Karani v Otieno (Civil Appeal E161 of 2022)
[2024] KEHC 8752 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E161 OF 2022

DKN MAGARE, J

JULY 15, 2024

BETWEEN

SAMSON MCHERU KARANI ..... APPELLANT

AND

JOACHIM OTIENO ..... RESPONDENT

(Appeal from the judgement and decree of Hon. J. Nyariki given on 30/8/2022 in Mombasa CMCC E059 of 2021)

JUDGMENT

1. This is an appeal from the judgement and decree of Hon. J. Nyariki given on 30/8/2022 in Mombasa CMCC E059 of 2021. The Appellant was the Plaintiff.
2. The appellant raised a precise ground of appeal as follows: -
    a. The learned magistrate erred in law and in fact by awarding a quantum which was excessively low in the circumstances.

Injuries

3. The Appellant pleaded the following injuries: -
    a. Pain and tenderness with inability to use the right limb.
    b. Comminuted fracture of mid shaft
4. The Appellant was treated at Coast General Teaching and Referral Hospital. He was then aged 20 years. He was also treated at Jambo Medical Centre and Nursing Home.
5. The PW indicated that the Appellant suffered previous harm. Parties had agreed on liability at 70:30. The respondent submitted that a sum of 300,000/= will suffice. Thy relied on the decision of Daniel

Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR, where R. E. Aburili J reduced an award of Kshs. 600,000/= to Kshs. 400,000/= on 29/5/2024 for head injuries with cut wounds, chest injuries, injuries on the left thigh, injuries to the right leg with cut wounds and a fracture and injuries on the left lower ankle joint.

6. The court relied on some old matter from 2017 and awarded the amount of Kshs. 318,500/=. This is the most precise general damages award I have ever encountered. Most of the others are rounded off to Kshs. 320,000/= or Kshs. 300,000/= or Kshs. 350,000/=.

7. 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.

8. 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."

9. 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."

10. 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.

11. 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..."

12. 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."

13. 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.

14. 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 uniformity 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."

15. 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.

16. 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.

17. 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..."

18. 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.

19. 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.

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

21. 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 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 have 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 different.

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

23. It is also not clear whether the same is before or after contribution which means the amount could either be Ksh.445,000/- before contribution or 222,950/- after contribution depending on the names and the school of thought the reader is in.

24. The same also creates a lexical ambiguity whether the damages at 30:70 at Ksh.318,500/- mean anything if for example it was at 100%. Given the ambiguity, it will be imperative to clarify the judgement, even where the court may find that the award was within range.

25. In Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, Meoli J Awarded Ksh. 800,000/- for a plaintiff who sustained fracture of the left femur shaft and swollen tender thigh. The injuries were classified as grievous harm and was awarded 5% permanent incapacity.

26. In Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR Odunga J dealt with a fracture of the femur, and stated: "In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body." There, the court awarded Kshs. 600,000/- in general damages.

27. In Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support, the court awarded Kshs. 700,000 as general damages.

28. In the case of *Kihara & another v Mutuku (Civil Appeal 27 of 2018)* [2022] KEHC 15626 (KLR) (17 November 2022) (Judgment) RM MWONGO, J, dismissed an appeal for

    (a) blunt injuries to the chest,

    (b) blunt injuries left thigh which developed into ecchymosis,

    (c) bruises on forearms and

    (d) fracture of the right femur and the magistrate awarded Ksh. 700,000/=.

29. I am aware that in the English Court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 were echoed by Potter JA in Tayab v Kinany (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326, at page 345 as follows:

> "But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional."

30. An award of Kshs. 318,500/= was a fluke and not a proper award. The Appellant prayed that this appeal be allowed and the judgement of the subordinate court be set aside and substituted with a judgment enhancing the award.

31. The appellant testified but cross-examination was mainly on liability. He stated that he was insured. Parties thereafter decided 70:30 and produced the list of documents. The court entered judgment on aforesaid on 30/8/2022 resulting in the appeal herein.

Analysis

32. The respondent had submitted that a sum of Ksh.300,000/- was sufficient. They relied on the case of Daniel Otieno Owino & Another Vs Elizabeth Atieno Owuor (2020) eKLR where Justice R.C. Aburili reduced damages from Ksh.600,000/- to Ksh.400,000/- for compound fracture of tibia and fibula. The appellant on the other hand had submitted Kshs. 1,500,000/-.

33. The appellant was treated with physiotherapy and gradual weight bearing, interlocking nail fixation on the right femur, with obvious deformity on the right leg, externally rotated with shortening.

34. In the circumstances, I set aside the award of Kshs. 318,500/= and substitute with a sum of 800,000/=.

35. The Appellant shall have costs of the suit of Kshs. 95,000/=.

36. Section 27 of the *Civil Procedure Act* provides as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

Determination

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

    a. Judgment on damages is set aside and in lieu thereof, I substitute with a sum of Kshs. 800,000/= subject to 30% liability (240,000/=) leaving a sum of Kshs. 560,000/=

    b. Costs of Kshs. 85,000/=

    c. 30 days stay of execution.

    d. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 15TH DAY OF JULY, 2024.

Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah