Khettya & 2 others v Wamalwa (Civil Appeal E050 of 2021)
[2023] KEHC 17544 (KLR) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E050 OF 2021

DK KEMEI, J

MAY 19, 2023

BETWEEN

SANDIP RAJNKANT KHETTYA ..... 1ST APPELLANT

NIRAJ RAJNKANT KETHIA ..... 2ND APPELLANT

LUDRA DIGITAL ENTERPRISE ..... 3RD APPELLANT

AND

EVANS WEKESA WAMALWA ..... RESPONDENT

(An Appeal arising out of the Judgment and Decree of Hon. S. O Mogute- SRM delivered on 11th August 2021 at Bungoma Chief Magistrate's Court Civil Case No. 101 of 2020)

JUDGMENT

1. The appeal is against the award of damages by the trial Court in the sum of Kshs 500,000/= for general damages for pain and suffering and loss of amenities and Kshs 10, 653/= for special damages with liability at 100%. The judgment was delivered on August 11, 2021. Aggrieved by the judgment, the Appellants filed a memorandum of appeal on the August 4, 2022. The appeal is mainly on the trial court's finding on quantum. The grounds of appeal are that: -

    i. The learned Magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent which was manifestly excessive.

    ii. The learned Magistrate failed to consider and appreciate the Appellants cross-examination of the Respondent's witnesses and therefore erred in his assessment of damages which was manifestly excessive.

iii. The learned Magistrate failed to address the glaring discrepancies in the treatment records produced before the Court and therefore erred in his assessment of damages which was manifestly excessive.

iv. The learned Magistrate failed to render/pronounce himself with regard to the glaring discrepancies in the treatment records.

v. The learned Magistrate erred in assessing damages and therefore failed to apply the principles applicable in award of damaged and comparable awards made for analogous injuries.

2. They proposed to ask the Court for the following orders that: - the Judgement/Decree of the lower Court on quantum dated August 11, 2021 be reviewed and/or set aside and that the costs of this appeal be borne by the Respondent.

3. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions. Both parties duly complied.

4. This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.

5. The Respondent filed suit against the Appellants dated March 13, 2020 seeking for general and special damages for serious injuries sustained in a road accident on the February 28, 2020 along Mumias-Bungoma road at Mukhuma Area. It was pleaded that the Respondent was lawfully riding a motor cycle registration number KMEW 390 when the Appellants driver/servant recklessly and/or negligently managed, controlled and/or drove the motor vehicle registration number KCQ 002L causing the same to violently lose control and knock the Respondents motor cycle registration number KMEW 390 as a result whereof he sustained severe body injuries.

6. From medical report by Dr Charles Andai, the Respondent suffered soft tissue injuries and moderately serious bone injuries, which were blunt injury to the back, blunt injury to the right shoulder, fracture of the right ulna distal end, fracture of the right 1 metatarsal, blunt injury to both knees, bruises to both forearms. The trial court also noted that the injuries were expected to have healed completely within a period of one and half years from the date the report was prepared.

7. Further, the Respondent had pleaded and proved special damages of Kshs 10, 653/= being Kshs 8,000.00 paid for the medical report, Kshs 2, 130/= for the medical expenses and Kshs 550.00 paid for the copy of records.

8. The Plaintiff, Evans Wekesa Wamalwa testified as PW1. He adopted his witness statement dated March 13, 2020 as his evidence in chief. He produced various documents in Court to substantiate his claim as follows: invoice as Pexhibit 1; copy of records as Pexhibit 2; copy of ID Card as Pexhibit 17 and demand notice as Pexhibit 18.

9. On cross examination, he told the Court that he was on the left side of the road facing Bungoma from Mukuma. The motor vehicle came from the back heading to Bungoma and there was a matatu on the opposite lane. The motor vehicle which was following him tried to overtake but on spotting the oncoming matatu moved to his side hitting him on his right side prompting his fall on the tarmac road.

10. On re-examination, he told the Court that the driver of the motor vehicle was behind him and that he tried to overtake him when the opposite lane was not clear thus forcing him back to the Respondent's lane and knocking him down in the process.

11. PW2 was Charles Andai, who testified that he is the doctor who examined the Respondent and who to produce a medical report dated March 4, 2020 as Pexhibit 4 and the receipt of Kshs 8,000/= as Pexhibit 4.

12. On cross examination, he told the Court that his prognosis of the Respondent was based on his x-ray film and treatment notes and which he used to prepare the medical report. The discharge summary showed the Respondent suffered: fracture of the 1st right metatarsal bone; back fracture ulna distal end and that the second medical report did not have a fracture of the ulna distal end.

13. PW3 was Dr Krandie Wafula Rene, who produced a copy of the treatment card for Evans Wekesa which listed his injuries as: swollen (R) hand; pain(R) shoulder, x-ray showed fractures of distal end of the (R) ulna and 1st metatarsal bone. He told the Court that he was the one who treated the Respondent and he produced the Respondent's treatment notes as Pexhibit 7 and produced the P3 form as Pexhibit 5.

14. On cross-examination, he told the Court that the Respondent had pain on his right shoulder; wrist joint and that there was a fracture of the metatarsal bone and distal end.

15. On re-examination, he told the Court that from the x-rays taken, there was a fracture of the distal end and the metatarsal bone.

16. PW4 was Edwin Lubale Chilechi, who told the Court that he is a clinical officer at Kabula Health Centre. He recalled that on February 28, 2020 he treated the Respondent who had been involved in a road traffic accident while riding a motor cycle. According to him, he had a stroke R (hand), bruise on the palm tenderness with reduced movement on the wrist joint, tenderness on the right wrist. He produced a receipt for Kshs 100/= paid by the Respondent as Pexhibit 15 and the treatment record as Pexhibit 16.

17. On cross-examination, he told the Court that his prognosis was based on his physical examination of the Respondent

18. On re-examination, he told the Court that he recommended an x-ray as he had seen a deformity to confirm that it was a fracture

19. PW5 was No 80XX6 PC Dennis Monyenye Menga who testified that he had a police file in reference to an accident which occurred on February 28, 2020 along Bungoma-Mumias road between KCQ OO2L Mitsubishi FH and motor cycle KMEW 390N TVS star. He produced the police abstract as Pexhibit 3 (a) and the police file copy Pexhibit 3(b). He told the Court that the case is still pending investigation.

20. On cross-examination, he told the Court that he was not the investigating officer as the officer in-charge of the case was at Kiganjo police training college. He told the Court that he could ascertain if the investigating officer visited the scene and that there was sketch of the scene.

21. On re-examination, he told the Court that the police abstract was issued on March 12, 2020 but the accident occurred on February 28, 2020.

22. At this juncture the Respondent closed his case.

23. The Appellants called Julius Onyango Odhiambo as DW1 who adopted his witness statement as his evidence in chief. He told the Court that on February 28, 2020 he was the driver of the motor vehicle registration number KCQ 002L Mitsubishi FH along Mumias-Bungoma Road. He recalled at 15.30 hours he passed Mukhuma area without any incident only to be flagged down by boda boda riders who informed him that he had been involved in a road traffic accident with a fellow rider. He was

accompanied to the scene but on arrival he did not find any motor cycle or the rider. He proceeded to Bungoma Police Station where he reported the accident.

24. On cross-examination, he told the Court that the motor vehicle KCQ 002L belonged to the 3rd Appellant and that at the time of the accident he was on duty.

25. On re-examination, he told the Court that the accident occurred at Musikoma area and he was driving at 40 Km/hr. He was the one who reported the accident to the police.

26. DW2 was Jackton Karl Amakobe who adopted his witness statement as his evidence in chief. He told the Court that on February 28, 2020 he was on board motor vehicle registration number KCQ 002L Mitsubishi FH which was driven by DW1 along Mumias-Bungoma road. He recalled at about 1530hrs while heading back to the hardware shop of reaching Mukhuma area boda boda operators were in hot pursuit of them telling them to stop. They informed them that they had knocked down a motor cycle operator. They proceeded to Bungoma Police Station where they reported the incident.

27. On cross-examination, he told the Court that DW1 was the driver of the 3rd Appellant's motor vehicle and that there was an allegation of an accident at about 3.00 PM. They returned to the scene but did not find the rider and motorcycle and they proceeded to report the accident at Bungoma Police Station.

28. On re-examination, he told the Court that the driver was not speeding at the time of the accident and that they took the motor vehicle to Bungoma Police Station and that they visited the scene with the police.

29. At the close of the defence case, parties were directed to file submissions.

30. The trial Court made a determination that the Respondent had sufficiently proved that the accident had indeed occurred as pleaded in the Plaint. The trial Court was not persuaded by the testimony of DW1 and DW2 denying the knowledge of the said accident. The trial Court was further persuaded by the Respondent that the motor vehicle did indeed belong to the 1st and 2ndAppellants as evident from the Motor vehicle search presented at trial.

31. On liability, the trial Court determined that the evidence as adduced by the Respondent was very clear on how motor vehicle registration number KCQ 002L hit his motor cycle registration number KMEV 390N on the material date. DW1 and DW2 did not challenge the evidence adduced by the Respondent in any manner on how the accident occurred. The trial Court further held the DW1 and DW2 testified that they were flagged down by boda boda operators on that date and they were informed that the driver had hit a motor cycle rider. This corroborated the Respondent's evidence that he was hit by a motor vehicle registration number KCQ 002L. The trial Court held that the driver of the motor vehicle was entirely to blame for the accident thus holding the Appellants jointly liable for the negligence of their driver/servant/employee.

32. On quantum, the trial Court determined that the Appellants did not tender any medical evidence to show the injuries suffered by the Respondents in as far as the said medical opinion is concerned. Dr. Andai's report was compiled based on the treatment notes from Kabula Dispensary; Bungoma District Hospital and the P3 form filled at Bungoma District Hospital which assessed the injuries as grievous harm. The trial Court further held that Dr Andai looked at the Respondent's films of his right wrist taken soon after the accident and they confirmed the fractures of the distal end of the right-hand ulna and base of the 1st Metatarsal. The learned magistrate found no reason to doubt the finding of Dr. Andai as there was no other medical opinion from another expert to the contrary.

33. The trial Court on perusal of the authorities relied on by the Appellants and Respondent, they included almost similar injuries as the Respondent's but however the proposal of Kshs 1,500,000.00/=

was on the higher side. Eventually, the learned magistrate made an award of Kshs 500,000/= for general damages for pain and suffering and loss of amenities and Kshs 10, 653/= for special damages as well as costs and interests from the date of filing suit until judgment.

34. It is now settled law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. See Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

35. A perusal of the record of appeal suffices to see that indeed on a balance of probabilities there was sufficient evidence enough to prove, at least on a balance of probability, that indeed a road traffic accident involving the said motor vehicle registration KCQ 002L and motor cycle registration number KMEV 390N which occurred along Mumias-Bungoma road as pleaded by the Respondent and consequently is enough to prove that the Respondent was the rider of the motor cycle registration number KMEV 390N in the accident and that the 1st and 2nd Appellants were its owners who had authorized the driver of motor vehicle registration KCQ 002L. The certificate of official search from the registrar of motor vehicles also conclusively proved ownership of the particular motor vehicle. There was no evidence called to rebut this assumption consequently displaying to the trial Court that the issue of ownership was not a central issue. I am persuaded by the Court of Appeal in the case of Nakuru Civil Appeal No 210 of 2006 and *Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another*. I therefore find that the said accident did occur and that the motor vehicle was indeed the Appellants. Consequently, without any rebuttal, the learned magistrate was right to accept the Respondent's evidence as the truth with respect to the question of who might have been responsible for the accident. As such, I am in agreement with the learned Magistrate's finding on 100% liability against the Appellants as there was no evidence adduced to the contrary. Further, it transpired that the Appellants lorry was overtaking the Respondent only to see an oncoming matatu thereby falling on the path of the respondent and causing the accident. It is thus clear that the Appellants driver did not observe the Highway code of traffic. Under those circumstances I do not see how the respondent contributed to the accident.

36. It is noted that the Appellants' appeal revolves around the question of quantum of damages. That being the position, then I find issue for determination here is whether the award of general damages of Kshs 500,000.00/= in light of the injuries stated above is inordinately high to persuade this Court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards".

37. To begin with, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr Andai as: blunt injury to the back, blunt injury to the right shoulder, fracture of the right ulna distal end, fracture of the right 1st metatarsal, blunt injury to both knees, bruises to both forearms.

38. I have considered the Appellants and Respondent's submissions on the quantum of damages, the authorities cited by Counsels in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a court is to consider is that as far as possible comparable injurie should correspond to comparable awards of damages.

39. From the evidence adduced by the Appellant it is clear that the Respondent had suffered soft tissue injuries and moderately serious bone injuries.

