Kadima v Omumu (Civil Appeal 50 of 2023)
[2024] KEHC 7681 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 50 OF 2023

DO OGEMBO, J

JUNE 20, 2024

BETWEEN

DENIS KADIMA ..... APPELLANT

AND

NICHOLAS NAMATSI OMUMU ..... RESPONDENT

(Being an appeal from the Judgment of Hon. T .A Obutu, SPM, given on 7/3/2023 in Mumias, PMCC No. E026 OF 2020)

JUDGMENT

1. Nicholas Namatsi Omumu, the Respondent herein sued the appellant, Denis Kadima before the lower court in the above case claiming General Damages, Special Damages plus costs and interest. Upon full hearing, the trial court entered judgment in favour of the plaintiff and against the Defendant on the following terms:-

   Liability .....70:30 in favour of the plaintiff

   General Damages.....Kshs. 700,000.00/=

   Special Damages.....Ksh. 27,125.00/=

   Kshs.727,125.00/=

   Less 30 % contribution.....Kshs. 218,137.50/=

   Award Kshs. 508,987.50/=

2. Aggrieved, the appellant has filed this appeal against the said judgment. The memorandum of Appeal filed herein on 5/4/2023 and dated 6/4/2023, lists the following grounds of appeal:-

1. That the learned trial magistrate erred in law and fact in making the award of general damages in the said judgment that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent.

2. That the learned trial magistrate erred in law and fact in failing to resolve the conflicting medical evidence and by so doing made an inappropriate award.

3. That the learned trial magistrate erred in law and in fact in failing to find that without the treatment notes the pleaded injuries were not established.

4. That the learned trial magistrate erred in law and in fact by failing to give due weight to the evidence of Dr. Obondi, a specialist orthopedic surgeon while preferring a medical report of a non-specialist medics.

5. That the learned trial magistrate erred in law and in finding that there were fractures without any x-ray films or report.

6. That the learned trial magistrate erred in law and in fact by entering judgment for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, corbitrary and totally unsupportable by any authority or precedent.

7. That the learned trial magistrate ignored the appellant's submission, paid lip service and made no reference to all the precedents on general damages cited before her, thus coming to a wrong decision on quantum.

8. That the learned trial magistrate erred in law and in fact in making an award of Kshs.700,000/= without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous, and which amounts to a miscarriage of justice.

3. The appellant prays that the judgment and decree be set aside or otherwise reviewed and substituted with a suitable award. He also pleads for costs of the appeal. The Respondent opposes this appeal.

4. As already seen above, the parties herein recorded a consent on liability apportioning the same at 30:70 in favour of the Respondent (plaintiff in the lower court). The appeal herein is therefore only on the issue of quantum of damages awarded. In the case of *Selle v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, the Court of Appeal spelt out the jurisdiction of the first appellate court. It is to reassess and re-evaluate the evidence and to come up with its own conclusions. It is therefore the duty of this court to consider such evidence as was produced before the trial court and for this court to come up with its conclusion and determination of the same.

5. Regarding the issue of quantum, the record of proceedings before the trial court shows that it was the evidence of the plaintiff, based on the statement filed, that he sustained a fracture of the left tibia and multiple abrasions to the right hand and fingers. He was admitted in hospital from 14/8/2020 to 18/8/2020. He produced the relevant exhibits including the medical report, the P3 form, the police abstract, the medical card and the discharge summary. The defendant, on the other hand, produced a 2nd medical report.

6. The appeal was canvassed by way of written submissions. On the side of the appellant, it was submitted that it was upon the plaintiff to prove that indeed he sustained the injuries as pleaded. That Dr. Andai, confirmed examining the plaintiff and that he noted the plaintiff had sustained a fracture of left tibia, abrasion to the left ankle and fingers. But that Dr. James Obondi who did the 2nd examination, did

not detect any fracture only soft tissue injuries which had been stitched. He examined the plaintiff two years after Dr. Andai and that x-rays did not reveal any fracture.

7. That in the judgment, the trial court noted;

   From the medical evidence tendered by the plaintiff and the defence, it emerges that the plaintiff suffered a fracture of the left tibia and multiple abrasion on the right hand and fingers."

