Kigada & another v Odeny (Civil Appeal E041 of 2021) [2023] KEHC 67 (KLR) (16 January 2023) (Judgment)

Neutral citation: [2023] KEHC 67 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E041 OF 2021

RE ABURILI, J

JANUARY 16, 2023

BETWEEN

BERNARD KIGADA ..... 1ST APPELLANT

BONIFACE OCHIENG OMOLO ..... 2ND APPELLANT

AND

TOM OCHIENG ODENY ..... RESPONDENT

(An appeal from the judgement and decree of Hon Rashid F. S.R.M in Winam PMCC No. 174 of 2019 delivered on 13th October, 2020)

JUDGMENT

1. The respondent Tom Ochieng Odeny sued the appellants herein in the subordinate court claiming general damages, interest thereon and costs arising from a road traffic accident which occurred on July 17, 2018 along the Kibos-Kondele road. At the time of the alleged accident, the respondent was riding a motorcycle while the 2nd appellant was driving the 1st appellant's multivehicle registration number KAT 451 R toyota matatu and headed in the same direction. The respondent attributed the occurrence of the accident to the appellants' negligence which occasioned him serious bodily harm.

2. The appellants entered appearance and filed their statement of defence denying the occurrence of the accident. They also attributed the accident to the respondent's negligence.

3. Subsequently, liability was settled by consent in the ratio of 15:85 in favour of the respondent as against the appellants/defendants.

4. In her judgment, the trial magistrate awarded the respondent general damages in the sum of kshs 600,000 plus interest and costs of the suit. That award is what the appellant was aggrieved by and hence this appeal which sets out the following grounds of appeal:

i. The learned trial magistrate erred in law and in fact in assessment of quantum thereby giving an award on quantum, general damages of kshs 600,000/= that was overly excessive in the circumstances of the case.

ii. The learned trial magistrate erred in law and fact when she failed to consider the appellant's evidence, judicial authorities and submissions on point of law and facts as damages payable in quantum to the respondent.

iii. The learned trial magistrate erred in law and fact in awarding excessive and undeserved general damages to the respondent in a tune of kshs 600,000/=.

iv. The learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

5. This being a first appeal, the court is obliged to abide by the provisions of section 78 of the *Civil Procedure Act* which provides:

> "78. Powers of appellate court
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> (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) to determine a case finally;
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> (b) to remand a case;
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> (c) to frame issues and refer them for trial;
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> (d) to take additional evidence or to require the evidence to be taken;
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> (e) to order a new trial.
>
> (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

6. The above section has been interpreted in several decisions. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013 eKLR, it was stated with regard to the duty of the first appellate court that:

> "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."

7. The same position was taken in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that:

> "An appeal to this court from a trial by 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

8. Revisiting the evidence before the trial court, the respondent/plaintiff testified as PW-1 and recalled that on the material date, while he was riding towards Migosi from Kisumu town and keeping to his lane on the left-hand side of the road, the appellants' motor vehicle registration number KAT 451R which was trailing him hit his motorcycle from the rear. The impact forced him and his pillion passenger to fall by the wayside. The motor vehicle drove off. The respondent in his witness statement and plaint stated that he was injured as a result of the said accident. He was admitted at Avenue Hospital for five days. He produced exhibits namely: police abstract as evidence that the accident was reported to the police; treatment notes, P3 form and copy of records showing ownership of the accident motor vehicle, among other documents as per the list filed in court. He stated that he had not healed.The undisputed injuries sustained by the respondent as pleaded are:

    a. Displaced and comminuted fractures of the right leg distal fibula and tibia bones.

    b. Swollen right shoulder joint.

    c. Chest tenderness

    d. Tenderness on the lower back.

    e. Tenderness on the hip joints.

    f. Swollen and deformed right leg near the ankle.

9. The parties' respective cases were then closed without the appellants tendering any evidence.

10. The respondent's counsel submitted proposing damages in the sum of kshs1,000,000 while the appellant's counsel did not file any submissions on quantum of damages.

Submissions On Appeal

11. The appeal was canvassed by way of written submissions. Both parties complied and filed their submissions.

12. The appellants' counsel submitted that given the nature of the injuries sustained by the respondent, an award of kshs 400,000/= would suffice. In support of this position, the case of *Kenya Power and Lighting Company Limited & another v Zakayo Saitoti Naingola* [2008]eKLR was relied on.

13. Further reliance was placed on the cases of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* (2020)eKLR, where the claimant was awarded kshs 400,000/=; *Robert Kithinji Kithaka v Attorney General* (2018)eKLR, where the appellate court affirmed an award of kshs 250,000/= by the trial court while in *Catherine Gatwiri v Peter Mwenda Karaai* (2018)eKLR, an award of kshs 500,000/= was made. It was submitted that all the above authorities bear semblance to the injuries sustained by the respondent in the instant appeal and urged this court to follow them.

14. On the issue of costs, the appellant submitted that they are entitled to costs of this appeal under section 27 of the *Civil Procedure Act*.

15. On his part, the respondent through his counsel submitted that the assessment and the award of damages is an exercise of judicial discretion that can only be disturbed on appeal if it can be established that the trial court misdirected itself leading to the wrong conclusion. This was the observation made in *Savana Saw Mills Ltd v George Mwale Mudomo* [2005]eKLR.

16. It was submitted that the trial court's finding was in tandem with the evidence adduced whereas the appellants have made no attempt to demonstrate how the trial magistrate misdirected himself in

arriving at the conclusion. In support of this contention, the case of *Catholic Diocese of Kisumu v Tete* [2004]eKLR was relied on.

17. In further support of the trial court's finding, the respondent submitted that his case was uncontroverted as the appellants neither tendered any evidence to controvert his testimony nor filed any submissions to be considered by the trial court. That the trial court's assessment of damages was fair and in consonance with the injuries sustained.

Analysis And Determination

18. As earlier stated, liability was settled by consent of the parties leaving the trial court and therefore this court to determine the issue of quantum. It is trite law that an assessment of damages is a matter of judicial discretion vested in the trial court and the court on appeal is only to interfere with such discretion or finding if it finds that the same was arrived at without sound basis.

19. Having considered the trial court record and the submissions, it is evident that the appellants never tendered in any evidence in rebuttal of the injuries sustained by the respondent save for the defence filed. Their case was closed without them testifying challenging the respondent's evidence.

20. When assessing damages awardable to a victim of tortious acts, this court finds refuge in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p 730 where it was held that:

> "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 that 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* [1961] EA 705, 709, 713; *Lukenya Ranching and Farming Co-operatives Society Ltd v Kavoloto* [1970] EA, 414, 418, 419. This court follows the same principles."

21. In *Gicheru v Morton and another* (2005) 2 KLR 333 the court stated that:

> "In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal 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 small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled."

22. Applying the above principles to this appeal, the nature of injuries sustained by the respondent are in no doubt and the same is found in the medical report from Avenue Hospital and the P3 form as replicated in paragraph 5 of the plaint as follows:

    a. Displaced and comminuted fractures of the right leg distal fibula and tibia bones.

    b. Swollen right shoulder joint.

    c. Chest tenderness

    d. Tenderness on the lower back.

    e. Tenderness on the hip joints.

f. Swollen and deformed right leg near the ankle.

23. It is also generally accepted that for uniformity, courts ought to follow comparable awards in the past though injuries in every situation vary as was observed by the Court of Appeal in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR where it was held that:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

24. With the above principles in mind, I now examine authorities with nearly similar injuries with a view of attaining uniformity and certainty in the award of damages considering that the respondent in his submissions in the trial court had proposed the sum of kshs 1,000,000/= as reasonable compensation.

25. In *Paul N Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR the appellant sustained multiple comminuted fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 centimeters, displaced fracture of the left shoulder blade, Swelling and stiffened knee. He was awarded kshs 500,000/=.

26. In *Thomas Ombima v Samson Anindo Mwenje* [2018] eKLR, the plaintiff sustained comminuted fracture of middle 1/3rd of left femur, back injury, dislocation left ankle, chest injuries, soft tissue injuries to the elbow joint and left knee joint. He was awarded kshs 400,000/= general damages.

27. In *Elisha Akello Raga v Shajan and Holdings Limited & anor* (2016) eKLR, the plaintiff suffered a cut wound on the right orbital area, blunt trauma to the chest, contusion on the right hip joint leading to dislocation of the right hip, bruises on the right knee and a fracture of the femur. The High Court upheld the trial court's award of kshs 450,000/=.

28. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor*[2020] eKLR, the respondent suffered compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury and Soft tissue injury on the left lower limb involving the high and ankle region. In that case, the High Court reduced an award of kshs 600,000/ to kshs 400,000/.

29. In light of the authorities stated above, and considering the injuries sustained by the respondent, I find the award of kshs 600,000/ to be on the higher side and hereby set aside the award and substitute it with an award of kshs 500,000/= This sum shall to be subjected to the 15% contribution bringing the sum awardable to the respondent to kshs 425,000/= with interest from the date of judgment in the subordinate court until payment in full.

30. Each party shall bear their own costs on this appeal.

31. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE