Western Express Coach Limited v Onyango (Civil Appeal E110 of 2021)
[2024] KEHC 11193 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E110 OF 2021

HM NYAGA, J

SEPTEMBER 23, 2024

BETWEEN

WESTERN EXPRESS COACH LIMITED ..... APPELLANT

AND

ALFRED OWINO ONYANGO ..... RESPONDENT

(Being an appeal Against the Judgment by Honourable R. Yator (Principal Magistrate) in Molo CMCC No. 8 of 2020 delivered on 30th September, 2021)

JUDGMENT

1. The Respondent herein filed a suit in the Chief Magistrates Court at Molo seeking general and special damages as a result of injuries he sustained in a road traffic accident on 23rd December 2017 at Tunnel area along Londiani – Muhoroni Road.
2. The Appellant herein filed defence denying liability.
3. At the end of the trial the learned magistrate entered judgment for the Respondent against the Appellant as follows;
    a. Liability of 100% against the Appellant
    b. General Damages – Kshs. 700,000/=
    c. Special Damages – Kshs. 109,550/=
    d. Costs and interest at court rates.
4. Aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal in which it set out the following grounds;

a. That the learned trial Magistrate erred in law and in fact in awarding Kshs. 700,000/= under general damages for pain and suffering which was inordinately high in the circumstances.

b. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages.

c. The learned magistrate erred and misdirected herself in law and in fact in misapplying the principles applicable to assessment of damages.

5. The Appellant sought orders that the judgment of the trial magistrate on quantum be set aside and be substituted with a reasonable award. The appellant also sought costs of the Appeal.

6. This Appeal is only on quantum. The parties were directed to file written submissions. Only the Respondent submissions were on the CTS portal or court record at the time of writing this judgment.

7. The Respondent's counsel submits that after the accident, the Respondent's injuries got worse and surgical debriment had to be done. Reliance was placed on the case of *Easy Coach Limited vs Emily Nyangasi HCCA No. 20 of 2015* where the Plaintiff was awarded Kshs. 700,000/= for facial injuries, injury to the chest, injury to the back, injury to the right hand and injury to the right leg with wounds.

8. Citing Shabani vs County Council of Nairobi [1985] KLR 516 the Respondent urged the court not to disturb the award of damages of the lower court.

Analysis and Determination

9. The duty of the Appellate court is to re-evaluate and analyze the evidence tendered before the lower court with a view to arriving at its own independent finding. This legal principle was stated in Selle -v- Associated Motor Boat Co. Ltd (1968) E.A, where the court held that-

> " An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are; that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."

10. Assessment of damages is at the discretion of the trial court, and this court cannot interfere with the exercise of such discretion except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another where it was stated as follows: -

> " I think it is well settled that this court will not interfere with the exercise of its 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 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."

11. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR, the Court of Appeal held that –

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:"An appellate court will not disturb an award of damages unless it is so 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."

12. The Appellant's case is that the award was manifestly high. The Respondent's position is that the award was reasonable, given the nature of the injuries he sustained.

13. So was this award so excessively high to warrant interference by the court?

14. To answer the question, I will look at the evidence adduced afresh, as I am enjoined to.

15. The Respondent pleaded the following injuries;

    a. Deep cut wound on the left foot leading the soft tissue injuries.

    b. Deep cut wound on the right ankle leading to soft tissue injuries.

16. According to the Discharge Summary from Mt. Longonot Medical Services Naivasha, the Respondent was admitted on 19th January, 2018 and was discharged on 31st March, 2018.

17. The Respondent also produced a Discharge Summary Form from Busia District Hospital which indicated that he was admitted in that hospital from 9th January, 2018 to 14th January, 2018.

18. The P3 form produced by the Respondent indicates that he was admitted in hospital for five (5) months. I don't think that this is the correct position.

19. The Medical Report by Dr. Obed Omuyoma states that the Respondent was given first aid at Fort Tenan Sub County Hospital and was taken to Port Florence Hospital 4 days later. There were no documents from the 2 mentioned institutions.

20. The discharge summary from Busia District Hospital indicated that he was treated for a septic leg injury. Now, the accident occurred on 23rd December 2017. There is no explanation as to why minor looking injuries turned septic after about 3 weeks. It could be partly due to lack of proper care, rather than the extent of the injuries themselves.

21. In my view, the Respondent's injuries were relatively minor since he was only subjected to first aid at first then released from hospital. They could have worsened by the fact that they became septic as shown in the discharge summary from Busia Hospital. That may have had nothing to do with the gravity of the injuries themselves but due to improper care after the accident. The Respondent was under a duty to ensure that his wounds were properly cared for. He cannot blame the Appellant if he never took proper care of the initial injuries leading to the subsequent complications.

22. Having stated the above, I am thus of the view that the award of general damages was manifestly excessive. The authority cited by the Respondent clearly shows mere serious injuries that those of the Respondent.

23. Consequently, I set aside the award of Kshs. 700,000/= and substitute it with an award of Kshs. 350,000/=.

24. I find that it would not be in order to burden either party with costs. So I order that each party will bear its own costs on this Appeal.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jennifer

Miss Nanjira for Appellant

No appearance for Respondent