Maina v Kungu (Civil Appeal E007 of 2023)
[2024] KEHC 10574 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E007 OF 2023

CJ KENDAGOR, J

JULY 22, 2024

BETWEEN

CAROLYNE WANJIKU MAINA ..... APPELLANT

AND

GEORGE KAHINGA KUNGU ..... RESPONDENT

(Being an appeal from the Judgment delivered by the Learned Senior Resident Magistrate Hon. F.I. Koome Njagi in CMCC Civil Suit No. 487 of 2021 in the Chief Magistrate's Court, Limuru on 21st December ,2022)

JUDGMENT

1. This Appeal arises from the Judgment of the trial court delivered on 21st December, 2022.
2. The Respondent sustained injuries as a result of a road traffic accident that occurred on 26th September, 2021 involving Motor Vehicle Registration Number KCX XXXX. Liability was agreed upon by the parties at 80%:20% in favor of the Respondent and the issue of quantum was canvassed by way of written submissions. The trial court awarded general damages for pain, suffering, and loss of amenities at KES. 750,000/= plus special damages of KES. 10,820/=.
3. The Appellant has appealed against the judgment on the following grounds;
    a. That the learned trial magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the Respondent.
    b. That the learned trial magistrate erred in law and in fact by ignoring the Defendant's written submissions and authorities cited therein in assessing general damages for pain, suffering, and loss of amenities.

4. The Appellant prays for orders that the appeal be allowed with costs, and the judgment delivered on 21st December 2022 be substituted with an assessment at a much lower amount. Further, the cost of the appeal is borne by the Respondent.

5. The appeal was opposed and the same was canvassed by way of written submissions.

Submissions:

6. The Appellant submitted that the learned trial magistrate erred in considering an additional injury that was not proved and that the award of general damages is manifestly excessive. The Appellant urged the court to find that the non-production of a radiologist report and X-ray film in respect of the contested injury leads to an inference that the injury was non-existent.

7. The Appellant further submitted that an award in the range of KES. 200,000/= to 300,000/= is appropriate considering the injuries and the authorities relied upon.

8. The Respondent on the other hand, submitted that the awarded quantum was justified and that the learned magistrate had relied on the evidence tendered in arriving at the assessment. The Respondent submitted that the variance in the injuries was because the 2nd medical examination and report was prepared close to 9 months after the occurrence of the accident. The respondent proposed an award of Kes. 1,000,000/- in the submissions before the lower court.

Issues for determination:

9. The main issue that arises for determination is whether the award of general damages was excessive to warrant interference by this court and who should bear the costs of the appeal.

10. This being the first appeal, this court is under a duty to re-evaluate and assess the evidence and make its conclusions. This duty was set out in *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

11. In the plaint dated 25th October 2021, the Respondent pleaded that he sustained the following injuries as a result of the accident;

    a. Swelling and wounds on the head

    b. Swollen, painful, and tender right wrist

    c. Swollen, painful, and tender left ankle

    d. Fracture-right distal radius

    e. Fracture-left lateral malleolus

12. There are two medical reports produced in this case. The medical reports were produced by consent and the makers were not called to testify.

13. The Respondent relied on Dr. G.K Mwaura's report dated 11th October 2021 and the Appellant relied on Dr. Wambugu P.M's report dated 17th May 2022. The two medical reports correspond that the

Respondent sustained blunt trauma to the head, blunt trauma to the left ankle joint, and a fracture of the right radius. The Appellant disputes the fracture of the left lateral malleolus which is not contained in the second medical report that they relied upon.

14. On re-evaluating the evidence, I note that the treatment notes and the P3 form were produced in support of the Respondent's claim. The notes capture the treatment plan on physical examination. The P3 form was filled on 4th October 2021, a week after the accident and the medical officer noted the injuries including the fracture of the left lateral malleolus. These documents produced before the trial court support the findings of Dr. G. K. Mwaura who examined the Respondent on 11th October 2021. Dr. Mwaura noted that plaster casts applied to the left leg and left arm were still in place at the time of examination.

15. Dr. Wambugu examined the Respondent about eight months after the accident. The trial court in examining the reports indicated as follows:

> " 8. The medical report by Dr. Wambugu dated 17/05/22 (8 months after the accident) confirmed the injuries except that of the left lateral malleolus. I have perused the P3 form and I note the fracture of the malleolus is captured."

16. As a first appeal court according to *Peters v. Sunday Post Ltd* (1958) EA 424, I am only allowed to interfere with a finding of fact, if, i) It is not supported by evidence or ii) It is contrary to the totality of the evidence produced at trial.

Kiruga v. Kiruga & Another [1988] KLR 348 and went on to emphasize and hold as follows: -

> " 2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong."

17. I have evaluated the trial court's finding of facts on the injuries and find no fault that he failed at some point to take account of particular circumstances or probabilities materially to estimate the evidence. The non-production of a radiologist report and X-ray film was not fatal to the proof of the contested injury as the other medical notes and documents supported the findings of the injury. The trial court findings on the injuries were upon consideration of the medical reports alongside all other available evidence.

18. The remaining issue is the question of the assessment of damages. The appellant relied on two authorities at the lower court and an additional authority in the submissions on appeal. In the case of *Patrisia Adhiambo Omolo v Emily Mandala* [2020] Eklr, the Judge upheld an award of Kes.180,000/= for fracture of the left forearm radius and ulna bones.

In the case of *Philip Musyoka Mutua v Leonard Kyalo Mutisya* [2018] eKLR, the Judge awarded a sum of Kes.300,000/= for pain and suffering on account of a closed fracture radius bone, bruises on the forehead and left hand and cut wound on the face.

In the case cited on appeal, *Gogni Rajope Construction Company Limited v. Francis Ojuok Olewe* [2015] eKLR, the Judge awarded Kes. 350,000/= for a fracture of the radius and ulna and a dislocation of the elbow joint. I also find that the injuries

19. The respondent on the other hand cited the following authorities;

> *Brookside Dairy Limited v Peter Butata Wanjohi* [2018] eKLR where the High Court noted the following injuries: Compound segmental fracture of the right tibia and fibula, fracture

to the right medial malleolus, fracture to the left lateral malleolus and blood loss, physical and psychological pain and upheld the judgment of the lower court at KShs.563,416.00/-.

Sese v TN (Minor suing thro' her next friend WMO) (Civil Appeal 25 of 2022) [2023] KEHC 24692 (KLR), the Respondent sustained soft tissue injury of the head, neck, back and right forearm, fracture of the right forearm and fracture of the right leg (medial malleolus) and the High Court upheld the Trial Court's award of Kes. 800,000/-

Titus v Ikonze (Civil Appeal 53 of 2019) [2021] KEHC 345 (KLR), where the respondent suffered fracture of the right distal radius, dislocation of the right ankle, and other soft tissue injuries. The Appellate Court awarded 800,000/= as general damages.

Kennedy Ago Lidweye v. Steel Plus Ltd. Nai HCCA NO. 248/2010, where the Respondent had sustained a compound fracture of the right distal radial ulna and the award of Kes. 600,000/= was upheld.

Wainaina v Wagacha (Civil Appeal 16 of 2019) [2023] KEHC 26226 (KLR), where the Respondent sustained a fracture of the left distal radius and laceration and was awarded Kes. 500,000/= as general damages.

20. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

21. I have carefully examined the authorities relied upon and the awards therein. Each case is always different and authorities relied on may never have the same injuries as those sustained in the case in issue. The courts are expected to give consideration based on comparative analysis, the age of the authorities, and inflationary trends. The learned magistrate considered the nature of the injuries compared with the injuries and subsequent awards in the cited authorities.

22. In the case of *Mbogo and Another v. Shah* [1968] EA 93 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 Respondent sustained swelling and wounds on the head; swollen, painful, and tender right wrist; swollen, painful, and tender left ankle; fracture-right distal radius and fracture-left lateral malleolus. The skeletal injuries were assessed as grievous harm in the evidence adduced. He is predominantly right-handed and a permanent degree of incapacitation for the right-hand wrist was assessed at 2%.

The learned trial magistrate awarded Kes.750,000/= as general damages for pain, suffering, and loss of amenities.

24. The quantum awarded was correctly based on the pleadings, evidence on record, and the submissions made by the parties. The lower court's award of Kes. 10,280/- as special damages was not disputed. Liability was also correctly apportioned in the ratio agreed upon by the parties.

25. Accordingly, the appeal is not merited and is dismissed with costs to the respondent.

Orders accordingly.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 22ND DAY OF JULY, 2024.

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C. KENDAGOR

JUDGE

Judgment delivered through the Microsoft Teams online platform.

In the presence of;

Court Assistant .....

Advocate for the Appellant .....

Email address: .....

Advocate for the Respondent .....

Email address: .....