Miregwa & another v Mokaya (Civil Appeal E080 of 2023)
[2024] KEHC 5586 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E080 OF 2023

TA ODERA, J

MAY 7, 2024

BETWEEN

DINAH MORAA MIREGWA ..... 1ST APPELLANT

JOASH NCHORE ..... 2ND APPELLANT

AND

BRIAN OKEMWA MOKAYA ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. P.K Mutai (SRM) in KISII CM CC No. 350 of 2022 dated 3.7.23)

JUDGMENT

The appellants moved this court by way of memorandum of appeal against the judgement and decree of Hon. P. K Mutai (SRM) delivered in KISII CM CC No. 350 of 2022 dated 3.7.23.

1. By a plaint dated 6/1/2017, the respondent (formerly the plaintiff) filed a suit seeking general damages for pain, suffering and loss of amenities and loss of future earning capacity, special damages, costs of the suit, interest and any other relief.

2. The trial Magistrate found the appellant to be 100% liable for the accident and this is not disputed. The Appeal challenges the award of damages only.

   The memorandum of appeal filed herein is based on the following grounds:

   a. The Learned trial magistrate erred in fact and in law by awarding general damages which were excessive in the circumstance.

   b. The learned trial magistrate erred in law and in principle by adopting wrong approach in computation of the General damages and by departing from the trends contained in the

Authorities cited by the Appellant which were binding on him and adopting a method which was erroneous in the circumstance and thereby occasioning miscarriage of justice.

c. The learned trial magistrate based his judgment on extraneous issues which were never pleaded nor proved before him, to award Kshs. 600,000/= as General damages thereby reaching an erroneous decision.

d. The learned trial magistrate erred in law and in fact in disregarding and/or failing to take into account the Appellant's written submissions and the evidence adduced by the defence which had articulated weighty and relevant issues of law and facts thereby arriving at an erroneous decision both in law and in principle.

e. The learned trial magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.

f. The learned magistrate erred in fact and law in finding that the Respondent was entitled to Khs. 600,000/= as General damages.

The appellant prays for orders that: -

a. This Appeal be allowed with costs.

b. This Honourable Court do set aside the learned trial magistrate's judgment dated 3rd July 2023 on quantum and replace with its own assessment.

c. Costs of the Appeal herein and those incurred in the subordinate Court be borne by the Respondent.

d. Any such and/or further orders that the Honourable Court shall deem just and expedient in the circumstance.

3. This is a first appeal and the duty of this court is to re-evaluate the entire evidence on record and arrive at it's own independent decision bearing in mind that it did not have an opportunity to see and hear the witnesses during their testimony as was held in the case of *Sielle v associated motors* 1963 EA.

4. Award of damages is also discretionary and the appellate court can only interfere with the same where the trial court misdirected itself and relied on wrong principles and or failed to consider relevant factors and awarded damages which are too low or high as was held in the case of *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470).

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low."

5. On the principles to be considered in awarding damages Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J held as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the

objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

6. The respondent in his plaint pleaded the following injuries

   i. Blunt trauma on the back

   ii. Blunt trauma on the left hand

   iii. Blunt trauma on the left wrist joint

   iv. Fracture of the left tibia

7. The injuries are supported by the medical report by Dr. Morebu Peter Momanyi dated 28.4.22 who said that the patient was on crutches and was not able to go about his duties. He said the patient was in the process of healing and he assessed the permanent disability at 30 %. The p3 form and the initial treatment notes also supports the said injuries.

8. I have also seen a medical report dated 25.6.22 by Dr. Obondi an Orthopedic surgeon which confirmed the injuries of the respondent. He found that he healed without any permanent disability. The fact that the respondent had fully healed was not challenged.

9. The Learned Trial Magistrate in awarding general damages in the sum of Kshs. 600,000/= relied on the case of *Daniel Otieno Owino & Another v Elizabeth Owuor 2020* eKLR where the respondent sustained fracture of tibia fibula bone on the right leg, deep cut wound and injuries to the right leg head and blunt injury to the chest and was awarded general damages in the sum of Kshs 600,000/=.

10. The appellant submitted that the award was inordinately high and warrants interference of this court as was held in the case of *Texcal Service station and another v Jappinene and another* (Nairobi CA no. 134 of 1998) and stated that in the case of *Mwaura Muiruri v Suera Flowers Limited and another* (2014) eKLR which the respondent relied on the plaintiff has sustained -

    a. multiple lacerations to the face.

    b. soft tissue injuries to chest cage.

    c. comminuted fractures of the right humerus and lower 1/3 tibia.

    d. Compound double fractures of the right leg upper and lower 1/3 tibia fibula.

    It was also submitted that the injuries healed without any permanent disability and that the injuries of respondent were similar to those sustained by the respondent in *Triad Coaches Limited v Mary Mutheu Kakemu* (2020) eKLR where the award of KShs. 200,000/= was up held. They also cited the case of *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* where the plaintiff sustained soft tissue injuries and fracture of the lower tibia fibula and the award of Kshs. 500,000/= was reduced to Kshs. 200,000/=.

