Njomuka Enterprises Ltd & another v Kahoro (Civil Appeal 14 of 2010) [2024] KEHC 2435 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 14 OF 2010

SM MOHOCHI, J

MARCH 5, 2024

BETWEEN

NJOMUKA ENTERPRISES LTD ..... 1ST APPELLANT

AFRIPACK INTERNATIONAL LTD ..... 2ND APPELLANT

AND

PAUL KIARIE KAHORO ..... RESPONDENT

(Appeal from the Judgment of Hon. Mr. Soita - PM, Molo Law Courts in Molo CMCC No. 42 of 2009 delivered on the 22.12.2009)

JUDGMENT

Introduction

1. The Respondent instituted a Civil Case at Molo, CMCC No. 42 of 2009 vide a plaint dated 24thJanuary, 2009 seeking compensation in the nature of damages occasioned by a road traffic accident that occurred on the 22nd July 2008 along Molo/Elburgon road while the Respondent was traveling in motor vehicle KAZ 135Z that was negligently driven causing an accident. In response, the 2nd Respondent filed a statement of defence dated 2nd March 2008, where it denied the averments made in the plaint vehemently.

2. The 1st Respondent has not appeared nor participated in the trial court proceedings as 1st Defendant and thus elected not to participate.

3. This is an Appeal against the Quantum of damages only.

The Appeal

4. Being aggrieved by the Judgment dated 22nd December 2009 the Appellant filed this present appeal citing the following two grounds in his memorandum of appeal:

i. That, the learned Magistrate erred in law and fact, in awarding damages to the Respondent amounting to Kshs 360,000/-.

ii. That, the quantum of damages is excessive and an erroneous estimate of the damages that ought to be awarded to the Respondent having regard to the injuries suffered by the said Respondent and judicial precedent involving injuries.

5. This Appeal was admitted on the 8th December 2022 and the court directed that the Appeal was to be heard and disposed-off by way of written submissions.

6. While parties had the opportunity to file their respective written submissions, the Appellant did not file any written submissions despite multiple opportunities availed.

The Respondent's Case

7. The doctor in his testimony stated that he classified the degree as harm. He proceeded to state that the Respondent may still develop in future.

8. The Respondent in his submissions at the trial court submitted for Kshs.500,000/- as reasonable compensation. The Respondent took into consideration the inflation, the age of authority relied on and the severity of the injuries sustained in arriving at the proposed award.

9. The Respondent in computing damages placed reliance on the case of Benjamin Kabwere Ngonyo vs Hamisi Salim & Another HCC NO, 391 OF 1992 Mombasa in which the court awarded Kshs.300,000/= as seen at page 25 of the record of appeal.

10. That, the trial court noted that doctor Kiamba did Confirm the injuries sustained by the Respondent as noted in her judgment notes at page 21 of the record of appeal.

11. That taking a look at the trial court's judgment notes at page 21 of the record of appeal, it is clear that the trial court took into consideration the submissions of both the Respondent and the Appellant when reaching at its decision and awarded Kshs.360,000/= as general damages.

12. The Respondent submits that, the award made by the trial court was not excessive in any way and in fact, the award was within the reasonable range of awards made for injuries which are as severe.

13. The Respondent rely on the case of Monica Kori Ndunda v Malindi Taxis Limited [1997] eKLR where the victim sustained a fracture of the skull, soft tissue injuries on the eye, back and leg and was awarded Kshs. 450,000/= as general damages.

14. That, over time the courts have increased the award for injuries similar to those sustained by the Respondent herein. The Respondent rely on the case of Moiz Motors Limited & Another v Harun Ngethe Wanjiru [2021] eKLR where the Respondent who sustained a fracture of the skull and soft tissue injuries was awarded Kshs.500,000/= as general damages.

15. The Respondent rely on the case of Tridev Construction vs Charles Wekesa Kasembeli Civil Appeal 121OF 2002,The court relied on the decision in Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini vs, A.M Lubia And Olive Lubia (1982-88)L KAR 727 At page 730 in which the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded were laid down in the Kemiro Africa Ltd case the court was of the opinion that the appellate court must be satisfied that either the judge in assessing damages took into account an irrelevant factor, or left out of account a relevant one or that short of this the amount is inordinately low or so high that it must be a wholly erroneous estimate of the damages.

16. The Respondent submits that, the trial court did not take into consideration anything it ought not to, in arriving at its award of general damages and therefor submits that this court ought not interfere with the award of the trial court but uphold the same.

17. The Respondent submits that, the appeal should be found to lack merit, further that, this court to uphold the lower court judgment under the above grounds and the appeal be dismissed with costs to the Respondent.

Analysis & Determination

18. I have considered the foregoing. As indicated the appeal only challenges the quantum of award of damages. The general law is that 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 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 be conventional. See Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.

19. In the case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 The Court of Appeal set out the circumstances under which an appellate 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 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. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " 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..."

21. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, 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 damage 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."

22. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " 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."

23. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary

terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

24. In this case, according to the plaint, the Respondent had Severe head injury- Severe head concussion with acute subdural hematoma and acute hemorrhage unto the left sphenoid sinus, suggestive of occult fracture base of scull. Soft tissue injuries of the left shoulder joint, and soft tissue injuries on the chest. These injuries were confirmed by PW1- Dr. W. Kiamba, who was the only medical expert to testify at the trial. Accordingly, there is no basis for disbelieving his evidence. As was held by the Court of Appeal in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139:

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and 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."

25. The trial magistrate awarded the Respondent general damages of Kshs.460,000/-. Before the trial court, the Respondent had proposed an award of Kshs.500, 000/- while the Appellant had proposed kshs. 50,000/-.

26. According to Dr. Kiamba who examined the Respondent after the accident, opined that the Respondent suffered grievous harm with possibility of developing full blown epilepsy in future.

27. In Telkom Orange Kenya Limited versus I S O (minor suing through his next friend and mother (J N) [2018] eKLR, the court found that the child had sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future but indicated that there was no permanent disability. The court proceeded to award general damages at Kshs 500,000/.

28. In the case of Joseph Kimanthi Nzau versus Johnson Macharia [2019] eKLR the court found that the plaintiff sustained fracture of the skull, right clavicle, left 1st and 2nd ribs and multiple soft injuries and awarded general damages of Kshs 800,000/-.

29. The extent and nature of injury, the pain suffered and the residual effects are all important factors in assessing damages. See Michael Okello vs. Priscilla Atieno [2021] eKLR.

30. Taking into account the inflationary tendencies since the year 2009, I find Kshs.360,000/- to be a fair compensation for the injuries sustained by the Respondent.

31. This court is satisfied that the impugned award in the nature of General damages was not erroneous or that the Trial Court 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 damage suffered.

32. The Appeal thus fails for want of merit and the same is accordingly dismissed.

33. Costs shall follow the event.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 5TH DAY OF MARCH 2024.

.....

Mohochi S. M.

Judge