Billal & another v Odero (Civil Appeal E229 of 2023)
[2024] KEHC 17076 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 17076 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E229 OF 2023

DKN MAGARE, J

APRIL 18, 2024

BETWEEN

AHMED MWALIM KHEIR BILLAL ..... 1ST APPELLANT

ALI AHMED ISLAM ..... 2ND APPELLANT

AND

BENSON OTIENO ODERO ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the decision of Hon. R.N. Akee – RM given in Mombasa CMCC 877 of 2022. On 17/8/2023. The Appellants were Respondents. The respondent was the Plaintiff in the lower court.

2. The Appellant set forth 3 grounds of appeal. I shall set them out herein as they are torturous to read. They are: -

    i. The learned magistrate erred in law and in fact in arriving at an unjust decision against the weight of evidence and was based on misguided points of fact and many principles of law and has occasioned a miscarriage of justice. (sic).

    ii. The learned magistrate erred in law and in fact in arriving at an unjust decision against the weight of evidence and was misguided to award Ksh. 1,500,000, Ksh. 240,000 and Ksh 8,620/- general damages, future medical expenses and special damages., costs and interest of the suit was excessive in a number of precedents as was presented.

    iii. The learned magistrate erred in law and in fact in disregarding other decided authorities on the issue of calculation of quantum thus awarding inordinately high amounts.

3. There must be a disclaimer. The grounds are copied as they are in the Memorandum of Appeal. The grammar, syntax and general flow are as filed. Though the appeal is on quantum, the grounds are general in nature. The 2nd and 3rd grounds deal with one issue.

4. The only set back is that I noted that the Appellant was strong on language using the words misguided. Courts are never misguided. They err either on points of law or fact. Or they fail to exercise discretion judiciously. However, misguided is not one of the errors. This was brought out in the decision of the Hon C.B Madan in Butt –vs- The Rent Restriction Tribunal No. 4 of 1979 as doth: -

> " A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs."

5. To paraphrase the eminent jurist, courts are courts, whether newly minted Resident Magistrates or veteran Chief Magistrates. Their decisions are no less decisions on the question they decide. It is suicidal to accept use of strong language to criticise decisions. Courts are allowed to fall into error, which is corrected along the food chain that is the hierarchy of the courts.

6. The Appellant filed submission dated 9/2/2024. They stated that the injuries suffered as per the plaint are: -

> " a. Multiple fracture of the right tibia and left tibia leg bones.
>
> b. Multiple fracture of the left fibula leg bone.
>
> c. Fracture of the right 3rd foot bone (metatarsal).
>
> d. Cut on the left leg. e. Multiple right and left lower limb fractures.

7. The Injuries were fairly agreed upon between the parties' doctors.

8. The Appellant is said to have attached the report of Dr. Jennifer Kahuthu. She estimated the cost of future expenses at Kshs. 90,000/= They stated that the award was too high. They proposed Ksh. 400,000/= as sufficient.

9. They stated that damages should not be inordinately high. The court should consider past decisions and the power of the Kenya Shillings. Reliance was placed on several cases, that is: -

   a. Herbart Otara Marube v Dankan Ochora [2022] eKLR, where the high court, R. E. Ougo, awarded a sum of Kshs. 450,000/- for a plaintiff fracture of right tibia, right ankle dislocation, chest contusion, laceration and cut wounds on the right lower limb on 17/3/2022.

   b) Wakim Sodas Limited v Sammy Aritos [2017] eKLR, where the Respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400, 000.00, which was upheld on appeal before Justice Prof. Joel Ngugi on 28/9/2017.

c) In Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR, Justice (RTD) S.J. Chitembwe declined to disturb an award of Kshs. 500, 000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

d) In the case of Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR where Justice D.S. Majanja in a judgment delivered on the 12/10/2018 reduced an award of Kshs. 1,000,000/= to Kshs. 450,000/= for a Respondent who had sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and where a permanent disability was anticipated.

e) In the case of Civicon Limited v Richard Njomo Omwancha & 2 others [2019] eKLR where the High court awarded Kshs, 500,000 to the 3rd a party who sustained the injuries of fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability as she was unable to walk without support.

10. Other than the first case the rest were more than 6 years old.

11. The injuries referred to in those cases were equally minor. They questioned Dr. Adede's postulation of Ksh. 240,000/= to remove 2 implants. They prayed for costs.

12. The Respondent filed submission dated 14/2/2024. They set out the injuries with 18% disability and newly diagnosed hyper tension. The implants were to be removed after 2 years at a cost of Kshs. 240,000/=

13. The respondent was examined 3 months after the accident and he was still using clutches. Had a prominent dark ugly 18 cm surgical keloid scars on both legs, 1/3 dark keloid 6 cm trauma scar on the left leg both knees and 3rd toes were stiff and multiple stiffness.

14. The report by Dr. Jenipher Kathuthu was not produced as an exhibit and only attached to submissions. However, parties had agreed to the same in the proceedings.

