Chau v Kahiga (Civil Appeal E252 of 2021)
[2023] KEHC 2172 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E252 OF 2021

JM CHIGITI, J

MARCH 2, 2023

BETWEEN

BENSON KAMAU CHAU ..... APPELLANT

AND

VIRGINIA WANGARI KAHIGA ..... RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Githunguri (Hon. Barbara Ojoo SPM) delivered on 25/11/2021 in Githunguri SPMCC No. 24 of 2019)

JUDGMENT

Brief Background:

1. This appeal arises from the judgment of Githunguri CMCC No. 24 of 2019, delivered on 25th November 202; wherein the trial court awarded special damages of Kshs 18,300/=, and General damages of Kshs. 800,000/= less 10% contribution.

2. The Appellant was aggrieved by the judgment and filed the instant Appeal, challenging the quantum of damages as assessed by the trial court.

Analysis and determination.

3. In the case of *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 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"

4. Similarly, in A*bok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated; "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."

5. This court has the discretion to re-assess, re-evaluate, and re-analyze the evidence of the trial court. In paragraph 4(c) of the plaint, the respondent pleaded that she sustained a fracture – 1st cervical (neck) bone. The P3 Form dated 4/2/2019 indicates that the Respondent sustained a fracture in the anterior 1st cervical bone resulting from the accident. The medical report from Kinoo Medical Clinic dated 27/3/19, indicated that she sustained a fracture – 1st Cervical (neck) bone as a pursuant to the accident.

6. On its part, the Appellant denied that the respondent sustained the alleged injuries putting the respondent to strict proof at paragraph 4 of the defence.

7. The appellant further produced a medical report dated 13/8/2019 from Dr. Imalingat which points out that the Respondent did not sustain any cervical spinal fracture. During examination on 18/2/21, the respondent did not make reference to any fracture. During cross-examination PW2 Dr. George Kungu Mwaura testified on 26/8/21 and indicated the she had a fracture on the neck.

8. On his part DW1 Dr. Jennifer Kahuthu indicated that the Respondent had no fractures upon examination. She testified that a repeat x-ray was administered upon the Respondent and did not show any fracture to the neck. She produced the medical report and X-rays as exhibits a, b, and c. During cross-examination the doctor reconfirmed the foregoing and made reference for the treatment notes and the P3 Form.

9. I have analyzed the foregoing evidence as tendered during the hearing as guided by the authority of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

10. I have noted with concern that the trial magistrate made no reference to the evidence produced by the witnesses. She made no reference to the useful medical reports by the doctors. Had she paid attention to the evidence of the doctors, the P3 Form, the treatment notes the medical reports of Dr. Imalingat, and Dr. Jenniffer Kahuthu alongside the X-ray reports then she would have arrived at an informed assessment of whether or not to;

    i. Award or not to award general damages.

    ii. The correct amount.

11. I shall proceed to evaluate, reassess the evidence in the circumstances. Section 107 of the *Evidence Act* dictates as follows that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

12. Section 109 of the *Evidence Act* stipulates that, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

13. The appellant pleaded that he sustained a fracture to the neck at paragraph 4 (c) of the plaint. the respondent denied this at paragraph 4 of the defence.

14. The court is faced with a situation where the appellant has tendered evidence through a DW1 and Medical reports and X-ray reports on one side; and the respondent version where she has called two doctors, a P3 Form and treatment notes on the other side.

15. The court must balance the scales of justice in arriving at a conclusion on whether or not the Respondent proved her case, before proceeding to the issue of the quantum of general damages.

16. The appellant came out as a very credible witness. she is a mature lady who is believable in her evidence. She testified and during cross examination on 18/2/21 and on 26/8/21 she has made no reference to any fracture to the cervical bone.

17. She maintained that position all through. This is confirmed by the evidence of DW1, the treatment notes and the medical reports of Dr. Imalingat dated 13/8/2019. The examinations were done within 6 (six) months of the injuries and had there been a fracture of the neck then it would have been easily detected.

18. It is the court's view that, had there been a neck fracture, then the Respondent would still be nursing it, alongside the other milder injuries which she is still nursing.

19. The Government doctor who prepared the P3 Form would have probably helped the court to solve the puzzle had the Respondent called him to testify.

20. The respondent did not show nor inform the court that she had difficulties with the said witness. A prudent represented litigant should have applied for witness summons to bring the said doctor to court. The Respondent opted not to pursue this opportunity.

21. I find that the respondent did not prove her case on a balance of probabilities in as far as the neck fracture is concerned. The medical report of Dr. Jasper Muruka dated 15/2/21 confirms the fact that the respondent attended the hospital for examination on 4/2/19. according, to the report there were no fractures in the respondents' skull and the lumbar spine.

Disposition:

22. The upshot is that the Appeal succeeds and the general damages are accordingly rewarded in terms of the particulars of injuries, as pleaded in paragraph 6(a) and (b) of the plaint. Paragraph 6(c) is disallowed.

23. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said: -

> " 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."

24. Further, in *Gicheru vs Morton and Another* (2005) 2 KLR 333 this Court stated:

> '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."

25. In *Fred Barasa Matayo v Channan Agricultural Contractors* {2013} eKLR: The court reviewed downwards an award of Kshs.250, 000/= to Kshs.150, 000/= to moderate soft tissue injuries that were expected to heal in eight months' time.

Orders:

26. From the above discussions and findings, the following are the orders of this court:

    1. The Appeal succeeds partly.
    2. Paragraph 6(c) of the plaint is disallowed.
    3. The General Damages at Kshs. 600,000 less 10 %.
    4. Costs

DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MARCH, 2023.

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JOHN CHIGITI (SC)

JUDGE