Nyambura & another v Simiyu (Civil Appeal 3 of 2023)
[2024] KEHC 279 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEHC 279 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 3 OF 2023

RN NYAKUNDI, J

JANUARY 24, 2024

BETWEEN

JOHN MDUNG'U NYAMBURA ..... 1ST APPELLANT

PATRICK WAFULA MISIKO ..... 2ND APPELLANT

AND

NELLY MUIA SIMIYU ..... RESPONDENT

JUDGMENT

1. The appeal is mainly on the issue of quantum. By a plaint dated 14/12/2021, the Respondent sued the Appellants seeking general damages, special damages and costs plus interests of the suit, arising from a road accident that occurred on 5/11/2021, along Eldoret- Kitale road at Soy Centre area involving motor cycle registration number KMFN xxxW Evalast in which the Respondent was travelling as a pillion passenger and motor vehicle registration number KAX xxxG Toyota Saloon being driven by the 2nd Respondent. As a result of the said accident the Respondent sustained severe injuries.

2. The Appellants filed their statement of defence dated 8/2/2022, denying the allegations made by the Respondent. In the alternative, the Appellants blamed both the Respondent and the rider of motor cycle registration number KMFN xxxW for negligence.

3. The parties herein entered consent on liability on 26/9/2033. The consent was recorded at the ratio of 80:20 in favour of the Respondent.

4. After trial Judgment was delivered on 13/12/2022, damages were assessed as hereunder: -

    a. General Damages..... Kshs.800,000/=

    b. Special Damages..... Kshs.6.830/=

    c. Less 20% contribution (20/100x806,830) .....Kshs.161,366/=

Kshs.806,830 – 161,366 =Kshs.645,464/=

d. Plus, costs and interests

5. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (3) grounds: -

1. That the learned trial Magistrate erred in law and fact in awarding general damages that were manifestly excessive in the circumstances in view of the evidence adduced by the parties and the comparable authorities provided by the Appellants.

2. That the learned trial Magistrate erred in law and fact in failing to take into account relevant evidence/factors thereby arriving at a determination on damages which were manifestly excessive.

3. That the learned trial Magistrate erred in law and fact in adopting the wrong principles in making a determination on the damages payable to the Respondent.

Hearing of the Appeal

6. The appeal was canvassed by way of written submissions. The Appellants filed their submissions on 23/10/ 2023 while, the Respondent filed hers on 30/10/2023.

The Appellants' Submissions

7. On whether the trial Magistrate erred in law and in fact in awarding general damages that were manifestly excessive in the circumstances in view of the evidence adduced by the parties and comparable authorities provided by the Appellants. Counsel for the Appellants submitted that that compensation is meant to compensate the victim for injuries sustained, and neither is it meant to punish the defendant, nor to unfairly enrich the victim. Counsel argued that compensation is not meant to maim the defendant while healing the victim. Instead, it is meant to reinstate the victim to their pre-accident position and for any losses they incurred after the accident.

8. Counsel submitted that the Plaintiff pleaded the following injuries in the plaint;

a. Head injury and loss of consciousness

b. Blunt injury to the chest

c. Blunt injury to the gravid abdomen with intra-uterine fetal death

d. Blunt injury to the left ankle

e. Bruises and blunt injury to the left foot

9. According to Counsel, the Plaintiff mainly sustained soft tissue injuries with the most grievous injury being the blunt injury to the gravid abdomen with intra-uterine fetal death. Counsel added that both Dr. Sokobe and Mr. Z. Gaya who examined the Plaintiff on diverse dates, the plaintiff was 21 weeks pregnant at the time of the accident and that unfortunately, she lost the pregnancy due to the accident but did not award any permanent disability.

10. Counsel contended that the Defendants urged the trial magistrate to award damages ranging from Kshs.350,000/= in view of the evidence on record and comparable authorities. However, the trial Magistrate held as follows;

> The defendant in proposing an award of Kshs. 350,000/= cited the case of *Leah Wambui Ngugi v George Mbugua Karanja & 2 Others* [2016] eKLR.They however did not annex a copy of the said authority to their submissions. I could not lay my hands on it to consider the same. The plaintiffs availed a copy of the said decision..."

