Serenje v Tiema & another (Civil Appeal E99 of 2021)
[2023] KEHC 18591 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 18591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E99 OF 2021

MS SHARIFF, J

MARCH 16, 2023

BETWEEN

GILBERT ALELA SERENJE ..... APPELLANT

AND

JUSTUS TIEMA ..... 1ST RESPONDENT

NICODEMUS ORODO ..... 2ND RESPONDENT

JUDGMENT

A. Case Background

1. Vide a Plaint dated February 1, 2019 the Appellant filed a claim of tortious negligence against the Respondents after the 2nd Respondent ran down the Appellant, then a pillion passenger on a motor cycle registration number KMDV xxxx, with the 1st Respondent's motor vehicle registration no KCT xxxx make Nissan Atlas. The Appellant had sustained bodily injuries therefrom.

2. The claim was resisted by the Respondent through a written statement of defence dated April 10, 2019.

B. Liability

3. On 1st October 2019 parties entered a consent on liability by apportioning the same at 30% against the Plaintiff and 70% against the Defendant.

C. Assessment

4. The case proceeded for assessment whereat the Appellant testified and called two expert witnesses; one Dr. Charles Andai from Lubino Clinic who produced two medical report and John Shigabe a Chief Clinical Officer from Emuhaya Sub-County Hospital who produced the P3 form as P. exhibit 3. The Appellant's injuries as pleaded and supported by the treatment notes P. exhibit 1, two medical report P. exhibit 5(a) and (b) and the P3 form P. exhibit 3 were described as follows:-

a. Cut wound to the forehead.

b. Blunt injury to the chest.

c. Fracture of the left humerus.

D. Impugned Judgment

5. The Trial court made an award of Kshs 400,000 by way of general damages and special damages of Kshs 13,626 less 30% contributory negligence and the sum award was Kshs 289,539.

E. Appeal

6. The Appellant was aggrieved by the Judgment on quantum and thus filed this appeal. He premises his appeal on the following grounds.

a. That the Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff was entitled to general damages of Kshs 400,000 which was too much on the lower side in view of the injuries suffered by the Plaintiff that it occasioned a miscarriage of justice.

b. That the Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and Judicial authorities on quantum thereby arriving at an erroneous figure on quantum.

c. That the Learned Trial Magistrate erred in law and in fact in failing to consider the passage of time and incidence of inflation.

7. The appeal is resisted by the Respondent. The issue for consideration is whether the award on quantum was inordinately low as to form an erroneous estimate of the general damages.

F. Submissions

8. The appeal was canvassed by way of written submissions.

9. The appellant in his submissions referred the court to two medical reports prepared by Dr. Charles Andai on October 22, 2018 and September 1, 2019 and posited that the award on general damages was excessively low.

10. The Respondents submit that the award on quantum was commensurate to the nature of injuries suffered by the Appellant and they urge this court not to disturb the impugned judgement. They further relied on their earlier submissions filed in the main case.

11. It is submitted by the Respondents that a party is bound by its pleadings and that the Appellant had sought to enhance his injuries at the submission stage to include fracture of *ulna* and disability. Reliance has been place on the case of *Patrick Muiru Kamunguna vs Kaylift Services Ltd & Another* (2021) eKLR in this regard.

G. Analysis And Determination

12. As a first appellate court I am duty bound to re-evaluate, re-assess and reanalyze the evidence and make my own conclusions while taking into account that I did not see nor hear the witness. In the case of *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 123 the court stated that:-

> "...this court is not bound necessary to accept the findings of fact by the court below. An appeal to this court...by way of a 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 wake due allowance in this respect."

13. The statement of the Appellant and his plaint disclosed 3 types of injuries as indicated in paragraph 4 hereinabove. However, I note that during his examination in chief, the appellant sought to enhance his injuries to include fracture of *ulna* and dislocation of elbow joint.

14. PW 2 Dr. Charles Andai who produced two medical reports as Appellant's exhibits 5(a) and 5(b) and the Chief Clinic Officer John Shigalu who produced the P3 form as Appellant's exhibit 3 were categorical that they did not observe any fracture of *ulna* nor a dislocation of elbow joint. The first medical report Appellant's exhibit 5a did not disclose any fracture of left *ulna*. The initial treatment notes did not either. Surprisingly, a medical report produced as Appellant's exhibit 5b prepared a year later contained new injuries.

15. I have found as of fact that the Appellant sustained three types of injuries as per his statement and his plaint both dated February 1, 2019, his medical report produced as Pex 5(a), treatment notes and P3 form. The trial court did not therefore err in failing to include injuries that were not supported by the pleadings and the initial medical evidence.

16. The Appellant has also assaulted the impugned judgment on grounds that his submissions and judicial authorities had been disregarded. I note that the trial court considered the submissions and authorities of both parties and found the authority cited by the Respondent to be most relevant.

17. In the case of *Logistics Solution Ltd v Steerey Maru Mwambela* [2021] eKLR an award of Kshs 450,000 general damages was found to be reasonable on appeal for comparable injuries.

18. I do agree with the Respondents that parties are bound by their own pleadings and so is the court. In the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & Others* [2014] eKLR the court stated:-

> " It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

19. The Supreme Court of Malawi had occasion to consider the same issue in the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3 and rendered itself as follows:-

> " As parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic ruled of pleadings....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific maters in dispute which the parties themselves have raised by the pleadings. Indeed, the curt would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

20. This legal principle was also restated in the case of *Raila Amolo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR and *Adeton Oladeji (NIG) Ltd v Nigeria Breweries PLC* SC 91/2002.

21. Whereas the trial court did consider the submission and authorities cited by the parties, it is not bound by the same. The appellant has emphasized that the trial court departed from the submissions of the parties and thus erred, given our adversarial legal system. I do state categorically that a court is not bound by the submissions of parties as they are neither pleadings nor evidence but rather, parties' focus pointers to the court to assist it in concentrating on points of relevance to each party's case when making its decision. Justice Mwera had an occasion to consider the relevance of submissions in the case of *Erastus Wade Opande v Kenya Revenue Authority & Another*, Kisumu HCCA No 46 of 2007 and rendered himself as follows :

> " Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

22. Similarly, the same judge when confronted with the same issue in *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 expressed himself as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

23. Yet, in *Ngang'a & Another v Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

24. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR rendered itself as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally

parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

25. In the case of *Avenue Car Hire & Another v Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 the Court of Appeal held that no judgement can be based on written submissions and that such a judgement is a nullity since submissions writing is not a mode of receiving evidence as set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in *Muchami Mugeni v Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998 found that the practice of making awards on the basis of the submissions rather than the evidence deplorable.

26. The principles upon which an appellate court can disturb a judgement of a trial court were enunciated in the case of *Butt v. Khan* Civil Appeal No. 40 of 1997 thus: -

> "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 arrive at a figure which was either inordinately high or low." See also *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia* CA 21 of 1984 [1882-1988]1 KAR 727.

27. Yet in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55, the court underscored the principle that the assessment of damages is a discretion of the trial court and stated that :-

> "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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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."

28. I find that the trial court did not erred on any account and made an award that is commensurate to the injuries sustained by the Appellant. The factor of inflation was duly considered.

H. Conclusion

29. This appeal is devoid of merit and is hereby dismissed with costs to the Respondents.

30. It is hereby so ordered.

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

MWANAISHA S. SHARIFF

JUDGE