40. On the issue of quantum, I shall rely on the Court of Appeal's decision in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, where the Court of Appeal held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:
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> "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." (Emphasis my own).
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> From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made. Upon studying the cited authorities relied upon by the Appellant, I note that the injuries therein were more severe in nature than in the current case. I am therefore not persuaded by the authorities cited by the appellant.
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> Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;
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> "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"

41. In the case of *Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR the Court stated as follows: -

> " It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

42. The other critical point of convergence for the Court is to bear in mind that the award of general damages is an exercise of discretion by the trial Court based on the evidence and impressions on

demeanor of witnesses made by the learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See *Simon Tavera v Mercy Mutitu Njeru* {2014} eKLR).

43. I took the step of considering comparable awards previously made and relied on the following cases:

    a. *Francis Ndungu Wambua & 2 others vs VK* (2019) eKLR.: The Court awarded general damages of Kshs. 1,000,000/= in the year 2019.

    b. *Josephine Angwenyi vs Samuel Ochillo* (2010) eKLR Civil Appeal 125 of 200: The Court awarded Kshs. 70,000/= for soft issue injuries with deep cut wound on the back, bruises to both legs, chest contusion, bruises to both hands, cerebral concussion and pain to the back.

    c. *David Okoka Odero Vs Kilindini Tea Warehouse Ltd* HCCA 2008 (eKLR): The Court awarded Kshs 40,000/=for injuries on the lumbar sacral spine and soft tissues injuries that healed without permanent incapacity.

    c. *Gilbert Odhiambo Owuor vs Nzoia Sugar Company Ltd* (2012) eKLR Civil Appeal 46 of 2010: The Court awarded Kshs 50,000/-. The Appellant suffered soft tissue injuries on the left leg with swollen and tender left foot and his ankle was in server pain. Further, the Plaintiff in the cited case was unable to use the left ankle and foot for considerable period. Further, there was limited movement of the left ankle. In our case the Plaintiff did not suffer any temporary or permanent disability. In fact, he was treated as an out patient as evidenced by his outpatient card.

    d. *Mokaya Mochama vs Julius Momanyi Nyokwoyo* (2013) eKLR: The award of Kshs 70,000/= was upheld. The Respondent/Plaintiff suffered cerebral concussion, deep cut wound on the back of his head, bruises on the right fore leg, injuries on his right hand, right leg (on the calf), his rib and his head. These injuries were described as "serious" and "severe soft tissue injuries". In the instant case, the injuries were bruises and no deep cut wound or cerebral concussions were suffered.

    e. *Ndungu Dennis vs Ann Wangari Ndirangu & Another* (2018) eKLR. The Court made an award of Kshs 100,000/= Injuries included minor bruises on the back, hit on the tibia or fibula area of the right leg with no fractures and tenderness on the right leg. The injuries sustained were described as soft injuries to lower right leg and soft injuries to the back. these were multiple soft tissue injuries. In this case, the injuries were bruises and knocks.

44. I further wish to point out that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered, not to mulch the tortfeasor for the injury he has caused. See the case of *Lim v Camden HA* {1980} AC 174. There is a distinct difference between the pain and suffering experienced by a victim of an accident with one who suffered soft tissue injuries and moderately serious bone injuries.

45. In view of the foregoing, I am persuaded that the award made by the learned trial magistrate was appropriate in comparison to comparable awards, hence there is no need for interference. However, I am not persuaded that the sum suggested by the Appellants is reasonable and fair in light of the injuries suffered, period taken since determination and the effects of inflation rates. The learned Magistrate relied on the case of *Daniel Otieno & Another vs Elizabeth Onyo* (2020) eKLR where the Plaintiff in this case suffered similar injuries to the instant respondent. The Court made an award of Kshs 400,000/= for general damages after setting aside the award of Kshs 600,000/= made by the trial Court. He made an award of Kshs 500,000/= taking into account the effects of inflation as an additional factor.

46. Upon considering the damages awarded in the authorities i have just cited, I find an award of Kshs 500,000/ to be reasonable and adequate as compensation for the injuries suffered in this case.

47. The test to be applied in an award of special damages is clearly articulated in the cases of *Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store* Civil Appeal No 5 of 1990 and *Idi Ayub Shaban v City Council of Nairobi* 1982 – 1988 IKAR 681 where the principle were laid down to the effect that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the Appellant had clearly proven the amount pleaded as special damages and as such I find no reason to vary the learned Magistrate's assessment thereon. In any event, the appellant raised no issue with that head of damage and hence the same shall remain undisturbed.

48. Accordingly, and for reasons foretasted, I find no merit in the appeal. The same is ordered dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

Munyire for Appellants

Mutunga for Bw'Onchiri for Respondent

Peter Court Assistant