8. The court then went ahead and awarded Ksh.700,000/= in general damages without setting out the points for determination counsel relied *Timsales Ltd v Samwel Kamore Kihara*(2016) eKLR in which the Court of Appeal held that in the absence of a judgment in terms of Order 21 Rule 4, the High Court had no basis of dealing in the matter in the manner it did. And also *Awili Nelson v Purity Achieng Ochieng* (2021) eKLR, in which the High Court held that the judgment of the magistrate failed to adhere to the Rules in failing to give reasons for the decision counsel also relied on *South Nyanza Sugar Co Ltd v Omwando Omwando* (2011) eKLR where the court observed that the judgment of the trial court did not qualify as a valid judgment in terms of Order 21 Rule 4.

9. On the quantum of damages, counsel relied on *Simon Taveta v mercy Mutitu Njeru* (2014) eKLR, wherein the Court of Appeal held; an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law.

10. That PW2 who produced the discharge summary could not vouch for the injuries and the x-ray films and reports were not produced. Further, that Dr. Andai, PW3 who made the medical report never confirmed seeing the Xrays with the fractures. And neither did the Doctor's medical report confirm the fractures. That in the contrary, Dr. Obondi, DW1, confirmed seeing the previdus medical reports and the x-rays, but saw no evidence of any fracture.

11. It was further submitted that it was the burden of the plaintiff to prove the injuries he suffered. That the failure of the plaintiff to produce the x-ray report showing the fractures was fatal to the plaintiff's case. He relied on TimsaleseKLR.Ltd v Wilson Libuywa, Nakuru, Hcca No. 135/2006 and Daniel Odhiambo Ngesa v Daniel Otieno Owino And Ano. (2020)

    On specific quantums, the appellant relied on the following decisions:-

    i. *West Kenya Sugar Co. Ltd v Joyce Mayabi Jutsushi* (2020) eKLR where a sum of Ksh130,000/= was awarded for a blunt injury to the chest ,back cut wound on the left leg and abrasions on left forearm.

    ii. *AAA Growers Ltd – Mukhabi Juma* (2020) eKLR, in which a sum of Kshs.120,000/= was awarded for blunt injury to the head and chest with soft tissue injuries.

    iii. *Jyoti Structures Ltd & Ano. v Truphena Chepkoech Too & Ano.* (2020) eKLR, where the court set aside an award of Kshs.250,000/= and made an award of Ksh125,000/= for soft tissue injuries.

12. The appellant cited many other authorities on the issue of quantum of damages. In total, counsel pleaded for an award of Kshs.300,000/= on 100% basis.

13. The Respondent, on the other hand, submitted that before the trial court, both parties filed relevant documents. That the plaintiff's case was based on the medical report by Dr. Charles Andai (PW3), the discharge summary and P3 form, which confirmed that the plaintiff sustained a fracture of the left tibia and was admitted for four days and that plaster of paris (pop) was applied. That the second report was done two years later after the injuries had fully healed.

And on the quantum of damages, the Respondent relied on *Andy Forwarders Services Ltd and 2 Others v Godfrey Githiri Njenga* (2018) eKLR wherein the court observed;

> An appellate court will not disturb an award for damages unless it is 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."

14. The Respondent has urged that this appeal be dismissed for lack of merit.

I have considered the evidence on record herein and the submissions of the parties. As agreed by the parties, liability was agreed on by consent and this appeal is limited to quantum of damages awardable. And the main issue is the extent of the injuries suffered by the Respondent in view of the differences in the finding of the two doctors who examined the Respondent and prepared their respective medical reports produced in court as plaintiff Exh. -1 and Defendant's Exh.1 ie the medical reports by Dr. Charles Andai (PW3) and that of Dr. James Obondi.

15. It is therefore important to consider the respective medical evidence produced by each party so that the court may decide who of the two sides proved its case on a balance of probabilities.

