Lumumba v Adero (Civil Appeal E040 of 2024)
[2024] KEHC 13084 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13084 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E040 OF 2024

RE ABURILI, J

OCTOBER 18, 2024

BETWEEN

JOHN WERE LUMUMBA .... APPELLANT

AND

SHEM OUMA ADERO .... RESPONDENT

(An appeal arising out of the Judgment of the Honourable G.C. Sere. in the Small Claims Court at Kisumu delivered on the 8th February 2024 in Kisumu SCCC No. E035 of 2022)

JUDGMENT

Introduction

1. The appellant filed an amended statement of claim on the 4th May 2023 seeking general damages of Kshs. 700,000 against the respondent following injuries sustained in a road traffic accident that allegedly occurred on the 9th July 2022.

2. The appellant averred that on the said day at around 10am while travelling as a pillion passenger aboard motor cycle registration no. KMFR xxxE along the extreme verge off Kisumu – Kakamega road near Lav bar area or thereabouts when the respondent's motor cycle registration number KMGE xxxJ was so negligently ridden so as to cause it to hit the appellant resulting in the injuries sustained by the appellant.

3. The respondent did not call any witness or produce any evidence to controvert the appellant's allegations.

4. The trial magistrate subsequently found liability at 100% against the respondent and proceeded to award general damages of Kshs. 500,000 and special damages of Kshs. 5,550.

5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 5th March 2024 raising the following grounds:

a. That the learned trial magistrate erred in law and in making an award in respect of general damages of Kshs. 500,000 that was too low in view of the injuries sustained by the appellant and presents a miscarriage of justice to the appellant.

b. That the learned trial magistrate erred in law and in fact in failing to completely evaluate the appellant's pleadings and evidence on quantum and special damages.

c. That the learned trial magistrate erred in law and in fact in failing to consider submissions of the appellant thereby arriving at an erroneous and low award for general damages and special damages.

d. That the award by the learned trial magistrate on general damages goes against established and prevailing judicial precedents and inflationary tendencies.

6. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

7. The appellant submitted that the trial magistrate completely overlooked his submissions on quantum as well as judicial precedent and that a sum of Kshs. 1,000,000 would comprise adequate compensation for his injuries. Reliance was placed on the following cases:

i. *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR where the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1,600,000 which were reduced on appeal to Kshs. 800,000

ii. *Godfrey Wamalwa Wamba & Another v Kyalo Wambua* [2018] eKLR where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery and the trial court awarded him general damages of Kshs. 700,000 which the appellate court upheld.

iii. *Alphonce Muli Nzuki v Brian Charles Ochuodho* [2014] eKLR, where the Plaintiff was awarded Kshs. 800,000 for compound comminuted fracture of the right tibia and fibula as well as degloving injury medial aspect of right leg and foot.

8. The appellant buttressed his submissions on quantum taking into consideration inflation, gravity of injuries and deformity arising therefrom.

9. The appellant thus prayed that the instant appeal be allowed with costs.

The Respondent's Submissions

10. It was submitted that the trial court's assessment of general damages of Kshs. 500,000 was appropriate taking into account that the appellant only suffered one fracture on the toe and other soft tissue injuries. The respondent submitted that the appellant failed to prove alleged multiple fractures.

11. The respondent relied on the cases of:

i. Siaya Civil Appeal No.19 of 2019 *Patrisia Adhiambo v Omolo v Emily Mandala* where this court upheld the award of the magistrate court at Ksh. 180,000 for similar injuries.

ii. Meru Civil Appeal 5 of 2017, *Paul Karimi Kithinji v Joseph Mutai Kireria* where the plaintiff suffered injuries of Minor laceration on the face and segment fracture of the right proximal

ulna and the doctor testified that the fracture had healed and would not leave any permanent disability on the plaintiff and Justice D.S Majanja stated that the award of Kshs. 250,000 as general damages given by' the trial court was highly excessive thus he set aside and substituted by Kshs. 150,000.

iii. Kisii Civil Appeal No.117 of 2019, *DG(minor suing thro' her next of friend and mother) v Richard Otieno Onyisi* where the appellant suffered injuries of chest contusion, left tibia fracture, bruises on the left foot and bruises on the left leg and the appellate court set aside and substituted the decision of the trial court and substituted it with an award of Kshs. 324,524.

12. The respondent thus submitted that the appeal be dismissed with costs.

Analysis and Determination

13. 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, it must bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated 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 reanalyze 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."

14. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

15. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730, Kneller JA stated:

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, 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 the damage. See *Ilango v Manyoka* [1967] EA 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited v Kalovoto* [1970] EA 414, 418, 419. This court follows the same principles."

16. The principles espoused in the above Court of Appeal decision have stood the test of time and continue to be applied by all appellate courts.

17. In the case of *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

> "… it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."

18. I have considered the submissions tendered together with the authorities cited by the parties. It is my view that the issue for determination herein is simply whether the award for general damages was too low as to warrant this court's interference.

19. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).

20. It is not in dispute that the appellant was injured, hence the question is what was the nature and extent of the injuries and what award should they should attract. In his amended statement of claim filed on the 4th May 2023 the appellant pleaded that he sustained the following injuries;

    i. Injury to the chest, tender
    ii. Back Ache
    iii. Deformed lower arm
    iv. Dislocated left wrist joint
    v. Cut wound on the left leg
    vi. Cut wound on the left hand
    vii. Swollen and dislocated left wrist joint
    viii. Deformed left foot
    ix. Compound fracture of the left foot
    x. Compacted vertical fracture of the medial malleolus on left foot.
    xi. Mild disruption of the cortical surface on left foot x-ray
    xii. None displaced transverse fracture of the distal ulna styloid left hand with associated mild soft tissue swelling locally. (x-ray left hand AP view).

21. In his testimony, th appellant adopted his statement dated 30.1.2023 and produced his exhibits 1 – 6c that included the P3 form and X-Ray report from West Kenya Diagnostic & Imaging Centre Limited.

22. In the instant case, the only evidence presented before this court was that by the appellant. The respondent did not file anything else. It is trite that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

23. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

> "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
>
> (See *Kirugi and Another v Kabiya and Others* [1983] eKLR).

24. The evidence by the appellant on the nature of injuries thus remained uncontroverted and I am thus persuaded that based on the evidence presented before the trial court proved that the appellant sustained soft tissue injuries as well as a compacted vertical fracture of the medial malleolus of the left leg and a non-displaced traverse fracture of the distal ulna styloid. The medial malleolus is the bony bump in the inner side of the ankle while the distal ulna styloid is a bony prominence found at distal end of the ulna in the forearm, basically at the wrist.

25. In layman's terms the appellant sustained a compacted vertical fracture of the ankle and a non-displaced traverse fracture of the wrist.

26. The appellant submitted that a sum of Kshs. 1,000,000 would comprise adequate compensation for his injuries whereas the respondent submitted that the trial court's assessment of general damages of Kshs. 500,000 was appropriate taking into account that the appellant only suffered one fracture on the toe and other soft tissue injuries.

27. I have considered the authorities provided by both parties herein. In *Harun Muyoma Boge v Daniel Otieno Agul*o MGR HCCA No. 7 of 2015 [2015] eKLR, D.S Majanja J. expressed himself thus: -

> "The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."

28. In my view, the authorities cited by the appellant relate to far serious injuries and are not comparable and similarly those relied on by the respondent relate to far less injuries in comparison to those sustained by the appellant.

29. The trial magistrate relied on the case of *Ndwiga & another v Mukimba* (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR) (13 July 2022) (Judgment) where the respondent suffered injuries of tenderness and swelling of the left leg and fracture of tibia and fibula left leg and the appellate court found that an award of Kshs 1,200,000 for general damages was inordinately high and thus it interfered with the same and substituted the award with an award of Kshs 500,000.

30. In the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR where the respondent had suffered a fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg and the High Court set aside the award of Kshs 600,000 and substituted it with Kshs 400,000.

31. I find these two cases comparable to the instant case. The injuries sustained therein by the plaintiffs were comparable to those sustained by the appellant herein.

32. I thus find that the award by the trial magistrate of Kshs. 500,000 was within those awarded in comparable cases. It was not inordinately low as averred by the appellant to warrant interference by this court. Furthermore, there is no much time lapse since those other awards were made.

33. The upshot of the above is that I find this appeal lacks merit and I proceed to dismiss it.

34. I order that each party bear their own costs of the dismissed appeal.

35. This file is closed. The lower court file to be returned forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE