Nganga & another v Okwaro (Civil Appeal 476 of 2022)
[2025] KEHC 6075 (KLR) (Civ) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 476 OF 2022

TW OUYA, J

MAY 15, 2025

BETWEEN

HELLEN NJERI NGANGA ..... 1ST APPELLANT

CHARLES MWORIA MBUI ..... 2ND APPELLANT

AND

LIYEGWA FRANCIS OKWARO ..... RESPONDENT

(appeals emanated from the judgement/decree and orders of Hon D. O Mbeja dated 29th May 2020 in civil suit No. 1060 of 2017 and 1059 of 2017)

JUDGMENT

1. This is an appeal that was consolidated with Milimani HCCA 475 of 2024. Both appeals emanated from the judgement/decree and orders of Hon D. O Mbeja dated 29th May 2020 in civil suit No. 1060 of 2017 and 1059 of 2017 awarding the respondent herein Kshs. 1,000,000 and 400,000 respectively as general damages for pain and suffering.

2. The appellants being dissatisfied with the said judgement lodged this appeal by way of a memorandum of appeal dated 1st July 2022 citing grounds that:

    a. The learned Magistrate erred in law by delivering two independent judgments in Civil cases 1059 and 1060 of 2017 despite the consolidation of the matters.

    b. The learned magistrate erred in law and fact by awarding inordinately high general damages of KES 1,000,000/= for pain and suffering, having failed to apply the principal of stare decisis in considering convectional awards for general damages of similar injuries.

c. The learned magistrate erred in law and fact by entering judgment in favour of the Respondent against the Appellants on liability at the ratio of 80:20. The learned magistrate failed to consider the evidence adduced by the investigating officer, which remained unimpeached during cross-examination, which blamed the plaintiff for the accident.

d. The learned magistrate erred in law and fact by dismissing, with neither an analysis of the evidence nor reasons for the decision, the counterclaim previously lodged in the suit.

e. The learned Magistrate erred in law and fact in failing to consider the Appellant's submissions and considering the relevant legal principles to critically analyze the Appellants' case while arriving at the Judgment, thus resulting in a miscarriage of justice to the Appellants.

3. The appellant prays for orders that:

a. The entire Judgement of the Chief Magistrates' Court at Milimani (Hon. D.O Mbeja) dated 29th May 2020, in Civil Case No. 1060 of 2017, be reviewed and/or set aside.

b. The costs of this Appeal be borne by the Respondent.

Submissions

4. This matter was canvassed by way of written submissions in which the respondent did not participate. The appellant raised and argued three issues; the first being whether the trial court erred in law by delivering independent judgements in civil cases 1059 and 1060 of 2017 despite consolidation of the matters. The appellant argues that the trial court acted in total disregard that the two matters had been consolidated and went ahead to deliver two independent judgements thereby causing significant prejudice to the appellants who had proceeded on the basis that upon consolidation, a single judgement would be rendered for both suits. In effect one suit remained undefended to the appellant's detriment thereby violating their constitutional right to be heard.

5. The Appellants raised the issue that the trial court erred in its finding of liability. They argued that the respondent's evidence did not meet the threshold of proof as embedded in section 107 of the *Evidence Act* that he who alleges must prove. He pointed out that the mere fact that an accident occurred does not mean that the appellant had driven negligently or that negligence must ipso facto be inferred and that his testimony during the trial that the respondent's motor cycle had rammed into his motor vehicle from behind was not shaken during cross examination. He contends that the respondent was to blame for the accident for failing to slow down or brake while the appellant had indicated brake lights and that the trial court the disregarded the testimony of the investigating officer who blamed for the accident on the respondent. He adds that the trial magistrate's finding on liability was not founded in law and evidence being that no evidence was tendered to establish his liability.

6. Thirdly, the appellants raised the issue that the trial court's award of damages was excessive in view of the injuries sustained stating that the finding was not supported by facts or law hence irregular. The trial court award in civil suit No. 1060 of 2017 of Kshs. 1,000,000 less 20% contribution for fracture of the right femur, cut wound on the right hand three fingers and pain and bleeding was excessive since recent precedent has awarded less for similar or graver injuries. He submits that an award of Kshs. 600,000 would adequately compensate the respondent and he cites authorities in support this position.

7. That the award in civil suit No. 1059 of 2017 of Kshs. 400,000 less 20% contribution for blunt injuries on the chest, left side and right thigh along with fracture of the left rib was excessive considering that recent precedent has awarded less for similar or graver injuries. With the support of authorities and comparable awards, he submits that an amount of Kshs 250,000v would have sufficed.

8. On special damages award of Kshs. 3,550, the appellants hold that the same did not meet the threshold for strict proof as the receipts produced did not bear revenue stamps.

Analysis

9. Having carefully considered the grounds of appeal, the parties rival written submissions together with all the authorities cited, I find that the issues arising for determination revolve around the following three issues:

    a. Whether the trial court erred in determining the two matters separately while the same had been consolidated.

    b. Whether the trial court erred on its finding of liability against the appellants.

    c. Whether the awards of Kshs. 1,000,000 Kshs. 400,000 and Kshs. 3,550 were excessive given the injuries sustained by the respondent.

