Alphajiri Limited v Kibe (Civil Appeal 892 of 2022)
[2024] KEHC 8712 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8712 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 892 OF 2022

RC RUTTO, J

JULY 19, 2024

BETWEEN

ALPHAJIRI LIMITED ..... APPELLANT

AND

DANSON KARANJA KIBE ..... RESPONDENT

(An appeal arising from the judgment of Hon. S. A Opande Principal Magistrate delivered on 4th October 2022 in Chief Magistrate Court at Nairobi Milimani Commercial Courts Civil Suit No 3673 of 2019)

JUDGMENT

Background

1. This is an appeal on quantum. The appellant is aggrieved by the decision of the trial Court that awarded the plaintiff general damages of Kshs 600, 000/=, special damages of Kshs 170,096/= and costs of the suit and interest.

2. The appellant in a Memorandum of Appeal dated 31st October, 2022, seeks that the court sets aside the judgment delivered on 4th October 2022 and reduce the general damages to a fair sum and costs.

3. The appeal is premised on the following grounds;

    a. That the Learned Trial Magistrate erred in law and facts by failing to properly scrutinize and evaluate the evidence tendered by the appellants and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of quantum and compensation to the plaintiff.

    b. That the Learned Magistrate erred in law and fact in awarding Kshs 600, 000/= as damages as the said award is excessively high considering the nature of the plaintiff's injuries.

c. That the Learned Magistrate erred in both law and fact in making an award on quantum which is too high and was not supported by relevant authorities, guided by the doctrine of precedent and or commensurate with the injuries suffered by the minor.

d. That the award on general damages and special damages was against the weight of the evidence before the court and was without any consideration to the submissions of the defence/ appellant's counsel whilst failing to take into account the amounts claimed by the respondent did not relate to injuries as per the medical reports produced in court.

e. That the Trial Magistrate erred in law and fact in failing to properly take into account the proper legal principles regarding quantum while considering the judgment awards in cases of similar nature.

f. That the Learned Magistrate erred in law and fact by making an award on damages that was inordinately high in favour of the plaintiff/respondent amounting to a miscarriage of justice.

4. The Respondent case before the trial court was that she was travelling aboard the school van motor vehicle registration number KAW 047Z along the Nairobi- Thika Superhighway on the way to M-pesa Foundation in Thika for the Great Debaters contest when the school van while parked beside the road at the Toll station was hit by a Hino Lorry Motor Vehicle Registration Number KCF 764 G and as a result thereof, she sustained the following injuries;

a. Deep cut wound right temporal scalp

b. Deep cut wound left pinna.

c. Blunt trauma swelling left upper limb

d. Blunt trauma with swelling left lower limb.

5. Upon analyzing the evidence presented as well as the parties' submissions, the trial court proceeded to deliver judgment in favour of the plaintiff in the following terms;

a. Liability at 100% in favour of the plaintiff against the defendant

b. General damages Kshs 600,000/-

c. Special damages Kshs 170,096/-

d. Costs and interest.

6. It is the above holding of the court that aggrieved the appellant leading to filing of this appeal.

Parties' Submissions

7. The appellant relies on its submissions dated 5th April 2024 in which it is argued that the respondent's prognosis indicated that she sustained only mild soft tissue injuries. Therefore, the appellant contends that the trial court applied incorrect principles in assessing the quantum of damages. To support their case, they made reference to the case of *Kipkebe Ltd v Moses Kauni Masaki*, Kisii High Court Civil Appeal No 127 of 2004.

8. The appellant also faults the trial court for failing to consider both medical reports and openly disregarding the findings in the report by Dr. Adegu, instead solely relying on the report by Dr. Kinuthia in making a determination.

9. Further, they submitted that the court was guided by authorities involving injuries which were not comparable to those sustained by the respondent. They thus proposed an award of Kshs 150,000/- and cited the cases of *Lilian Anyango Otieno v Phillip Mugoya Ogila* [2022] eKLR; and *Telkom Orange Kenya Limited v S O (minor suing through his next friend and mother* [2018] eKLR to support its case.

10. In response, the respondent relied upon her submissions dated 18th April 2024 in which she argued that the award by the trial court was not excessive. She contended that the court was guided by the injuries she sustained as well as past comparable cases and inflation.

11. In response to the assertion that the trial court did not consider Dr Adegu's medical report, the respondent stated that this was not true. She submitted that the trial court considered both reports and relied on the report by Dr, Kimathi, which was the first in time in determining the injuries sustained by the respondent. Further, she explained that the injuries listed by Dr. Kimathi were similar to those listed on the P3 Form, which was filled months after the accident.

12. It was her submission that the trial court in reaching at the award of damages, took into account the age of the respondent who was a minor, the injuries, inflation, and residual complication. That from Dr. Adegu's medical report done two years after the accident, the respondent was still experiencing pain on the left knee and muscle pull on the same leg.

13. Further, the respondent argued that the authorities relied upon by the appellant did not take into account these residual complications, hence, the trial court did not err. The respondent relied on the case of Naivasha Civil Appeal No. 64 of 2018 *Robinson Njoroge v Daniel Ombasa* (2021)eKLR and Nairobi Civil Appeal No 310 of 2014 *Hannah Wanjiku Wambui v Benard Ngaruiya Wataka* (2018) eKLR.