16. The record of proceedings depict that the Respondent's case was first based on the medical report of Dr. Charles M. Andai (PEXH-1). The report shows that the Doctor examined the Respondent on 18/9/2020, about 30 days from the date of the accident on 14/8/2020. In the same report, the Doctor noted that the Respondent had sustained a fracture of the left tibia and multiple abrasions to the right hand and fingers. The report further notes that the Respondent had an application of plaster of paris on the left leg and that the xray film shown confirmed the fracture of the left tibia plateu. The P3 form produced by the plaintiff further confirms at Section A (1) (d) that the Respondent had suffered a fracture on left tibial platue, again also shown on the xray. Further, the discharge summary produced by the Respondent issued from St. Mary's Mission Hospital Mumias, on 18/8/2020, also confirms that the x-ray done confirmed that the Respondent had sustained a left knee fracture and p.o.p applied.

17. It is worth noting that the discharge summary produced by the Respondent is made by one medical officer Godfrey Mosing, whereas the medical report produced by the party is by Dr. Charles Andai. And the two documents though issued by two different medical facilities are in agreement that the Respondent indeed sustained the fracture complained of amongst the other soft tissue injuries.

18. The appellant (Defendant) on the other hand produced the medical report by Dr. James Obondi Otieno as exhibit (DEXH-1). The report shows that the doctor examined the Respondent on 23/3/2022, about one year and 7 months from the date of the accident. In the same report, the doctor observed that the Respondent sustained bruise scars on the dorsum of the right hand, laceration of the left knee and that x-ray showed no fracture. Just as the plaintiff's case, the Defendant/Appellant did not attach any x-rays no support of its case.

19. From the above evidence it is clear that the Respondent's case on the extent of injuries sustained was supported by the medical report of Dr, Andai, the P3 form and the discharge summary. The appellant's case was on the other hand, only based on the medical report of Dr. Obondi, made much later after the date of the accident.

20. Whereas the appellant's appeal is also on the basis that the Respondent did not present the initial x-ray relied on by Dr. Andai, it is also telling that Dr. Obondi who did the 2nd medical report has also not produced the x-ray mentioned in his medical report and which apparently did not disclose any fractures. The appellant has also not challenged the medical evidence of the Respondent that the

Respondent had been inserted with a plaster of the paris which according to the Respondent is proof of the bone fracture. And the appellant has not challenged the evidence of the Respondent on the possibility that the fracture injury may have healed and therefore not detectable during the examination done 1 year 7 months later after the date of the accident.

21. It is for these reasons that this court is convinced that the Plaintiff (Respondent) indeed proved on a balance of probabilities that he sustained the injuries as claimed and that the 2nd medical report produced by the defendant falls short of challenging the evidence of the plaintiff in this respect. I so find.

22. On whether this court can interfere with the quantum of the damages awarded by the trial court, I note that the two sides are agreed on the applicable principles. The case of *Arrow Car Ltd v Bimomo & 2 Others* (2004 KLR 101, cited by the Respondent and Kemfro Africa Ltd T/A Meru Express Service (1982 – 88) 1 KAR 777, cited by the appellant, are agreed that;

> ...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of E.A. to be that it must be satisfied that either the Judge, in assessing the damages took into account on irrelevant factor, 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 the damage."

23. The appellant has not pointed out in this appeal any irrelevant factor that the trial magistrate took into account in making the award. Neither has the appellant pointed out any relevant factor the learned magistrate left out. The appellant has also not shown how the said award of the trial court is inordinately high and erroneous.

24. I have myself considered the impugned judgment of the trial court. It is clear from the same that in arriving at the award, the trial court relied on the related cases of *Stanley Maore v Godfrey Mwenda* (2014) eKLR and *Mbaka Nguru & Ano. v James George Raknar* (1998) eKLR. The court went on to consider the current economic trend, and economic hard times.

25. I find no fault in neither the considerations that the trial court in making the award nor in the quantum of damages awarded.

26. In all, I do not find any merit in this appeal of the appellant dated 6/4/2023. I dismiss the same with costs to the Respondent. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE, 2024.

D. O. OGEMBO

JUDGE

20/6/2024

Court

Judgment read out in Open Court (Virtually) in presence of Ms. Lugulu for Respondent. Ms Baraza for the Appellant is absent.

D. O. OGEMBO

JUDGE

20/6/2024