Munyao & another v Muli (Civil Appeal 044 of 2021)
[2023] KEHC 3166 (KLR) (17 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 044 OF 2021

TM MATHEKA, J

APRIL 17, 2023

BETWEEN

BRIAN MUNYAO ..... 1ST APPELLANT

CYRUS MUTUA NGONYO ..... 2ND APPELLANT

AND

ALEX KIMEU MULI ..... RESPONDENT

(Appeal from the Judgment of Hon. C. MAYAMBA (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.E 033 of 2020, delivered on 18th June 2021)

JUDGMENT

Introduction

1. Alex Kimeu Muli The respondent filed a suit in the subordinate Court seeking general damages for personal injuries sustained from a road accident on 10th July 2018 at Mukaa, along the Nunguni-Salama road. He also sought orders for special damages, costs of the suit and interest.

2. The appellants, Brian Munyao and Cyrus Mutua Ngonyo were the defendants in the trial Court. They filed a joint statement of defence whereby they denied all the allegations in the plaint and called the plaintiff to strict proof.

3. The parties recorded a consent on liability in the ratio of 70:30 in favor of the respondent and agreed that the special damages pleaded at Ksh 92,675 would be awarded. Consequently, the only issue left for determination was the quantum of general damages for pain and suffering.

4. The learned trial magistrate after considering the evidence and submissions awarded the sum of Kshs 800,000/= as general damages. The resultant orders were as follows:-

   Liability 70:30

General damages..... Ksh 800,000/=

less 30% (240,000).....Ksh 560,000/=

Special damages.....Ksh 92,675/=

Costs and interest

5. The appellants were aggrieved by this decision, and sought to have the same set aside and revised trough this appeal listing four grounds as follows;

   a. That the learned magistrate erred and misdirected himself in law, principle and facts when he misapprehended an misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.

   b. That the learned magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation and thus erroneously apportioned liability against the appellant.

   c. That the learned magistrate erred in law and fact in arriving at a decision that was against the weight of evidence on record and weight of law and as a result, he arrived at an erroneous decision.

   d. That the learned magistrate erred in law and fact by taking into account irrelevant and extraneous factors, hence he reached an erroneous verdict.

6. Directions were taken that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellants' Submissions

7. They submit that the award of Ksh 800,000/= is inordinately and excessively high for the injuries sustained by the respondent and constitute an entirely erroneous estimate in the circumstances. They cite Tayab –vs- Kinany (1983) KLR 14 where it was stated that;

> " By common consent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said and done, it must be that amounts which are awarded are to a reasonable extent conventional."

8. They submit that from the comments of Dr. Ashwin Madhiwala who examined the respondent, the injuries sustained can be classified as soft tissue injuries which have since healed and cannot attract an award of Ksh 800,000/=. It is their position that an award of Ksh 500,000 would be adequate in the circumstances of this case.

9. Further, they have relied on the following authorities:

a. Specialized Aluminium Renovators Ltd & Anor –vs- Stephen Mutuku Musyoka (2021) eKLR where the Court set aside an award of Ksh 800,000/= and substituted it with Ksh 500,000/=. In so doing, it stated as follows;

> In consideration of the above, this Court finds that the trial Court made an award which appeared to be excessive after taking into account the fracture to the radius which injury occurred before the subject accident."

b. Njeru Jim Kennedy –vs- Stephen Ngururu Karanja (2021) eKLR where the High Court set aside an award of Ksh 850,000/= and substituted it with Ksh 500,000/=.

c. Kamau Paul & Anor –vs- Lydia Muringe Waikwa (2021) eKLR where the High Court set aside an award of Ksh 800,000 and substituted it with Ksh 500,000.

d. Isaac Kang'ethe & Anor –vs- Andrew Thuku Looremeta (2022) eKLR where the appellate Court set aside an award of Kshs 800,000/= and substituted it with Ksh 600,000/=.Plaintiff suffered blunt injury to the left side of the head and neck, mild head injury and left facial nerve injury. It was argued that this was extremely persuasive.

e. Jane Bosibori Mainya & Anor –vs- Cyrus Kanyotu Mwaniki (2022) eKLR where an award of Ksh 800,000/= was substituted with Ksh 600,000/= for injuries similar to those of the respondent

The Respondent's Submissions

10. The respondent submits that the 2nd ground of the appeal should be struck out as the judgment on liability emanated from consent of both parties.

11. He submits that he was admitted at Kenyatta National Hospital for 10 days and the doctor classified his injuries as grievous harm. He relies on Mohammed Jabane –vs- Higstone Tongoi Olenja, Civil Appeal No. 2 of 1986, Vol 1 KAR 1982 where the Court held that the correct approach in award of damages is as follows:

    a. Each case shall be considered on its own facts.

    b. Awards should not be excessive for the sake of those who have to pay premium, medical fees or taxes.

    c. Comparable injuries should attract comparable awards.

    d. Inflation should be considered.