10. This being a first appeal, this court is duty bound to re-analyse, re-consider and re-evaluate the evidence on record and to draw its own independent conclusion on whether the findings of the trial court should stand; although it should bear in mind that it neither heard nor saw the witnesses and to make due allowance in that respect. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle v Associated Motor Boat Co. [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278.

11. That being said, this court observes that the two suits at the point of consolidation revolved around an accident involving motor vehicle registration number KBK 353R belonging to the appellants and motorcycle KMDR 607W which was riden by the Respondent. The trial court made a finding on liability in CMCC No. 1060 of 2017 by adopting the finding that was already made in CMCC No. 1059 of 2017. The same is acknowledged as captured in the judgement as:

> " Following the consolidation of this suit with number 1059 of 2017 on 12th June 2019 this court will adopt the finding on liability in the related dispute. Consequently, judgement is entered in favor of the plaintiff against the defendants at the ratio of 80:20, all the circumstances of this case considered."

12. It is apparent from the above that consolidation was made pursuant to the finding on liability in CMCC No. 1059 of 2017 which was then adopted in CMCC No.1060 of 2017 on 12th June 2019. Whereas the record of proceedings of 12th June 2019 do not reflect the consolidation, the same is relied upon by the Appellants in their appeal as also reflected in the impugned judgement. Based on the above, this court finds no basis to delve into the trial court finding on liability.

13. As to whether or not the trial court issued two independent judgements while the two matters were already consolidated, counsel argues that an award of kshs.400,0000 was made regarding 1059 of 2017 which was not defended thereby violating the appellants' rights. Upon perusal of the impugned judgment delivered on 29th May 2020, this court observes that there is no mention of a separate award of Kshs. 400,000 as cited by the appellant. The only award made in this judgement is for Kshs. 1,000,000 for pain and suffering and Kshs. 3,550 for special damages the total of which was subjected to 20% contribution. The appellants on their part have also failed to include in the record of appeal, a copy of

ruling /judgement in 1059 of 2017, reflecting the alleged separate judgement despite the fact that this allegation forms part of the backbone of this appeal. This court finds that this ground of appeal is not supported by the record and must therefore fail.

14. It is then upon this court to address the issue as to whether the award for general damages was inordinately high or excessive considering the injuries sustained which were: cut wound on the right hand three fingers, pain and bleeding and fracture of the femur. The trial court awarded Kshs. 1,000,000 for pain and suffering and Kshs. 3,550 for special damages the total of which was subjected to 20% contribution. Counsel for the appellant submits that this was excessive and that an award of Kshs. 600,000 would have sufficed. Counsel refers to the principle laid down in the authority of Kenya Power and Lighting Comp Ltd & Another V Zakayo Saitoti Naingola & Another [2008] Eklr where Judge Nambuye held:

> " On quantum [the] court in determining whether to interfere with the same or not, the court has to bear in mind the following principles of damages:
>
> i. Damages should not be inordinately too high or too low.
>
> ii. They are meant to compensate a party for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered....."

15. Taking into account the above principle, this court has considered the authorities cited by the appellant alongside others with comparable injuries attracting comparable awards. In Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR the respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh with 4% incapacity. The Court on appeal set aside an award of Kshs 1,200,000 and substituted it with one of Kshs. 800,000.

16. In Francis Maina Kahura Vs Nahashon Wanjau Muriithi [2015] eKLR, the Plaintiff who sustained a segmented fracture of the mid-shaft right femur and a cut would on the left knee was awarded by the High Court Kshs. 500,000 general damages.

17. In Jackson Mbaluka Mwangangi v Onesmus Nzioka & Another [2021] eKLR Appellant sustained blunt injury to the right shoulder and fracture of the femur. The Court on appeal increased the award of damages from Kshs. 350,000 to Kshs. 600,000.The Court stated:

> " In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body."

18. This court takes into account that awards increase as the years go by and reflect the strength of the shilling which keeps changing at the time of each decision thus factoring inflation trends. Upon considering the damages awarded in the authorities I have just cited; it is my finding that the Learned Trial Magistrate did not take into consideration similar award for similar injuries and therefore based the award on a wrong principle.

19. I am also persuaded that the award made by the Learned Trial Magistrate fell on the slightly higher side in comparison to the comparable awards, hence there is a need for me to exercise my discretion and interfere with it. Taking into account all factors as stated above, I find an award of Kshs. 600,000 to be reasonable and adequate to compensate for the injuries suffered by the Appellant at the time.

Determination

20. The upshot of the above is that this appeal succeeds partially as the trial court award of Kshs. 1,000,000 is set aside and substituted with an award of Kshs. 600,000. Being that this appeal has partially succeeded each party shall bear their costs.

    Stay of execution orders granted for 30 days.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 15TH DAY OF MAY, 2025.

HON. T. W. Ouya

JUDGE