15. They prayed that the Court dismisses the Appeal. They relied on the cases of:-

i. Damaris Wamucii Kagechu v Joseph Kirui & Another (2019) eKLR where Kshs. 1,500,000/= was awarded in 2019 for fractures on both legs.

ii. (ii)Peter Mutemi Kakuli v Ngase & Another (2022) eKLR where Kshs. 1,300,000/- was awarded in 2022 for fractured tibia and fibula.

16. They prayed that the court dismisses the Appeal with costs.

Evidence and pleadings

17. The defendant annexed to their submission a report by Dr. Jenipher Kahutu. The respondent had pleaded the following injuries, observations and special damages-

Injuries

Multiple fracture of the right tibia and left tibia leg bones

Multiple fractures of the left fibula leg borne

Fracture of the 3rd right foot bone

Cut on the left leg

Multiple left and right lower limb fractures permanent disability 18%

Hypertension

Complaints

Right tibia and fibula metal implants

Multiple joint stiffness

Weak points at fractures

Use of scratches after wheel chair

Pain in the injured areas

Acute physical and emotional stress

Ugly keloid scars

Accelerated bone and joint wear at fractures

Wounds and pain

2 metal implants to be removed at cost of Kshs. 240,000

Special damages

Motor vehicle search Kshs. 550

Medical report Kshs. 2000

P3 Form Kshs. 1,500

Treatment expenses Kshs. 4,570

Future medical expenses Kshs. 240,000/=

18. The evidence related to liability is not necessary for this Appeal as it is based on quantum. Dr. Ajoni Adede of Gama medical clinic examined the respondent and wrote a report on 16/5/2022.

19. The Discharge summons indicates several fractures as reflected in Dr. Ajoni's report the Respondent testified as PW1 on 16/5/2022. The medical report by Dr. Jenipher and the abstract were produced by consent. The court delivered its judgment on 17/8/2023 as follows: -

    a. General damages 1,500,00=

    b. Special damages 8,620

    c. Future medical expenses. 240,0000/=

20. The court does not indicate at least on record how the Kshs. 1,5000,000/= was arrived at.

Analysis

21. 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 trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where 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."

23. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by 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-trial and the Court of Appeal is not bound to follow the trial 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."

24. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial 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.

25. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

26. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

27. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

28. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts.

> The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

29. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

30. The Court of Appeal, pronounced itself succinctly on these principles 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.

31. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, 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..."

32. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

33. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

34. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

35. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may havfidelite decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question

turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

36. 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..."

37. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

38. In this matter the appellant used very old decisions with very minor injuries The Respondent applied more serious authorities and moderately applicable authorities.

39. In the case of P Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, Justice C. Meoli reduced damage from 1,000,000 to 800,000/= in a case of 15% permanent disability fracture of the femur and swollen thigh.

40. In the case of Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR Justice R.E. ABURILI substituted for a sum of 880,000/= for 500,000/=. The plaintiff had suffered a fracture of the right zygoma (facial bone).

41. Looking at the 18% disability, the complications including hyper tension the award of Kshs 1,500,000/= is sufficient in the circumstances I find no reason to interfere with the award.

42. On the question of removal of the implants doctor Jenipher indicates Kshs. 90,000/=. The does not give an indication on where the surgery was to be done. The same are not contextualised. The breakdown is unrealistic in view of the fact that there are multiple fractures.

43. There was no basis for disbelieving Dr. Ajoni Adede. His evidence was consistent with the evidence generally. The appellants doctor was out of sync with the evidence. I therefore dismiss her evidence. If she wished that she was to challenge Dr. Ajoni Adede's evidence, she should have done so in her report. Despite having the report she does not show any single error on the report. The challenge on future medical expenses is this baseless.

44. Section 48 of the *Evidence Act*, Cap 80 states as follows; -

> 48. Opinions of experts
>
> (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
>
> (2) Such persons are called experts.

45. In the case of Mutonyi versus Republic (1982) KLR 203, 210 Potter JA said:

> Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.
>
> In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:
>
> "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."
>
> So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

46. In the case of Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the Court of Appeal stated as doth regarding expert evidence: -

> " In consideration of the above, the Judge distilled own elements/ ingredients for admitting and acting on expert evidence as more particularly set out in the impugned ruling and which we find prudent not to rehash.
>
> 12. Also taken into consideration among numerous others is the case of Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR fromwhich the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows:"In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-

> stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence."
>
> An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

47. Nothing was placed before me to show that the court was wrong in believing Dr Adede as Opposed to Dr Jenipher. It does not matter, who I could have believed were the parties testifying before me. Consequently, the claim for future medical expenses was properly proved.

48. There is no disputation on special damages. The upshot of the foregoing is that the Appeal lacks merit and is accordingly dismissed with costs of 195,000/=

Determination

49. In the circumstances I make the following orders: -

    i. The Appeal lacks merit and is accordingly dismissed with costs of 195,000/=.

    ii. 30 days stay of execution

    iii The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ogowe for the Respondent

No appearance for Appellant

Court Assistant - Brian/Winnie