12. He submits that the learned trial magistrate did not go out of the set principles in making the award.

Duty of Court

13. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

14. Having looked at the grounds of appeal, the rival submissions and entire record, the only issue for determination is whether the award on general damages should be disturbed.

Analysis

15. With respect to liability, from the outset the respondent is correct in submitting the 2nd ground of appeal is misplaced because the judgment on liability was by consent of the parties. As per Flora N Wasike v Destimo Wamboko and s. 67(2) of the *Civil Procedure Act*, there can be no appeal against a decree passed by court it the consent of parties. A court will only interfere if the circumstances so dictate.

16. The injuries sustained were pleaded as follows;

    a. Bruises-head left side

    b. ICT scan-left sided

    c. Loss of consciousness

17. The respondent produced a medical evidence; The P3 indicated that at the time of injury the respondent had sustained injuries that were classified as harm.

18. The respondent produce a P3 form which indicated at the time of injury the he had sustained injuries that were classified as harm, a medico legal report by Dr. G.K Mwaura (P.Ex 1) which particularized the injuries as bruises left side of the head, CT scan- left sided subdural haematoma, loss of consciousness, termed as grievous harm injuries (moderate head injury). It also showed that he underwent surgery where the haematoma was evacuated. At the time of examination, the respondent had a scar on the left side of the scalp, was healing but he had complains about headaches, dizziness and generalized body weakness. According to the doctor, the respondent

19. The trial Court record of 30th April 2021 indicates that the appellants produced a medical report as D.Exh 1 but I did not find it in the record of appeal and trial Court file.

20. I have looked at the injuries sustained by the respondent and I am alive to the fact that no two cases can be completely similar. Specialized Aluminium Renovators Ltd (supra), the respondent sustained fractures of the frontal nasal bones, nasal bones, right orbit, frontal lobe hemorrhage constusion and bleeding into sinuses.

21. In Njeru Jim Kennedy (supra), the respondent sustained degloving of the left side of the mouth and cheek, fracture of upper incisor teeth, soft tissue injury on the scalp and soft tissue injury of the left hand. The doctor who examined him opined that he would require cosmetic surgery at a cost of Ksh 150,000/= and the trial Court awarded the same. On appeal however, the learned Judge noted that since there was divergence of opinion from the two doctors, only half of the amount should have been awarded.

22. In Kamau Paul (supra), 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 respondent had acquired permanent disability which was assessed at 4% by one doctor and 45% by another.

23. In the trial Court, the respondent relied on Gabriel Maina Mungai -vs- Jane Wanjiku Mwaura (2019) eKLR where an award of Ksh 1,000,000/= was reduced to Ksh 750,000/= on appeal. There, the respondent sustained a head injury with loss of consciousness for almost 3 weeks, fracture of the left clavicle bone, cut wound on the head, soft tissue injury to abdomen, termination of a six-month pregnancy, permanent incapacity of 15%.

24. From the foregoing, it is evident that the injuries sustained by respondents, in the authorities cited by the appellants, were much more severe than the ones sustained by the respondent in this case. On the other hand the authority cited by the respondent is not comparable because the injuries therein are also more severe.

25. From the medical report, there is no indication of future complications and there is no indication of any acquired any incapacity. In the circumstances, the appellants submission that the award of Kshs 800,000/= was inordinately high is persuasive.. While at it, it is important to mention that the parties did not submit authorities which would have offered proper guidance to the trial magistrate. The one by the respondent had much more severe injuries and the appellants submitted an authority on soft tissue injuries to support their proposal of Ksh 150,000/=.

26. Considering that the authorities cited by the appellants in this appeal are very recent, it is evident that the conventional award would be between Ksh 500,000/= and Ksh 600,000/=. Taking into consideration the other recent authorities I am persuaded that an award of Ksh 500,000/= general damages would suffice in the circumstances of this case.

27. Liability was agreed on by consent at 70:30 in favour of the respondent. The judgment with respect to special damages was also entered by consent.

28. Ultimately the appeal succeeds and the judgment of the learned trail court on quantum is set aside and substituted as follows.

    General damages.....Ksh 500,000/=

    @70%.....Ksh 350,000

    Special damages (by consent) .....Ksh 92,675

    Net award.....Ksh 442, 675

29. The award will earn interest at court rates from the date of the judgment of the subordinate court the 18th June 2021.

30. The respondent will have the costs in the subordinate court, the appellant, the costs of the appeal.

31. Orders accordingly.

Dated, signed and delivered via email this 17th day of April 2023

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Mumbua T. Matheka

Judge

C.A - Mwiwa

Mwangangi Nzisa & Associates

Advocates for the Appellant

Mutunga & Muindi Co Advocates

Advocates for the Respondent