11. Counsel further submitted that the trial Magistrate went ahead and relied on the Plaintiff's authority wherein the Plaintiff had sustained soft tissue injuries and was 36 weeks pregnant at the time of the accident. The Plaintiff therein had premature birth as a result of the accident. Counsel argued that the facts in the Plaintiff's authority were not similar to the one before the trial Court. Counsel submitted in the Plaintiff's authority, the plaintiff was 36 weeks pregnant, which translates to 9 months of pregnancy. The Plaintiff therein also had premature birth, unlike in this case where the plaintiff was 21 weeks pregnant which translates to 5 months, and the foetus in this instant case did not survive. Counsel further argued that in the Plaintiff's cited authority, the Plaintiff gave birth prematurely and it was expected that in the event that the baby survived, it would need antenatal care and any other medication in the event of future complication. Counsel added the baby would also need special care during the period that the mother was still ailing as a result of the said accident and the award was being made under two entries, both for the mother and the prematurely born baby. According to Counsel it was therefore only just that the amount of Kshs.1,000,000/= be awarded in that case. Counsel further argued that in the present case the pregnancy was 21 weeks old and not 36 weeks old. The foetus did not survive. The plaintiff's authority is not similar to the instant case. It would therefore by unfair to the Appellants to use the said authority as the weighing scale for establishing the damages to be awarded in this case.

12. Counsel further submitted that trial Magistrate admitted to not having considered the Defendants' authorities at all, despite the facts in the authorities being comparable to the ones that were before the trial court. Counsel argued that the Defendants clearly cited their authority as follows in their submissions:-

> We are fortified by the authority of *Leah Wambui Ngugi v George Mbugua Karanja & 2 Others* [2016] eKLR where the appellant was awarded Kshs.350,000/¿ for= for blunt injury on the lower back, swollen bruises on both knees, blunt injury on the back and blunt injury on the abdomen and loss of pregnancy at 5 months gestation in 2016."

13. According to Counsel, the authority was clear enough for the trial Magistrate's perusal and consideration and therefore, annexing the authority would have only highlighted what was already in the submissions. Counsel further argued that besides the cited authority is a reported authority and the Court is expected to be aware of the same. Counsel maintained that authorities are only meant to persuade the court and are not necessarily the law. It was therefore an error by the trial Magistrate to rely on one sided authority merely because he could not see the Appellants' authority

14. Counsel argued that to allow the decision to stand would greatly occasion an injustice upon the Appellants.

15. In the end, Counsel urged the Court to consider the authorities cited by the Appellants and set aside the general damages awarded by the subordinate court and/or re-assess the same downwards.

The Respondent's Submissions

16. On whether the learned trial Magistrate awarded inordinately excessive general damages, given the evidence and the authorities supplied by the parties. Counsel submitted that it is trite law that general damages awarded for injuries sustained should be reasonable besides being comparable to damages awarded in other similar cases. Counsel cited the case of *Municipal Council of Nakuru& another v David Mburu Gathiaya* |1993| eKLR, where the Court of Appeal intimated that no two similar cases are exactly the same and that similar cases only serve as a guide for awarding general damages. The count further noted an upward trend in award of damages owing to inflation. Counsel added that the discretionary power of the court in awarding general damages should be used judicially as was noted in *Kennedy Ongando v Dennis Bosire Nyangena* [2021] eKLR.

17. Counsel submitted that the Respondent herein sustained the following injures as a result of the accident for which the appellants were found liable: head injury with loss of consciousness, blunt injury to the chest, blunt injury to the gravid abdomen with intra-uterine foetus death at 5 months gestation, blunt injury to the left ankle, bruises to the left ankle, as well as bruises and blunt injury to the left foot.

18. Counsel submitted that the Appellants cited the case of *Leah Wambui Ngugi v George Mbugua Karanja & 2 others* [2016] eKLR, although they did not annex the same. The injuries sustained by the appellant in this authority are particularized in paragraph 12 of the judgment as blunt injury to the lower back, swollen and bruised knees and blunt injury to the abdomen occasioning loss of pregnancy at 5 months gestation. Counsel further submitted that in this case, the Appellant was awarded Kshs.350,000/= for the aforesaid injuries in a judgment rendered on 9/9/2016. Counsel added that the Respondent on the other hand cited *Reuben Wekesa Kituyi & another v Asmin Teresa Osundwa* [2021] eKLR where the Appellant suffered blunt trauma to the left shoulder, blunt trauma to the left leg and blunt trauma to the abdomen which subsequently led miscarriage at 36 weeks gestation. The High Court found that an award of Ksh.1,000,000/=as general damages was commensurate to injuries sustained and hence did not disturb the lower court's finding

19. Counsel further submitted that in distinguishing the two cases relied upon by the parties, the Appellants in their written submissions contended that the Learned Trial Magistrate erroneously found that the injuries sustained in *Reuben Wekesa Kituyi* (*supra*) were comparable to the injuries sustained by the respondent herein. We respectfully differ with this position and in the alternative argue that both cases involved soft tissue injury and blunt injury to the abdomen which ultimately led to the foetal death. Counsel argued that although the case in *Reuben Wekesa Kituyi*, the foetus was at 36 weeks gestation, it is notable that the court awarded a higher figure in general damages, being Kshs.1,000,000/=.In the instant case where the foetus was at 21 weeks gestation, we submit that the trial court did not err in fact and in law in finding that a sum of Kshs.800,000/= in general damages was appropriate.

20. In disagreeing with the position taken by the Appellant to the effect that the Court in *Reuben Wekesa Kituyi* was justified in awarding Kshs.1,000,000/= by reason of the Appellant's foetus being born alive and hence needing antenatal care and future medical care in the event of future medical complications. Counsel submitted that the averments made by appellants are merely imaginary and illusionary as the court in *Reuben Wekesa Kituyi* at paragraph 23 of its judgment noted that the appellants foetus "aborted a week following the accident" and as such it cannot be argued that the foetus in *Reuben Wekesa Kituyi* survived hence justifying a higher sum in general damages.

21. Counsel further submitted that there are glaring differences between the instant case and the case in *Leah Wambui Ngugi* (*supra*)whose reliance was sought by the Appellants. Counsel argued that in that

case, the injuries sustained were less than the injuries sustained by the Respondent in the instant case. Counsel further submitted that besides sustaining blunt injuries similar to those sustained in *Leah Wambui Ngugi*, the Respondent herein sustained injuries to head, chest and ankles.

22. Counsel further submitted that the *Leah Wambui Ngugi case* decided in 2016 and it is trite law that Courts, in awarding general damages should take into account various circumstances including the rate of inflation. Counsel urged the Court to take judicial notice of the current inflation and find that an award of Kshs.800,000/= is reasonable in the circumstances and not inordinately high as alleged by the Appellants.

23. As to whether the Court considered relevant evidence and applied the relevant principles relating to award of general damages, Counsel submitted that, the trial Court appropriately considered all evidence and applied the relevant principals in arriving at the general damages awarded to the Respondent.

24. Counsel added that although the Appellants argue that the trial Court never considered the authority they had cited, there is nothing in the said authority that would have placed them in a better position, given that the same was decided 8 years ago and involved fewer injuries than is the position in the instant case.

25. Counsel argued that the Learned Trial Magistrate decided the case on the basis of similar cases. In this regard, we note that the *case of Reuben Wekesa Kituyi* is fairly comparable and more recent and further take note that no two cases are a replica of each other. Counsel maintained that the Appellants have not demonstrated abuse of discretion in awarding general damage on the part of the Learned Trial Magistrate. Further, Counsel submitted that the Appellants have also not demonstrated that the Learned Trial Magistrate failed to use the said discretion judiciously in awarding damages to the responded herein.

