



Doshi & Company (Hardware) Limited & another v Juma (Civil Appeal E1080 of 2023) [2024] KEHC 11699 (KLR) (Civ) (1 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1080 OF 2023

AM MUTETI, J

OCTOBER 1, 2024

BETWEEN

DOSHI & COMPANY (HARDWARE) LIMITED 1ST APPELLANT

PAUL OMARI NYABUTO 2ND APPELLANT

AND

HASSAN CHITECH JUMA RESPONDENT

(Being an appeal from part of the judgement of the Honourable Rawlings Liluma (SRM) delivered on 15th September 2023 in CMCC NO. E038 OF 2022 at Nairobi)

JUDGMENT

Introduction

1. The appellants in this appeal are aggrieved by the learned Honourable Magistrate's decision to award the Respondent the sum of Kshs. 700,000 in general damages which sum the appellants claim is inordinately high considering the nature of the injuries sustained and comparable awards by other Courts.

Appellants Case

2. The appellants vide their memorandum of appeal have raised four grounds namely:
 - i. That the Learned Magistrate erred in law and in fact as the evidence adduced did not support the finding of the injuries sustained by the Respondent in the judgment.
 - ii. That the Learned Magistrate's award of damages in particular considering the injuries sustained by the Respondent was inordinately high, in that it was an erroneous estimate of damages



without due regard being made to the true and correct injuries sustained by the Respondent and the comparable cases.

- iii. That the Learned Magistrate erred in law and in fact in holding that the Respondent's injuries were of a serious nature contrary to the evidence adduced to prove the same.
 - iv. The Learned Magistrate erred in law and in fact in awarding the sum of Kshs. 700,000.00 as general damages which amount was inordinately high considering the true and correct injuries sustained by the Respondent and comparable case law.
3. In their submissions dated 14th May 2024 the appellants have argued the grounds together.
 4. The appellants urge the Court to find that the award by the Court was inordinately high and unmerited.
 5. The appellants therefore seek that this Court finds that the entire judgement by the Court is fundamentally flawed and that the orders made are altogether inconsistent with the law, unconscionable and as such ought to be set aside.

Respondents Case

6. The respondents on his part supports the decision of the learned Honourable Magistrate and pleads with the Court not to interfere with the same.
7. In the respondents view the sum of Kshs. 700,000 for general damages was reasonable and appropriate taking into account inflation and comparable authorities.
8. The respondent thus submits that the appeal has no merit and should be rejected in toto.

Analysis

9. I have noted that the appellant was found 100 % liable for the accident that happened on the 29th July 2021 along Busia road at the Enterprise Road junction.
10. According to PW1 PC Lucas Wambua the motor vehicle KBS 703B was to blame for the accident. The respondent was a pedestrian when the motor vehicle hit him.
11. As a result of the accident he lost his job at general plastics.
12. He testified that when the motor vehicle hit him he was walking along the pavement and he was off the road.
13. The appellants called DW1 who was the doctor who did a second medical report in which he disputed their being a fracture suffered by the respondent as a result of the accident.
14. Notably the appellant did not lead any evidence to counter the evidence led by the respondent regarding the circumstances of the accident. The respondent's evidence therefore was unchallenged and therefore the decision by the learned Honourable Magistrate on liability was supported by the evidence.
15. I find no reason to interfere with the same.
16. The contention by the appellants that all the orders by the Magistrate were unconscionable is therefore outlandish and goes against the weight of evidence. The submission cannot therefore be sustained.



Quantum

17. The Court sitting as a first appellate Court is under duty to review the evidence on record and draw its own conclusions well aware that it did not have the opportunity to see or hear the witnesses.
18. The assessment of damages is a matter of exercise of judicial discretion and appellate Courts are cautioned to be guarded in approach to requests for review of this exercise of judicial discretion.
19. This Court would only interfere where it is satisfied that the exercise of discretion by the Magistrate was not judicious or was on account a material misdirection on relevant evidence or the application of wrong principles by the Court. – See *Mbogo Vs. Shah* 1968 EA 93.
20. An error apparent on the face of the record would also attract this Court’s intervention.
21. It is for the appellants to demonstrate to this Court that the Magistrate was incorrect in his decision considering the evidence adduced before him or acted on the wrong principle.
22. The principles must be clearly brought out by the appellants in their submissions.
23. The appellants in this appeal have simply stated that the orders made by the Magistrate were against the law, clear statutory provisions and equity.
24. Not a single statutory provision violated by the Magistrate has been stated. Equally the principles of equity breached have not been stated. It is a sweeping submission at best.
25. The appellants have however highlighted decisions that they have urged the Court to consider. On the strength of those submissions the appellants urge this Court to review the sum of Kshs. 700,000 to a paltry Kshs. 80,000.
26. The decisions cited by the appellants include;-
 - i. *Losangi Insurance Prokers Ltd & Another Vs. Josephat Achesa Sumbali* [2022] eKLR in which an award for Kshs. 300,000 was reduced to Kshs. 95,000 for a deep cut wound on the knee, pain and bleeding.
 - ii. *Edward Mutevu Maithya & Another Vs. Edward Nuaweya* [2022] eKLR where a sum of Kshs. 500,000 was reduced to Kshs. 100,000 in general damages for injuries of cut wounds on the scalp, bruises on the back, bruises on the right upper limb and on the left limb.
27. The respondent on the other hand has relied on the following decisions:-
 - i. *Beatrice Khamede Vs. Eric Wanuu & Another* [2019] eKLR where the plaintiff was awarded Kshs. 800,000 in general damages for a fracture of the left shoulder blade.
 - ii. *Roy Mackenzie Vs. Cartrack Kenya Ltd & Another [2012] Civil suit 86 of 2012* where the plaintiff was awarded Kshs. 700,000 for serious injuries on the left shoulder leaving him disabled with restricted movement of his shoulder and arm.
28. The issue that I see in this appeal is that the two doctors PW1 and DW1 contradict each other on the nature of injuries, more so on whether the respondent suffered a fracture.
29. DW1 concedes that doctors can differ on medical evidence and precisely that is the reason in this Court’s mind theirs remains an opinion.
30. As a general principle of law opinions of experts are not binding to the assessor of facts but are able to assist the Court to form its own opinion before reaching a decision.



31. The doctor PW1 called by the plaintiff (respondent) indicated in his report that there was a fracture of the scapula. It is this portion of the medical evidence that DW1 disputes. In his report DW1 Doctor Wambugu stated that in his opinion the respondent suffered soft tissue injuries.
32. As stated earlier on this judgement the Magistrate had the advantage of hearing and seeing the witnesses. This Court is thus deprived of the advantage of drawing inferences as to demeanour of their witness and why in the opinion of the magistrate she elected to believe the plaintiff's doctor on the injuries.
33. The Court notes that an opinion about the veracity of the evidence of a witness could be subjective or objective based on the appearance of the witnesses.
34. The Court therefore is not in a position to fault the magistrate on her opinion about the evidence given by the two doctors.
35. However, I have considered that matter and independently found that there is no permanent incapacity noted by either doctors.
36. The respondent authorities allude to a sum awarded to persons who in this Court's view suffered more serious injuries.
37. I am therefore inclined to review the award of general damages from the figure of Ksh. 700,000 to Kshs. 500,000 taking into account the value of our currency today.

Conclusion

28. In the end the orders of this Court are:-
 - i. That the appeal on quantum is allowed.
 - ii. The sum of Kshs. 700,000 awarded to the respondent is reviewed downwards to Kshs. 500,000 in general damages.
 - iii. The special damages are retained at Kshs. 5,075.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF OCTOBER, 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Ndunge for the Appellant

Odhiambo for Respondent

