Kivuva v Mutua (Civil Appeal 199 of 2011)
[2024] KEHC 121 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 199 OF 2011

FROO OLEL, J

JANUARY 17, 2024

BETWEEN

PETER NZONZO KIVUVA .... APPELLANT

AND

KALEKYE MUTUA .... RESPONDENT

(Being an appeal from the judgment of Hon J.K Nge'no (Mr) Chief Magistrate delivered on 24th November 2011 in the Chief Magistrates Court at Kangundo in Civil Suit No. 281 of 2009)

JUDGMENT

1. This appeal arises from the judgment/decree of Honourable J. K Ng'eno Chief Magistrate delivered on 24th November 2011 in Kangundo Chief Magistrate court civil case no.281 of 2009, where he awarded the Respondent's a total of Ksh.205, 000/= as damages arising from injuries sustained from a road accident which occurred on 9th July 2009 along Tala – Ndunduni earth road at Ngonda. There was a test suit being Kangundo Pmcc No 280 of 2009, where liability had been decided as against the appellant at 100% and the said judgment on liability was adopted herein by the trial court.

Background

2. The Respondent filed a plaint dated 11th November 2019, as against the appellant claiming damages in tort. In the plaint, the respondent did aver that on 9th July 2009, she was a lawful fair paying passenger travelling on the defendant's motor vehicle registration Number KAL 435B, when the defendants' authorized agent servant, employee and/or driver negligently and recklessly drove the suit motor vehicle and caused an accident in consequence whereof the respondent did sustain bodily injuries.

3. The appellant on his part did file a statement of defense where he denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant further denied all the particulars of negligence, carelessness and recklessness attributed to him and/or his servant,

employee or agents and stated in the alternative that if indeed an accident occurred, it was substantially contributed too by the respondent's negligence which were particularized in the said defense filed. The appellants also denied that the respondent suffered any loss and prayed for the suit to be dismissed.

4. PW1 Kalekye Mutua testified that she was a farmer based at Ndunduni. On 09. 07 2009, she was travelling as a fair paying passenger on the appellants motor vehicle from Tala to Ndunduni. The motor vehicle was being driven at high speed, it lost control as a result of which they had a self-involving accident and she injured her mouth and lost four teeth. She also injured her left arm which had a crack. She was treated at Kangundo District Hospital and later reported the matter to the police, where she was issued with a police abstract. She sought for compensation for the injuries suffered. In cross examination she reiterated that she had no dental problems before the said accident and her injuries were caused by the said accident.

5. PW2 DR C. W. Mwangi was the medical doctor who examined the respondent who presented a history of having been involved in a road traffic accident on 09.07.2009. She had been treated at Kangundo District Hospital and discharged on the same day. She sustained injuries on the left shoulder joint and upper hand which was painful and also had tender and lose lower front teeth. X ray of the shoulder showed no fractures. On physical examination she was in general fair condition but displayed pain when taking off her coat. The tender left shoulder joint worsened when he attempted rotation of the shoulder joint.

6. PW2 in his conclusion did find that as a result of the said accident, the respondent did injury her lower shoulder, her lower jaw and four lower teeth which became loose and painful making it difficult for her to bite food. The left shoulder was still painful and she could not use the left upper limb to perform tasks. The appellant did not call any witness and by consent judgment on liability was agreed upon at 100%.

7. The trial court did consider the evidence tendered and awarded the respondent General damages of Kshs 200,000/=, special damages of Kshs 5,000/= plus cost and interest. The appellants being wholly dissatisfied by the said judgement did file their memorandum of appeal dated 9th November, 2011 and raised the following grounds of appeal;

    a. That the learned magistrate misdirected himself and grossly erred in law in finding that the defendant liable on a 100% basis when he knew or ought to have known that indeed, the evidence adduced on behalf of the respondent could not support the same.

    b. That learned trial magistrate misdirected himself and erred in awarding an inordinately high award for general damages In respect to pain, suffering and los soft amenities vis a vis the injuries sustained by the respondent which were minor and soft tissue in nature.

    c. The learned trial magistrate erred in law and in fact in ignoring medical evidence placed before him which indicated that the respondent had not sustained the injuries alluded to on the alleged date of the accident.

    d. The learned trial magistrate erred in law and in fact when he found that the appellant was the registered owner of the motor vehicle registration Number KAL 435B at the time of the alleged accident when he knew or ought to have known that there was no single evidence to demonstrate the same.

    e. The learned trial magistrate erred in law in totally the appellant's counsel's submissions on issues of law and evidence and thereby arrived at an erroneous assessment.

f. The learned trial magistrate erred in failing to apply relevant and pertinent judicial comparable, precedents and trends regarding similar minor and soft tissue injuries.

g. The learned trial magistrate misapprehended the medical evidence in all material respects thus arriving at a wrong assessment of general damages.

Appellant's Submissions

8. The appellant's filed their submissions on 17.05.2023 and submitted that the trial magistrate erred in law by awarding general damages that were inordinately high yet the injuries suffered were minor and soft tissue in nature. Further the trial magistrate erred by basing his judgment on speculation as the respondent did not plead any fracture injury nor were such injury proved. Reliance was placed on David Sironga ole Tukai Vs Francis Arap Muge & Another (eKLR 2014) & Supreme Court of Nigeria in Adetoun Oladeji & Nigo Limited Vs Nigeria Breweries PLC (SC 91/2002).

9. As regards the issue of quantum, the appellant submitted that the award of Kshs200, 000/= was inordinately high as the respondent's injuries were soft tissue in nature. The appropriate award for such injuries ought to have been as sum of Kshs 60,000/=. Reliance was placed on Eastern Produce (K) ltd Vs Gilbert Muhunzi Makotsi (2013) eKLR, Nairobi HCC No. 1309 of 2002 Pamela Ombiyo Okinda Vs Kenya Bus Services Ltd & Olouch Erick Gogo Vs Universal Corporation limited (2015) eKLR.

10. The respondent did not file any submissions.

Analysis and Determination

11. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

12. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

13. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316.

14. The appellant's in their memorandum of appeal raised seven (7) grounds of Appeal, where they challenged the trial court findings on both liability and quantum. But given that the parties did enter into a consent in the primary suit where liability in the test suit being Kangundo Pmcc No 280 of 2009, was adopted herein, and which judgement had found the appellant 100% liable, this court will thus only proceed to determine the issue of quantum.

15. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004] eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms: -

> " It is trite law that the 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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".

16. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

17. The respondent did plead in the plaint that she suffered injuries to the shoulder joint, injuries to the left upper arm and she also had a tender and mobile lower front tooth. In her examination in chief she did maintain that those were the injuries suffered and added that her left arm suffered a crack and she had lost four teeth. She produced the treatment notes and P3 form as exhibits. PW2 Dr Caroline Mwangi also examined the respondent and confirmed the injury to the shoulder and mobile tender lower tooth. The shoulder was still very painful and the respondent could not use her teeth to bite food. The trial magistrate did consider the nature of injuries suffered, the authorities relied upon and awarded the appellant Ksh. 200,000/=.

18. Having considered the evidence presented, I do find that, the respondent did prove that she suffered serious soft tissue injury to the left arm and shoulder and at the same time lost use four teeth as a result of the said accident. These injuries cannot be termed as minor soft tissue injuries nor would a lower award of Kshs 60,000/= as a suggested by the appellant be appropriate.

19. Looking at similar citation for similar injuries especially during the period when the judgment was made and also current citations where similar injuries have been sustained; B.K suing through his mother and next friend EM Vs Wilson Gitari Mburugu (2020) eKLR & Peter Njuguna Vs Francis Njuguna Njoroge(2015) eKLR , I do not find that the award to be excessive nor did the magistrate act on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damages suffered. To the contrary the trial magistrate did consider the relevant authorities cited, inflationary trends and arrived at a correct balanced award.

DISPOSITION

20. This appeal therefore has no merit and the same is dismissed.

21. Each party shall bear their costs of this appeal.

22. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE