ. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

16. However, a medical report will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. The Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

17. The evidence of a medical report as is in this case must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

18. This court will independently reevaluate the expert reports herein. The Appellant had metal fixation in the left tibia and that was the common position of the medical doctors. The Respondent's doctor did not dispute that the metal fixation in the left tibia of the Appellant would need to be removed and he did not dispute the projected amount of Ksh. 200,000/= as required to take care of the removal of the metal implants. Therefore, the lower court was in error when it declined to award the Appellant Ksh. 200,000/= for future medical expenses. I award the same.

19. On the question of quantum of damages, the Court of Appeal in Catholic Diocese of Kisumu vs. 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:

> " 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."

20. The court of appeal further postulated in the case of Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 as follows:

> " 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... The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

21. The court of appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

22. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages :-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

23. It is thus settled that for the appellate court to interfere with the award it is not enough to show that the award is high or that had I handled the case in the subordinate court, I would have awarded a different figure. It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established as correctly stated in Ngonze v Ng'ang'a (Civil Suit 82 of 2017) [2024] KEHC 11261 (KLR) (26 September 2024) (Judgment), where this court stated as doth:

> " 46. Assessment of damages is exercise in discretion. In the case of Butler –V- Butler (1984) KLR 225 the court held: -"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision."

47. Nevertheless, the court is duty bound to assess damages even when the suit is dismissed. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -"It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

24. With the above guide, if the award proposed by the lower court is inordinately low, then I will have to set it aside. If, however, it is just low but not inordinately low, I will not do so.

25. The injuries pleaded and proved were as follows:

i. Right tibia (medial malleolus) fracture

ii. Right fibula (lateral malleolus) fracture

iii. Blunt trauma to the lower back

iv. Bruises on the right upper limb

v. Chest contusion

vi. Blunt trauma to the abdomen

vii. Bruises to the left upper limb.

26. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards." I understand no single case is typically identical to the other. In Penina Waithira Kaburu v LP [2019] eKLR, the Court stated thus on the issue of award of general damages –

> "While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

27. In my reevaluation, the lower court did not cite any authority that guided its founding on the award of general damages. I dismiss the authorities relied on by the Appellant as they projected more severe injuries. The authorities by the Respondent on the other hand presented lessor injuries to the one in this case. I now analyze similar fact cases on quantum.

28. The Civicon Limited case (supra) had distinguishable injuries. Therein, the 2nd Plaintiff, one Gladys Nyakerariao Omwancha suffered a fracture of the tibia and fibula and dislocation of the hip joint and was awarded Kshs. 1,000,000/= that was reduced to Kshs. 450,000 on appeal. In Sammy Mugo Kinyanjui & Another vs Kairo Thuo (2017) eKLR, Kshs. 600,000/= was awarded for the Plaintiff,

who had slight tenderness in the forehead, neck, chest, abdomen, right knee, and both legs; fracture of the right tibia; fracture of the left tibia and fibula.

29. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR, the court set out the principles guiding the court in assessing damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

30. Equally, it is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

31. Therefore, in the circumstances, the award of Kshs. 650,000/- for general damages would in my view be adequate compensation to the Appellant. This court finds that the lower court erred in not awarding the damages for future medical expenses. In the case of, Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

32. Future medical expenses as special damages should be pleaded and proved. The Appellant pleaded, and Dr. Morebu proved Ksh. 200,000/=. As was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the

circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

33. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 384,462/=, which the lower court granted. The same are in order.

Determination

34. In the upshot, I make the following orders:

    a. The lower court's Judgment on general damages is set aside and substituted with an award of Kshs. 650,000/= subject to contribution.

    b. Special damages of Kshs. 384,462/= were not challenged.

    c. The Appellant is awarded Ksh. 200,000/= for future medical expenses.

    d. The Appellant shall have costs of this appeal assessed at Kshs. 95,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Orayo for the Appellant

Mr. Kamau for the Respondent

Court Assistant – Michael