    Further the case of *Stanley Maore v Geoffrey Mwenda* (Nyeri CA No. 147 of 2002 where the court of appeal held that "It has been stated now and again that in assessment of damages the general method of approach should be that of comparable award keeping in mind the correct level of awards in similar cases". Also that in that case the court reduced an award of damages of Kshs. 500,000/=to Kshs. 300,000/=. It was also submitted that the court did not consider the cited Triad case and that the

appellant has satisfied the conditions set out in the case of Texcal Service station (Supra). The appellant submitted that the award of general damages ought to be reduced to Kshs 200,000/=.

The respondent submitted that the award of Kshs. 600,000/= was commensurate with the injuries sustained and ought not be disturbed. He cited the case of *Kimatu Mbuvi T/A Kimatu Mbuvi and bros v Augustine Munyao Kioko* (2006) eKLR where the court of appeal held '' It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd v Shephard* [1964] AC 326 at page 353.

> " The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of 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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."

11. The respondent cited the case of *Mwaura Muiruri v Suera Flowers Limited and another* (2014) eKLR

12. This is a first appeal and the duty of this court is to re-evaluate the entire evidence on record and arrive at its own independent decision bearing in mind that it did not have an opportunity to see and hear the witnesses during their testimony as was held in the case of *Sielle v associated motors* 1963 EA.

13. Award of damages is also discretionary and the appellate court can only interfere with the same where the trial court misdirected itself and relied on wrong principles and or failed to consider relevant factors and awarded damages which are too low or high as was held in the case of *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470).

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14. On the principles to be considered in awarding damages Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J held as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant." Also see the case of *Kimatu Mbuvi T/A Kimatu Mbuvi* and *Bros v Augustine Munyao Kioko*

(2006) eKLR (Supra) and the case of Stanley Maore v Geoffrey Mwenda (Nyeri CA No. 147 of 2002).

15. I have carefully re-evaluated the entire evidence on record and the able submissions by both counsel. The issues arriving for determination are

    a. Whether the respondent sustained resultant 30 % disability?

    b. Whether the trial magistrate misdirected himself in making the ward of damages

    c. Whether this court should interfere with the said damages

    d. Who will bear the costs of this suit?

16. On whether the respondent sustained 30 % disability, the two doctors are in consensus on the injuries sustained by the respondent. The only point of difference is on the effects of the injuries. while Dr. Morebu says he sustained 30 % Permanent disability Dr. Obondi said that he had fully recovered by the time he saw him. It is worth noting that Dr. Morebu saw the respondent about 2 months after the accident when he was still on crutches while Dr. Obondi saw him about 4 months after the accident later. is clear that in this case the patient had not healed by the time he was seen by Dr. Morebu due to the short period between the accident and the examination and thus disability could not be determined at the time of examination. I find that the report of Dr. Morebu was exaggerated to the extent of the 30 % disability and thus I agree with Dr. Obondi that the respondent had fully healed by 22.6.22 when he saw him.

17. On whether the award was manifestly excessive , general damages were awarded at Kshs 600,000/= which the respondent said is commensurate to the injuries sustained while the appellant said it was excessive . I have seen the cited cases of Triad and Muiruri (Supra). The injuries in the Muiruri case are obviously more severe than the one in the instant case while the injuries in the Triad case are comparable to the ones herein. I have also seen the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR, Kshs. 400,000/= was awarded to a plaintiff with compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, blunt chest injury and head injury with cut wound on the nose. This is the case relied on by the learned Trial Magistrate in arriving at the award in the lower court . I have also seen the case of *Nahson Nyabaro Nyandega v Peter Nyakweba Omboga* [2021] eKLR in which Hon Justice E.Maina awarded general damages in the sum of Kshs 650,000/= for bruises on the face , compound fracture of the right tibia bone and cut would on the right leg .In the said case the fracture was compound and a metal plate was inserted in the leg which required removal and while in this case there was no such metal plate . The cited Triad and Gladys cases were decided by courts of concurrent jurisdiction and they are 2 and 4 years old respectively. The Kenyan Shilling has undergone inflation due to the effects of Covid 19 on the economy.

18. I have considered that nature of the injuries sustained by the respondent, the cited cases with comparable injuries the said Nahson case, the inflation and all the necessary factors. I find that general damages in the sum of Kshs. 450,000/= would be adequate herein. the award of the Learned Trial Magistrate for general damages in the sum of Kshs. 600,000/=was thus excessive and I proceed to set it aside and substitute it with Kshs. 450,000/= 18. Appellant is awarded costs of the appeal

T.A ODERA

JUDGE

7.5.24

Delivered virtually Via team's platform in the presence of: -

Miss Anyango holding brief b for Miss Ataka for appellant.

Miss Nyandoro present for respondent

Court Assistant: Oigo

Anyango: We seek 45 days stay of execution.

Nyandoro: We can have 30 days.

Order:

Appellant is granted 30 days stay of execution which is reasonable.

T.A ODERA

JUDGE