Oyoo v John (Civil Appeal 84 of 2022) [2023] KEHC 2027 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2027 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 84 OF 2022

TA ODERA, J

FEBRUARY 16, 2023

BETWEEN

JOSEPH OTIENO OYOO .... APPELLANT

AND

DANIEL KIMANI JOHN .... RESPONDENT

(Appeal Against the Judgment of Hon R.K Langat SRM delivered on 24.8.21 in PMCC no.21 of 2020 Rongo)

JUDGMENT

Background

1. The appeal before court is against the award of general and future medical expenses to the Respondents by the trial court in the sum of Kshs 1,200,000/= and Kshs 75,000/= respectively b liability having been agreed between both parties at 80%:20% in favour of the Respondents.

2. Brief facts of the case were that on or about December 7, 2020 while the plaintiff was a passenger in motor vehicle registration no KCP 948C along the Awendo-Rongo road at Komire when the Appellant's motor vehicle registration number KBY 716k collided with the vehicle he was in occasioning him serious bodily injuries .

3. Vide a judgment delivered on August 24, 2021 the Learned Trial Magistrate entered Judgment in the following terms;

   General Damages for pain suffering and loss of amenities Ksh 1,200,000/=

   Future medical expenses Kshs 75,000/= special damages Kshs 6100/=

   Total Kshs 1,2,81,100/=

   Less @0% 256,220/=

   Grand Total Ksh 1,024,880/=

4. The appellant filed a memorandum of appeal dated September 14, 2022 in which he raised the following grounds;

   i. The learned magistrate erred in law and fact in assessing and awarding general damages and special damages wherein the respondent failed to prove his case.

   ii. The learned trial magistrate erred in law and fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

   iii. That the learned trial magistrate erred in law and fact in failing to attach due weight to the appellant and authorities attached thereto.

   iv. That award is in the circumstances so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the respondent.

   v. The said award is all together disproportionate and not in line with the comparable awards made in respect of similar injuries.

   vi. That the learned trial magistrate erred in law by giving a very high award in quantum contrary to the evidence given in court.

   vii. The learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages due in particular case and was manifestly excessive.

   viii. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

5. This is an appellate court and this court had a duty to re-evaluate the entire evidence of the lower court and arrive at its own conclusion as was held in the case of *Selle vs Associated Motor Boat Co* [1968] EA 123 that:

   > " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The appeal was canvassed by way of written submissions pursuant to directions given on December 22, 22. Both parties complied with the said directives.

7. I have carefully considered the records of the lower court and the submissions and authorities filed herein by both parties on whether the Appeal was filed out of time, respondent submitted that the appeal was time barred having been filed out of time. Appellant did not respond to this bit I have seen the order dated issued in High court Miscellaneous Suit No 150 of 2021 Migori where leave was grated in paragraph 3 and respondent was ordered to file the appeal within 7 days from July 14, 2022. I have seen memorandum of appeal herein and I note that it was stamped on July 15, 2022. The payment receipt of transaction No. QGE9GCCKF shows that the payment of Kshs 1550/= was made on July 14, 22. Though the appellant has not responded to this issue I deed it that the Memorandum of appeal was filed within time.

8. On whether the respondent failed to prove damages , the trial was only in relation to assessment of damages and the liability was agreed on at 80 :20 in favour of respondent against the appellant submitted that the medical report of Dr peter Morebu is full of falsehood as the injuries have been exaggerated as there is no evidence that the respondent sustained fracture of the left as alleged. The respondent's counsel submitted that the respondent sustained fracture of the left tibia, chest contusion, bruises on the face, loose incisors, bruises on the right elbow, bruises on the left elbow and avulsion of the front upper teeth. Also that he was admitted at Awendo Sub -county hospital and he had not fully healed by the time of his testimony and that Dr Morebu found that he sustained severe injuries and could not walk without support and that a permanent disability was anticipated. Pw1 said he sustained the said injuries Dr Morebu (PW3) said he saw the patient but he cannot recall if he was treated for fractures on re-examination he said the x-ray revealed fractures and that it is the patient who had the x rays. All the treatment notes the medical report talk of the fracture of the tibia. However the x ray films were not produced in evidence and Pw1 did not account for them. It is trite law that he who alleged must prove and fractures are usually proved by the x rays films which the doctor uses to ascertain that they were indeed sustained. In the absence of the Xray film I find that the trial magistrate erred in finding that the respondent sustained fractures as a result of the accident.

9. On the other injuries the discharge indicate on the diagnosis that pw1 sustained ''soft tissue injury and stable tibia fracture ''. The said notes indicate that the patient was admitted at Awendo Sub-county hospital from January 7, 20 to January 8, 20 and had blunt force trauma on the face with periostisis. The multiple soft tissue injuries pleaded were not indicated by the doctor upon discharge of the patient a day after the admission. The patient no evidence was adduce of treatment of the teeth or extraction. Appellant cited the case of *Joseph Kimanthi Nzau and another vs Johnson Macharia* (2019) eKLR where reference was made to the words of Byamugisha -J *Sentongo and Another vs Uganda Railways Corp* Kampala HCCS No 263 of 1987 however need to be taken note of. In that case the learned judge held, citing Sarkar on Evidence 12th ED pp 506.R. that:

> "Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."

10. I thus find that the injuries have been exaggerated in the medical report. However it is trite law that exaggeration is not a ground for dismissal of the entire evidence of a witness as not all the finding has a pinch of salt. I find that the respondent sustained soft tissue injury to the face.

11. On damages, the trial court awarded general damages for pain suffering and loss of amenities in the sum of Kshs 1,200,000/=. The appellant submitted that Kshs 60,000/= would suffice for the soft tissue injuries while the respondent urged this court to uphold the award of the trial magistrate based on the evidence on record. Counsel for the appellant submitted cited the case of *Mokaya vs Julius Momanyi Nyokwoyo* (2013) eKLR where the plaintiff was awarded Kshs 60,000/= for soft tissue injuries and also *Eastern produce (K) Limited vs Joseph Mamboleo Khamadi* (2015) where the general damages for soft tissue injuries were awarded at Ksh 50,000/=. Respondent submitted that the award was within the range of the awards for similar injuries and considering the inflation factor. He cited the case of *Francis Ndungu Wambui & 2 others vs VK (minor suing through next friend and mother (MCWK)* 2019 where Ksh 1000,000/= was awarded to for fracture distal tibia Fibula shaft and loss of consciousness for 30 minutes. Also *Joseph Musee Mua vs Julius Mbogo Mugi & 3 others* (2013) eKLR where the

court awarded Kshs 1,300,000/= for fracture of left tibia fibula, two broken teeth, chest and shoulder injuries. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

12. Considering the nature of the injuries sustained by respondent , the inflation factor , the current trend of awards for similar injuries and all the relevant factors. I find that general damages in the sum of Ksh 70,000/= would suffice. I proceed to substitute the award of general damages in the sum of Ksh 1, 200,000/= with the award of Ksh 70,000/= . Special damages were awarded at Kshs 6200/=. The same were pleaded at Kshs 90,200/= as computed hereunder;

    a. Treatment and transport expenses -Ksh 1,000/= .

    b. Cost of preparation of medical report -Ksh 5,000/=

    c. Registration of demand -Ksh 1,000/=

    d. Doctors charges to attend court -Ksh 6,000/=

    e. Cost of anticipated 2nd medical examination -Ksh 3,000/= .

    f. Future treatment expenses -Ksh 75,000/=

Treatment expenses and cost of medical report were proved with receipts as pleaded and I award the same. Appellant was not entitled to fees for demand notice and it is covered in instruction fees and so I decline to award the same. Fees for attendance of the doctor was not proved. Cost of anticipated medical report was also not proved.

13. On future medical expenses at Ksh 75,000/= the same were not proved since the initial treatment notes did not specify the tooth injury and no further treatment notes and x-ray films were produced to support the alleged fracture of the jaw were availed to support the same. I decline to grant the same, I thus agree with the trial Magistrate on the special damages and I uphold the award of Kshs 6,200/= under this head.

14. In the upshot I enter Judgement of Respondent in the sum of Ksh 70,000/= + 6,200/- =Ksh 76,200/= Less agreed 20% liability = Ksh 60,960/=

15. I award costs of this appeal to the appellant.

16. The appeal has thus partially succeeded.

T.A. ODERA - JUDGE

16.2.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

MISS KUSA FOR THE RESPONDENT,

NO APPEARANCE FOR APPELLANT,

COURT ASSISTANT; BOR.

T.A. ODERA - JUDGE

16.2.2023