Muoki v Muia (Civil Appeal E126 of 2021)
[2023] KEHC 1774 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1774 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E126 OF 2021

FR OLEL, J

MARCH 16, 2023

BETWEEN

ESTHER KAMENE MUOKI ..... APPELLANT

AND

MACDONALD MATHINA MUIA ..... RESPONDENT

(Being an Appeal from The Judgment and Decree of Hon C. N Ondieki (P.M) Delivered On 7 ^Th July 2021 in Machakos Civil Case 85 Of 2019)

JUDGMENT

1. The Appellant was the defendant in the primary suit, where she was sued for compensation arising from a Road Traffic Accident which occurred on 23/6/2018. The plaintiff claim was that on the fateful day, he was a was a pillion passenger on motor cycle registration No KMDB 157P travelling along Machakos – Kitui Road, when the suit motor vehicle registration Number KCJ 018M was carelessly, recklessly and/or negligently driven managed and/or controlled by the defendants authorized driver that it was allowed to knock down the plaintiff thereby causing him to suffer bodily injury.

2. On March 17, 2021 the parties did record a consent on liability and the same was endorsed in the ratio of 20.80 (in favour of the plaintiff). Further the parties consented to the production of the claim supporting documents as exhibits without calling the makers thereof. The compromise was accordingly adopted by the trial court and judgment on liability entered in accordance with provisions of Order 25, Rule 5 of the civil procedure rules.

3. The trial court proceeded to make a determination on quantum payable and awarded Kshs550,000/= less 20% contributory liability. The plaintiff was also awarded special damages of Ksh7,650/= and future medical expense of Ksh10,000/= plus costs and interest of the suit.

4. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal dated July 23, 2023 and raised 4 grounds of appeal namely:-

a. That the learned trial magistrate's award of General damages for pain, suffering and loss of Amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the Respondent.

b. That the learned magistrate award of special damages was erroneous as the same was not strictly proved as required by law.

c. That the learned magistrate's a award on Future medical costs was erroneous as the same was not strictly proved and the same was not supported by any Evidence.

d. That the learned magistrate's erred in both law and fact by ignoring the authorities cited therein in assessing damages.

5. The Appellant herein therefor prayed that the award of damages be set aside and substituted with an award commensurate with the injuries sustained.

Background Facts

6. The parties did record a consent on liability March 17, 2021 at the ratio of 20: 80 in favour of the plaintiff. On the said date the plaintiff adopted her witness statement and all the documents in her trial bundle were produced as Exhibits. Further the medical report of Dr Wambugu dated 5/8/2020 too was produced as D-Exhibit 1. The plaintiff testified and blamed the driver of the defendant for the accident. As regards the injuries suffered the plaintiff stated that she was injured on the head, face, lost one tooth, had another partially broken tooth. She prayed to be compensated.

7. The Respondent elected not to call any witness and closed their case.

Submissions

8. The appellant did submit that the court has wide discretion in awarding damages and that each case must be looked at in its peculiar circumstance, more so with regard to accident cases where injuries suffered differed from person to person.

9. The appellant conceded that it was not in doubt that the respondent was involved in a road traffic accident and suffered injuries as outlined by the medical reports of Dr.Cyprianus Okoth Okere dated7th November 2018 and the medical report of Dr Wambugu P.M dated August 5, 2020. The injuries sustained were dental and soft tissue injuries with no permanent incapacitation.

10. The appellant submitted that the injuries suffered by the appellant in short could be summarized as loss of left upper central incisor, chip enamel fracture of left upper lateral incisor, and multiple bruises on the head, left hand and leg. The appellant referred the court to several citations where comparable awards were made to comparable injuries and the awards were in the range of Kshs150,000 to 2,000,000/=. The appellant relied on the decided citations of *James Nganga Kimani & another vs Giachagi Njoroge & 2 others* {2019} , *Yusuf Abdala Said & Another –v- Anthony Suter Chepkonga* { 2015}eKLR and *Fast Choice Company Ltd & Another V Jospeh Wanyirii Mwangi* {2011}.

11. On special damages the appellants stated that the same was wrongly awarded as the receipts did not contain stamp duty receipt and therefor the said receipt was inadmissible in evidence. The appellants prayed that this appeal be allowed with costs.

12. The respondent opposed this appeal and stated that the quantum awarded was in order. It was not excessive and/or inordinately high so as to represent an error of estimate in the compensation awarded to the respondent.

13. Further the respondent submitted that the award was in order when compared to similar injury awards. In particular they referred this court to the award in *Patrick Murithi Mukuha v Edwin Warui Munene & 5 others* {2005} Eklr in civil case No 19 of 20200. As regards special damages the respondents submitted that both medical reports admitted into evidence provided for future medical expense of Kshs 10,000/= as cost of replacing the lost tooth. This is an issue which was specifically pleaded and thus they were entitled to the same. They relied on the decision of *IhaGarama V Jackson Njeru Njoka* { 2019) eKLR Civil Appeal No 50 of 2017.

14. The upshot of their submissions was that this appeal had no merit and should be dismissed with costs

Determination

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

16. As held in *Selle & another vs Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270

17. In *Coghlan v Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

18. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

19. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> "It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

20. Similarly, in *Woodruff Vs Dupoint*(1964) EA 404 it was held by the East Africa court of Appeal that:-

> "The question as to quantum of damages is one of the facts for the trial court judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them.....The quantum of damages being a question of fact for the trial judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff but whether the damages awarded are "such as may fairly and reasonably be considered as arising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

21. It was also held by the court of appeal in *Epantus Mwangi & Ano Vs Duncan Mwangi* Civil Appeal No 77 of 1982(1982 -1988} 1KAR 278 that;

> "A member of an appellate court is not bound to accept the learned Judge's finding of fact if it appears either that (a) he has clearly failed on some point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

22. Finally in the decision of *West(H) and Sons Limited vs Shepherd* [1964] AC 326 at 345 it was appreciated that ;-

> "The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

23. The Appellant submitted that taking into account similar award for similar injuries the award of general damages should be reduced to Kshs200,000/=. The Respondents on the other hand in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld.

24. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the appellant. It is clear he suffered soft tissue injury on the head, face and fractured one tooth (No 11) and also completely lost the other tooth (No 21).The injuries were confirmed by medical reports of Dr. Cyprianus Okere, the treatment notes from Machakos County Hospital and the appellant's own doctor one Dr. Wambugu. The Appellant indeed proved that was injured and therefore entitled to adequate compensation.

25. The question which then arise if for the award of damages of Kshs. 550,000/= was adequate or was it excessive. I do find that given the inflationary rates as comparable awards awarded for soft tissue injuries this award slightly on the higher side. The comparable awards cited by both parties should be considered with current inflationary trends. I therefor substitute the award of Kshs550,000/= with an award of Kshs400,000/= as damages for pain suffering and loss of amenities.

26. In arriving at this award, I have considered the respondents injuries , all the medical reports , the comparable citations by both the parties as submitted in the lower court and those filed in this appeal as well as current inflationary trends .

27. The Appellants also raised an issue that special damages ought not to be awarded as the receipts for treatment did not have revenue stamps as mandatorily required by the *Stamp Duty Act*. The *Stamp Duty Act* Cap 480 at section 3 states that, " The act shall apply to all stamp duties and to all fees and penalties which are for the time being directed to be collected or received by means of stamps under or by virtue of any written law."

28. It was the appellant who was allege that stamp duty is required for the receipts worth Ksh 7,650.00/= pleaded and proved by the respondent. It was for the appellant who alleges that stamp duty applies, to bring evidence and show that receipts from Machakos level Five Hospital and Dr .C. Okere fall under the *Excise Duty Act* , Cap 480. At the trial they failed to do so. Generally it should also be noted that currently excise duty receipts are levied on legal instruments such as cheques, military commission, marriage license, land transactions, share and when paying to register documents at registrar of documents and not on profession service where VAT is levied.

29. This court also notes that the appellant did not raise this issue before the trial court. It can thus not be raised as a fresh issue in this appeal.

30. The final issue raised by the appellant was the amount of Ksh 10,000/= award as cost of future medical treatment. Again this was an issue directly pleaded by the respondent and both medical reports admitted into evidence did state that the cost of future medical expense to enable the respondent replace his lost tooth was capped at Ksh 10,000/=. Under this award the court cannot be faulted as it was expressly pleaded and proved.

Disposition

31. The upshot is that this appeal partially succeed. The award of Kshs 550,00/= award as general damages for pain, suffering and loss of amenities is hereby set aside and the same is reduce to Kshs 400,000/=. The special damages awarded are upheld.

32. Each part will bear their own cost of this appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 16TH DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;