14. In conclusion, the respondent urged the court to find that the appeal fails because the appellant had failed to prove that the award granted by the trial court was inordinately high or that the magistrate considered irrelevant and extraneous matters in arriving at the figures.

Analysis and Determination

15. The crux of this case is whether the trial court erred in determining the quantum of damages.

16. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and in *Selle & Anor – v- Associate Motor Boat Co. Ltd* 1968 EA 123.

17. Besides, the circumstances under which an appellate court can interfere with trial court's discretion on assessment of damages were stated in the case of *Kemfro Africa Ltd v Lubia & another* , where it was held that:

> " ...its [trial court] 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."

18. Also, in *Sheikh Mustaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457, the court pronounced 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..."

19. Similarly, in *Jane Chelagat Bor v. 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."

20. In this case, the appellant relies upon a medical report conducted by Dr. William Adegu. On her part, the respondent relied upon the medical report by Dr. Moses Kinuthia. In its submissions, the appellant states that Dr Adegu's report confirms the injuries as pleaded on the plaint and as listed in the 1st medical report by Dr. Moses Kinuthia.

21. A perusal of the two medical reports confirms the assertions by the appellant that the report, although prepared at different times speak to the same injuries all of which were pleaded on the plaint. Thus, this court will be guided by the finding of fact with regards to injuries sustained namely; deep cut wound right temporal scalp, deep cut wound left pinna, blunt trauma swelling left upper limb and blunt trauma with swelling left lower limb in order to determine if the damages awarded by the trial court were excessive.

22. In the case of *Matunda (Fruits) Bus Services Ltd v Agnes Chemngeno Tuiya* [2021] eKLR the respondent herein sustained deep cut wound on the scalp, cut wound on the right temporal region of the scalp, deep cut wound on the right shin, blunt injuries to the neck, loose two upper incisor teeth, loose two lower incisor teeth and cut wound on the lower lip and an award of Kshs 390,000.00 for general damages was substituted with Kshs 250,000.00/=

23. In *Kenya Power & Lighting Co. Ltd v Mary Akinyi,* HCCA No. 72 of 2007, (Korir J. as he then was) upheld an award of Kshs. 350,000/- as general damages for deep cut wound on the calf muscles of the left leg, laceration on the right knee and right shoulder and contusion on the chest.

24. In *Francis Ochieng & another v Alice Kajimba* [2015] eKLR, a sum of Ksh. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries.

25. Having analysed the above cases with comparable injuries, I now turn to consider whether the general damages awarded by the trial court were excessive. In doing this, I draw inference to the Court of Appeal decision in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR which stated that "comparable injuries should attract comparable awards". Therefore, the guiding principle in the

assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position also finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

> " Having so said, 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."

26. Undoubtedly, the respondent degree of suffering was harm as reported by Dr. Kinuthia's report and soft tissue injuries as explained in Dr. Adegu's report. In arriving at its decision, the trial court stated that " I will go by the report by Dr. Kinuthia as it is first in time and he probably saw the victim before she was healed. Based on the authorities cited and considering the plaintiff was a minor owed duty of car, I will award Kshs 600,000/- in general damages."

27. From the record, I note that both the appellant and respondent filed their submissions whereby they both made reference to different authorities to support their respective proposals on quantum. In this instance therefore, I fault the trial court for giving a blanket statement in particular stating "Based on the authorities cited and considering the plaintiff was a minor owed duty of care, I will award Kshs 600,000/- in general damages" without being specific as to which of the authorities guided the considerations when arriving at Kshs 600,000/- general damages. It is always important to extract the ratio for an authority that a court seeks to rely upon as this demystify the consideration.

28. In making a blanket statement, the learned magistrate failed to elaborate on which consideration impacted his decision making. The trial court ought to have cited the decisions relied upon and demonstrate how they related to the issues in question. It is always important to show how the decision is applicable and that the facts are similar, in line with the rationale behind the doctrine of stare decisis. One must show that the ratio in the particular case is applicable in the given circumstance.

29. In my considered view therefore and taking into account the authorities I have cited, the contemporary value of the shilling and inflation rates, I find that an award of Kshs. 400,000.00 for pain and suffering is commensurate to the injuries suffered.

30. As for special damages, the amount pleaded and proved was Ksh 170, 096/= and I have no reason to disturb the finding.

31. The upshot of the above is that this appeal succeeds to the extent that the Judgment delivered on 4th October 2022 in Chief Magistrate Court at Nairobi Milimani Commercial Courts Civil Suit No 3673 of 2019 on quantum under general damages is hereby set aside and substituted with the following judgment and award:-

    i. The award of Kshs 600,000.00 for general damages is substituted with Kshs 400,000.00.

    ii. The award of Special damages Ksh 170, 096/= issued by the trial court is upheld.

    iii. In the interest of justice, each party shall bear their own cost of this appeal.

    It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 19TH DAY OF JULY 2024

For Appellants: Mr. Muriuki H/B for Mr. Gaya

For Respondent: N/A

Court Assistant: Peter Wabwire