26. Having demonstrated that the general damages awarded to the respondent were not inordinately high and that they were arrived at following established principles of law governing award of damages, Counsel urged the Court to make a finding that the learned trial Magistrate did not err in fact and law in arriving at the general damages awarded to the respondent. In the end, Counsel urged the Court to make a finding that this instant appeal unmerited and therefore should be dismissed with costs.

Determination

27. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach its own determination bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123

28. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the Appellant together with all the authorities cited. Having done so, I find that only one key issue emerges for my determination:

> Whether the award of general damages of Kshs.800,000/= in light of the injuries stated above is inordinately high to persuade this Court to interfere with it.

29. From the judgement of the trial court damages awarded was to compensate the claimant to the suit for the pain, fear, anxiety, suffering, anguish and emotional distress experienced and associated with

the physical injuries sustained during the accident. The most important aspect of a personal injury, namely the impact of the injury to the healthy condition of the claimant is usually very difficult to assess at all. It is this diminution in health that primarily affect the quality of life of that individual which should be the basic element in evaluating personal injury related cases in our Courts of law. It is sometimes rear for the trial courts to look at the concept of the quality of life from the domain of an accident victim capable of addressing the divergent impairments which impact negatively to the wellness and health of the claimant. The magnitude of pain and suffering damages in concrete terms besides application of passed awards does not allow a trial court to arrive at a fair, just, and equitable conclusion. First and foremost, it should be borne in mind that damages for non-pecuniary lose aims at compensating the victim. Second, in our legal system it is often satisfaction to the victim to make up for the injustice or grievances occasioned by the wrong doer who by virtue of his or her negligent act led to the injuries suffered by the claimant. In our view, this concept provides a very good starting point in considering the merits of this appeal. The ways and means that are employed by trial courts to assess pain and suffering damages in personal injury claims going by the level of litigation denotes that the determinant are far from being explicit. The mere fact that the amounts differ between one specific case to another even with the coherent framework of similar injuries and comparable awards is in itself problematic. Therefore, wide judicial discretion remains the be the norm and characteristics of the assessment of pain and suffering damages in personal injury cases in Kenya. The resulting effect being that the awards are either too high or rather too low necessitating a second bite of the cherry to the superior courts. Indeed, in our legal system rarely do courts delve so much into the intensity of the pain, the type, severity, duration of the injury, the reduction in health, and their contribution in the calculation of pain and suffering damages. In essence therefore the appeal's court is systematically being asked to invalidate or review the assessment of damages awarded by the trial courts on grounds which are not very precise save for the language that the trial magistrate erred in his or her judicial discretion resulting in high or low magnitude of pain and suffering damages. Therefore, several distinct factors are relevant for an appeal's court to interfere with the impugned judgement of the trial court. It does not stop at to the extent upon which the learned trial magistrate erred in the measure exactly expressed in the judgement.

30. It is not disputed that 5/11/2021, along Eldoret- Kitale road at Soy Centre area an accident occurred involving motor cycle registration number KMFN xxxW Evalast in which the Respondent was travelling as a pillion passenger and motor vehicle registration number KAX xxxG Toyota Saloon being driven by the 2nd Respondent. As a result of the said accident the Respondent sustained severe injuries. From the medical reports, the evidence of the claimant herein in the respondent there is no doubt that she experienced varying degrees of pain, suffering and discomfort associated with the injuries. It is accepted that in arriving at a reasonable award the trial court must have regard to comparable awards within the jurisdiction for comparable injuries so far as possible and where there are multiple injuries affecting different parts of the body each injury must be taken into account in assessing the global sum. In reviewing this case I am reminded of the dicta from a comparative jurisdiction in the case of: Sawyer, P in *Automotive and Industrial Distributors Ltd v Omerod* (2003) BHS J No. 103 where she opined:

> Loss of amenities, which is considered sometimes as a separate head of damages and sometimes is subsumed under that head of damage called "pain and suffering" takes into account the "curtailment of the plaintiff's enjoyment of life not by the positive unpleasantness of pain and suffering but, in a more negative way, by the to pursue the activities a plaintiff may have pursued before"

– see e.g. McGregor on *Damages* 16th edition paragraph 1706. In *Manley v rugby Portland Cement Co*, (1951) CA no. 286 at Kemp, and Kemp, the *Quantum of Damages*, Vol. 1 2nd ed. 1961) p.624, Birkett, L.J. said:

> There is a head of damage which is sometimes called loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed will never again go upon his walking excursions – things of that kind – loss of amenities."

31. As assessment of damages is at the discretion of the trial court, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd v Gathogo Kanini v A.M.M Lubia & Another* (*supra*) where the Court held as follows: -

> I think it is well settled that this court will not interfere with the exercise of its 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 it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

32. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal held that –

> ...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 judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that:
>
> > 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

33. The question is whether this Court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

34. In this matter the Respondent was attended to in several medical facilities but in the medical report dated 27/11/2021, prepared by Dr. Joseph Sokobe, who opined that the injuries sustained by the Appellant were as follows;

    a. Head injury with brief loss of consciousness

    b. Blunt injury to the chest

c. Blunt injury to the gravid abdomen with intra-uterine fetal death

d. Blunt injury to the left ankle

e. Bruises & Blunt injury to the left foot

35. He observed that the Respondent had sustained severe injury more so to the abdomen with subsequent loss of pregnancy at 21 weeks.

36. From my re-evaluation of the evidence, I find that the learned trial Magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made.

37. At the trial Court Counsel for the Appellants proposed an award of Kshs.350,000/= as general damages. The Appellant relied on the case of *Leah Wambui Ngugi v George Mbugua Karanja & Others* [2016] eKLR, (*supra*) where the Appellant was awarded Kshs.350,000 as general damages for blunt injury on the lower back, swollen bruised on both knees and blunt injury on the abdomen and loss of pregnancy at 5 months (21/40) gestation.

38. On the hand, the Respondent proposed an ward of Kshs.1,500,000/= as general damages. The Respondent relied on the case of *Reuben Wekesa Kituyi & another v Asmin Teresa Osundwa* [2021] eKLR, (*supra*) wherein the Court upheld the award of Kshs.1,000,000/= as general damages awarded by the trial Court for blunt trauma to the abdomen which led to the miscarriage of her 6 months' old foetus.

39. In awarding Kshs.800,000/= as general damages, the trial Magistrate relied on the case of *Stanley Maore v Geoffrey Mwenda* [2004] eKLR; where the Court of Appeal stated that; we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. The trial Magistrate also cited the case of *Ugenya Bus Services v Gachoki* [1982] eKLR on issues of inflation.

40. The trial Magistrate also observed that the Appellants did not annex a copy of the authority they relied on. The trial Magistrate further observed that the Respondent had availed a copy of the decision she had relied on and that the facts in the said decision were similar and comparable to the ones in the case before him. The trial Magistrate also noted that from the medical report by Dr. Joseph Sokobe, the Plaintiff had lost her pregnancy of about 21 weeks.

41. It must be noted that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects. In both authorities save for the nature of the sustained both parties were pregnant and lost their foetus as a result of the said accidents. From Dr. Sokobe's report it crystal clear that the Respondent sustained severe injuries and also lost her foetus at 21 weeks. To my mind, the period of gestation does not really matter at the time of the accident or not. What matters is the evidence adduced in Court that show that the said foetus lost as a result of the said accident. The argument by the Appellants Counsel is therefore untenable in the circumstances.

42. With foregoing in mind, it cannot therefore be said that the lower Court committed an error of principle; or that it took into account irrelevant factors; or even that the award of Kshs. 800,000/= was so inordinately high as to represent an erroneous estimate of the compensation due to the Respondent for her injuries. Apparently, this is not the case for the court to exercise discretion to interfere with the highlighted assessment of damages in favour of the respondent. The question of whether the damages

were too high was never properly canvassed on the merits to convince this court to apply any of the parameters set out in the cases of *Selle and Kemfro Africa supra*.

43. In the premises, I opine that the amount awarded by the trial Court was sufficient and reaffirm the same.

44. The appeal is dismissed with costs to the Respondent.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 24TH DAY OF JANUARY, 2024

R. NYAKUNDI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR