Maina v Kahunga & another (Civil Appeal 28 of 2022) [2023] KEHC 606 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL 28 OF 2022

CM KARIUKI, J

FEBRUARY 9, 2023

BETWEEN

RAHAB WANJUGU MAINA .... APPELLANT

AND

JOSHUA MWANGI KAHUNGA .... 1ST RESPONDENT

WILSON MUTURI MWANGI .... 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon Vincent Kiplagat, Senior Resident Magistrate in Nyahururu CMCC No. 103 of 2020 delivered on 22nd July 2022)

JUDGMENT

1. The appellant instituted this appeal *vide* a memorandum of appeal dated August 17, 2022. The memorandum of appeal set out the following grounds of appeal: -

    i. That the learned magistrate erred in law and in fact in awarding quantum of general damages for pain and suffering and loss of amenities that was inordinately low, erroneous, oppressive and inadequate and amounted to miscarriage of justice.

    ii. That the learned magistrate erred in law and fact by ignoring the appellant's submissions paid lip service and filed to consider all the precedents on general damages cited thus coming to a wrong decision on quantum.

    iii. That the learned trial magistrate erred in law and in fact in failing to appreciate the principles governing the award of damages namely that like cases attract similar awards, and ignoring completely the appellant's submissions.

iv. That the learned trial magistrate erred in law and in fact in making an award of kshs 100,000/- in general damages for pain and suffering and loss of amenities without giving reasons for such an award thus making an award arbitrary, capricious and inordinately low, erroneous and which amounted to a miscarriage of justice.

v. Thus, the appellant prayed for the following: -

vi. That the appeal be allowed.

vii. That the subordinate's court finding on quantum of general damages for pain and suffering an loss of amenities be set aside, overturned and/or varied and substituted with finding of this court.

viii. That this honourable court be pleased to assess upwards the quantum of damages for pain and suffering.

ix. That the respondent does pay the costs of this appeal and the costs in the lower court.

x. That such further relief as may appear just to the honourable court.

2. Appellant's Submissions

3. The appellant urged the court to enhance the award of general damages from kshs 100,000/- to 600,000 based on the pleaded injuries as testified on by dr Obed Omutoma at 100% on liability. That there is no question that the appellant proved the injuries pleaded and therefore the question is only what damages was she entitled to. The injuries she proved were in the following areas:-Colles fracture of the left wrist jointBlunt injury to the left thigh leading to soft tissue injuriesSoft tissue injuries of the lower lip

4. She stated that the injuries and fracture kept her in the hospital for 18 days and the discharge summary from North Kinangop Catholic Hospital was produced to prove the same. Reliance was placed on *Leonard Njenga Nganga & Another v Lawrence Maingi Ndeta* [2018] eKLR, *Southern Engineering Company Ltd vs Musingi Mutia* [1985] KLR 730 which was quoted on *James Gichuki Gathura v Entonox Enterprises Ltd* [2021] eKLR.

5. To demonstrate previous awards granted by the lower court for similar injuries the appellant cited the cases of *Kamau Paul & Anor v Lydia Muringe Waikwa* [2018] eKLR, *Peris Mwikali Mutual v Peter Munyao Kimata* [2008] eKLR, *Issa Transporters Limited V Chengo Panga Tsama* [2019] eKLR & *Wainaina Ng'ang'a Gakuu vs Jael Oduor & 3 Others* [2008] eKLR

6. It was also asserted that PW3 had indicated that he had charged court attendance fee of kshs 30,000/- yet the trial magistrate declined to award this on the ground that it was prayed for under the head of general damages. The appellant submitted that this was a cost which could not have been under special damages as special damages must be what has been paid prior to filing of the suit.in addition, a copy of the receipt for the said payment could not have been produced at that particular time because of the Ministry of Health measures which required that the hearing be conducted virtually.

7. Respondent's Submissions

8. The respondent submitted that there were three issues of determination i.e.Whether the award on general damages was inordinately lowWhether the appellant is entitled to doctors attendance chargesWho should bear the costs of this appeal

9. On the first issue the respondent asserted that a plaintiff is only entitled to what is fair, just and reasonable and that whatever assessments such as this are necessary they must be done with moderation they should neither be seen to be enriching the plaintiff or punishing the defendant. Reliance was placed on *Catholic Diocese of Kisumu v Sophia Achieng Atete* Civil appeal No 284 of 2001 [2004] 2 KLR 55, *Patrisia Adhiambo Omollo v Emily Mandela* [2020] eKLR

10. It was proposed that should this court be of the opinion that the award was not comparable to the injuries then the sum of kshs 250,000 be awarded as general damages to be reasonable and comparable to similar cases.

11. On the second issue, the respondent submitted that the appellant raised the issue of doctor's attendance charges which was not raised in the memorandum of appeal and therefore the sum should be disregarded. Reliance was placed on *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others* [2014] eKLR.

12. Lastly, it was stated that the appeal should be dismissed with costs to the respondents according to section 27 of the *Civil Procedure Act* and the holding of the court in *Party of Independent Candidate of Kenya & Another vs Mutua Kilonzo & 2 Others* [2013] eKLR.

13. Analysis and Determination

14. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions as was established by the Court of appeal in the case of *Peters v Sunday Post Limited* [1958] EA 424.

15. The appropriate standard of review established in cases of appeal are underpinned in the following three principles:-

    i. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

16. In the instant appeal, I will put my mind to the main issue for determination that is the quantum of damages awarded.

17. I stand guided by the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2)* Civil appeal No 21 of 1984 [1985] eKLR where

the Court of appeal stated that in an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined thus:

> 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.

18. On the issue of quantum, the Court of appeal's decision in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, 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."

19. Further, in dealing with the appeal on quantum I will rely on the decision of the Court of appeal in Bashir Ahmed *Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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"

20. Additionally, In the case of *Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR the court stated as follows:

> " It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

21. The appellant herein urged the court to enhance the award of general damages from kshs 100,000/- to 600,000 based on the pleaded injuries as testified on by Dr. Obed Omutoma at 100% on liability.

22. It is not in dispute that the appellant proved that she suffered following injuries from the medical report:-Colles fracture of the left wrist jointBlunt injury to the left thigh leading to soft tissue injuriesSoft tissue injuries of the lower lip

23. The doctor also concluded that the appellant suffered a permanent disability of 10% and the degree of injury was examined as grievous harm.

24. For pain and suffering, the trial magistrate awarded 100,000/- which he found to be appropriate within the circumstances. He also awarded the appellant 200,000 as future medical expenses.

25. I would like to point out that the claim for future medical expenses is a special claim categorized within general damages that needs to be specifically pleaded and proved. The appellant pleaded and proved the same. (See the case of *Tracom Limited & Another v Hassan Mohammed Adan* [2009] eKLR). Therefore, the total sum of general damages awarded by the trial court was kshs 300,000/-

26. Evidently, the appellant was dissatisfied with the award of kshs 100,000/- for pain and suffering by the trial court. The crux of this issue is whether the aforementioned award of kshs 100,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it.

27. In the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR, the Court of Appeal stated that comparable injuries should attract comparable awards.

28. I have thoroughly examined some of the authorities relied on by the appellants in their submissions i.e.:-*Kamau Paul & Another v Lydia Muringe Waikwa* [2021] Eklr In this case, the respondent sustained a fracture of the left radius with displacement, loss of two lower incisor teeth, broken upper central and left lateral incisor teeth, cut wound to the lips and blunt trauma to the chest. The doctor assessed permanent functional incapacity at 45%.The Appellate Court stated that:-

> " The most severe injury to the respondent herein was the wrist fracture, and by 2015, the respondent had not developed carpal tunnel as anticipated by dr Wangata in May 2011. dr Wambugu upon examining her in May 2015 stated that the fracture had healed without deformity albeit with slight risk of osteoarthritis and he assessed permanent disability at 4% compared to dr Wangata's 45%. No doubt the latter opinion was influenced by the anticipation that the respondent would likely suffer carpal tunnel syndrome. Regarding healing and sequela, the latest report appears more accurate, to my mind. The respondent lost two teeth while two were broken, with attendant lip injury. There were also soft tissue chest injuries that resolved without event. Apparently, the trial court paid scant attention to the contents of the appellants' medical report, while accepting the respondent's medical report. The appellants' complaints in that regard appear justified. Reviewing all the relevant evidence on the respondent's injuries, pain and suffering and possibly minimal permanent incapacity, the court is persuaded that the award on general damages was too high and ought to be disturbed. The court will therefore review the award

downwards to a sum of Shs 500,000/- (Five Hundred Thousand) subject to the liability ratio of 75:25 agreed upon by the parties."

-Peris Mwikali Mutua v Peter Munyao Kimata [2008] eKLR

The respondent in this case suffered marked pain and tenderness of the left hip joint; marked swelling and severe tenderness of the left forearm; bruises on the left forearm; and a fracture of the ulna and radius (colles fracture) of the left distal forearm.

The appellate court upheld he award of kshs 450,000/- awarded by the trial court.

-Issa Transporters Limited v Chengo Panga Tsama [2019] eKLR

The respondent herein is said to have sustained a fracture of the colles on the left wrist and deep cut wound on the left side of the forehead. He was awarded kshs 350,000/- as general damages which was further upheld by the high court and court of appeal.

29. As I have stated before, it is almost impossible to find an authority where one person's injuries are fully comparable to another person's injuries. However, a court is to consider what is as far as possible comparable" to the other person's injuries, and the after effects.

30. Moreover, in the case of *Kensilver Express Limited v Nzangu* (Civil appeal E039 of 2021) [2022] KEHC 10331 (KLR) (20 July 2022) the court stated that:-

> Notably, it must be understood that money can never compensate a person for the injuries sustained. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents. [See Court of Appeal in *Stanley Maore vs Geoffrey Mwenda* Nyeri CA No 147 of 2002].

31. Having done the same, I am of the opinion that the cases cited by the appellant presented injuries that are not exact but are comparable to the appellant's injuries. I have also taken note that the appellant cited the case of *Kamau Paul & Another v Lydia Muringe Waikwa* [2021] eKLR and *Peris Mwikali Mutua v Peter Munyao Kimata* [2008] eKLR where cited in the appellant's trial submissions and the same was available to the trial magistrate for consideration.

32. Accordingly, guided by the aforementioned cases and the principles for the assessment of damages as enshrined in the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR where the Court of Appeal stated as follows:-

    i. "The assessment of damages in personal injury case by a court is guided by the following principles:

    ii. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    iii. The award should be commensurable with the injuries sustained.

    iv. Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.

v. Previous awards to be taken into account to maintain the stability of awards but factors such as inflation should be taken into account.

vi. The awards should not be inordinately low or high"

33. I am inclined to find that the trial court made an award that was inordinately low in comparison to the injuries suffered by the respondent thus calling for interference by this court. I therefore set aside the award of kshs 100,000/- for pain and suffering by the trial magistrate and in its place award an amount of kshs 300,000/-

34. The appellant also asserted that PW3 had indicated that he had charged court attendance fee of kshs 30,000/- yet the trial magistrate declined to award this on the ground that it was prayed for under the head of general damages. Contrarily, the respondent submitted that the appellant raised the issue of doctor's attendance charges which was not raised in the memorandum of appeal and therefore the sum should be disregarded.

35. I agree with the respondent on this issue. The appellant cannot be allowed to introduce new issues via their submissions.

36. In the upshot I find the appeal partially merited and give the following final orders:

1) The respondent to shoulder 100% liability as held by trial court

2) Damages assessed as hereunder:-

   i. Pain and Suffering............................kshs 300,000.00

   ii. Future medical expenses.................kshs 200,000.00 as awarded by the trial court

   iii. Special damages........................ kshs 5000.00 as awarded by the trial court

3) Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9TH DAY OF FEBRUARY 2023.

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CHARLES KARIUKI

JUDGE