Kagiri v Waime (Civil Appeal 7 of 2019) [2023] KEHC 17800 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 7 OF 2019

FR OLEL, J

MAY 16, 2023

BETWEEN

CAROL WANJIRU KAGIRI ..... APPELLANT

AND

JAMES NGETHE WAIME ..... RESPONDENT

(Being An Appeal From The Judgment And Decree Of Hon E. K. Nyutu (P.M.) Delivered On 18th December 2018 in Engineer CMCC No 132 Of 2016)

JUDGMENT

1. The Appellant was the Defendant in the primary suit, where she was sued as the owner of Motor Vehicle Registration number KBM 427 X (hereinafter referred to as "the suit motor vehicle"). It is averred that on 5.2.2016 at around 11.00am, the respondent was lawfully travelling in the motor vehicle along Njambini- Olkalau road at Shove area when the appellant and/or her driver, agent or servant negligently drove, managed and controlled the suit motor vehicle causing it to lose control, veer off the road and landed in a ditch as a consequence of which the Plaintiff sustained serious bodily injuries being a fracture of the neck of the left humerous with a slight displacement of the main fragments and also fracture of the left olecranon process. The respondent prayed for Special damages of Kshs 112,083, general damages for pain and suffering and interest.

2. The Appellant herein filed her statement of defence dated 11.11.2016 essentially denying the contents of the Plaint and opined that if the accident occurred then it was caused by the negligence of the respondent. The Defendant asked that the suit be dismissed.

3. After the hearing, the learned magistrate in his judgment delivered on 18th December 2018 apportioned Liability at 100% as against the defendant and proceeded to award general damages at Kshs. 800,000/=, special damages at Kshs 132,218/= plus costs and interest of the suit.

4. The Appeal is raised grounds of appeal namely:-

a. That the Learned Trial Magistrate erred both in law and in fact and misdirected herself in awarding an exorbitant quantum of damages of Kshs 800,000 as general damages for pain, suffering and loss of amenities that is commensurable to the injuries sustained by the Respondent and does not conform with the principles for award of damages and decided authorities.

b. That the Learned Trial Magistrate erred both in law and in fact and misdirected herself as to the extent and nature of the Respondent's injuries and thereby erred in her assessment of damages which were manifestly excessive.

5. The Appellant sought that the appeal be allowed and the award be substituted with an award that is reasonable and matches previous judicial awards for similar injuries. The appellant also prayed for costs of the appeal.

Facts of the Case

6. The Plaintiff called two witnesses. PW1 James NgetheWaimewho adopted his witness statement recorded on 26.8.2016 and further stated that on 5.2.2016 he was heading to Ol kalua for a funeral and was travelling with other people along Njambini – Ol Kalau road in Motor Vehicle KBM 427X belonging to the appellant. At a placed called Shove, the suit motor vehicle lost control and entered into a ditch. He sustained a fracture of the left hand and shoulder. They were taken to North Kinangop hospital where he was given first aid and later transferred to Thika District Hospital. A POP was applied on his fracture and he was required to pay Kshs 250,000 for an operation since he could not afford, he went to stay for home for about 10 days. He later went to Kijabe hospital where he was admitted from 25.2.2016 to 01.032016 where an operation was done with an open reduction and internal fixation of the fracture. The accident was reported at Kinangop police station and he was later examined by Dr. OKERE who prepared a medical report. He said he had not recovered from the injury and was unable to stretch his hand above and still had a metal plate in the site of the fracture. He blamed the owner of the motor vehicle for the accident as she was careless while driving. He said there is nothing that he could have done to prevent the accident, he had worn a safety belt and denied moving around in the car. He also denied obstructing the driver. He prayed for compensation for his injuries. The respondent did produce the documents in his list of documents as Exhibits.

7. Upon cross examination, he further testified that the motor vehicle had a capacity for five people and at the time of the accident, they were five of them including the driver. He was seated at the back seat and noticed that the suit motor vehicle was being driven at high speed though he did not see the speed and did complain about the high speed. He further testified that he did not know how the driver lost control of the suit motor vehicle and only found himself in hospital. He used to work as a prison warder in the past and is now retired. Because of injury to his left hand he cannot perform hard tasks. In re-examination, he stated that he was not aware if anyone was charged with a traffic offence.

8. PW2, Dr. Cyprianus Okoth Okerewho stated that on 17.8.2016 he examined PW1 a 44-year-old male right-handed farmer, he sustained a fracture of the neck of the left humerous with a slight displacement of the main fragments and a fracture of the left olecranon process (the elbow bone). He said the injury was grievous harm and the degree of incapacity 40%. He relied on discharge summary from AIC Kijabe hospital-ray films and a CT scan. He produced the medical report and receipts for Kshs 2,000 and 20,000 for the report and court attendance respectively.

9. Upon cross examination, he further stated that the accident occurred on 05.2.2016 and he examined the patient on 17.8.2016, the fracture had healed but with permanent incapacity. There was fracture of 2 bones namely the radius and ulna, which is the reason for permanent disability. He said the 40%

incapacity was his medical opinion and that the patient was unable to raise the arm and to perform heavy duties with the said arm.

10. The Appellant called one witness. DW1 Isabel Wanjiku. she adopted her statement recorded on 18.8.2017 and stated that on 5.2.2016 she was travelling from Thika to Nakuru for a funeral in motor vehicle KBM 427X Toyota. On reaching a place near Engineer, she saw two lorries moving in the opposite direction, one made to overtake the other. She swerved to avoid the head on collision, and her motor vehicle rolled. She lost consciousness and when she regained it, she found herself at North Kinangop Hospital from where she was referred to St. Murumbaz Mission Hospital.

11. She said the motor vehicle belongs to Caroline Wanjiru Kagiri, her daughter. She is the one who was driving and it is the lorry driver who should be liable for the accident as he was driving reckless. She said she was not charged with any traffic offence.

Appeal Submissions

12. The Appellant filed submissions on 1.12.2022 in which she submitted that the award of Kshs 800,000 was manifestly excessive. While relying on the case of *HB (Minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & Another* [2021] e KLR, *Millicent Atieno Ochuonyo v Katola Rchard* [2015] e KLR, It was submitted that the trial court ignored the cardinal principle in assessment of damages that comparable injuries would as far as possible be compensated by comparable awards .That in the case of *Loise Njoki Kariuki v Bendricon Wamboka Waswa & Another* [2013] eKLR which the Trial Court relied on in makings its determination , the plaintiff lost the whole right arm and half of her forearm which was extremely severe in comparison to those the Respondent suffered.

13. It was submitted that the cases relied upon by the Respondent in the lower court also had more severe injuries which are not comparable to the ones suffered by the Respondent.

14. The Appellant submitted that Kshs 350,000 would be sufficient. She submitted that in the recent decisions where there were serious injuries, lower awards were given. She relied on the case of *Alex Wanjala v Pwani Oil Products Limited & Another* [2019] e KLR where the court awarded Kshs 600,000 to an Appellant who had sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture in the humerous and closed fracture of the right femur and the case of *Joseph Mwangi Thuita v Joseph Mwole* [2018] eKLR where the court awarded Kshs 700,0000 to a plaintiff who suffered fractured femur, compound fracture of tibia and fibula, shortening right leg and episodic pain on the thigh with inability to walk without support.

15. The Respondent filed submissions on 5. 12. 2022 and while relying on the case of *Kemfro Africa t/a Meru Express service, Gathogo Kanini vs A.M.M Lubia & Another* [1988] eKLR, *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR submitted that the general rule involving award of damages is that there should be some degree of uniformity in awarding damages having regard to recent awards in comparable cases. That similar injuries must attract similar awards however progressive increments should be made taking into account time lapse and the effects of inflation. That damages cannot remain constant for similar injuries over a long period of time.

16. It was submitted that the learned Trial Magistrate considered all relevant factors, pleadings, severity of injuries sustained as per the medical report, present similar awards and inflation and thus the decision on quantum cannot be faulted. Further, that the Appellant had not demonstrated that the award made was inordinately high nor had applied the wrong principles on arriving at the award.

17. As regards costs, it was submitted that costs follow the event as per section 27 of the *Civil Procedure Act*.

Analysis & Determination

18. I have I have considered the lower court record, the memorandum of Appeal and the submissions of parties and find that only issue for determination is quantum, more specifically general damages.

19. This court has a duty that is enumerated under Section 78 of the *Civil Procedure Act* which espouses that the role of a first appellate court which is to:

'..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

20. This was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that:

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

21. The Appellant contends that the award of Kshs 800,000 as general damages for pain, suffering and loss of amenities was exorbitant and not commensurable to the injuries sustained by the Respondent and does not conform with the principles for award of damages and decided authorities. The Trial Court in making its determination based on the injuries sustained and guided by the case of *Loise Njoki vs Bendricon Wamboka Wasawa & Another* [2013] eKLR.

22. When it comes to establishing the nature of injuries, the court can only rely on the evidence placed before it. According to the Respondent, he pleaded in the Plaint that he sustained serious bodily injuries being a fracture of the neck of the left humerous with a slight displacement of the main fragments and fracture of the left olecranon process. It was his testimony that he sustained the said injuries. He also stated that he sustained a fracture on the left hand and shoulder. The only expert evidence on record is that of Pw2. From the medical report by Dr. Okere dated 17.08.2016, the Respondent sustained the following injuries;

    a. A surgical scar on the left distal humerous and forearm proximately posteriorly

    b. Patient unable to raise left arm

    c. Gripping power of the left hand greatly reduced

    d. Permanent incapacity of 40%

23. This evidence is not disputed. The accident occurred on 5.02.2016 and the Respondent contended that he was admitted from 25.02.2016 to 1.03.2016 where an operation was done with an open reduction and internal fixation of the fracture.

24. An appellate court can interfere with a trial court's assessment of general damages, the principles for interfering with the trial court's award are well established in *Salim Zein And Another vs Rose Mulee Mutua* Civil Appeal No. 147 of 1994 where the court stated that;

> " The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage."

25. Similarly in the case of *Telkom Orange Kenya Limited vs I S O minor suing through his next friend and mother J N* [2018] eKLR it was held that;

> " General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that: 'Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.'"

26. The law is well settled that in deliberating on whether to interfere with the award of a trial court, an appellate court ought to take into account the following principles portrayed in *Kemfro Africa Ltd t/a Meru Express Services 1976 & another [1976] v Lubia & Another (No. 2)* [1985] eKLR:

    a) Whether the trial court took into account an irrelevant factor, or

    b) Whether the trial court left out of account a relevant factor, or

    c) Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

27. I have considered the authorities that parties made reference to in their submissions. The case of Haron Kipchumba Supra quoted by the Appellant where an award of 350,000 in 2014 for a less severe injury. In the case of *Reuben Mongare Keba v LPN* (2016) eKLR the respondent suffered fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg and was awarded general damages of Kshs. 800,000.

28. In *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR where this court upheld an award of Kshs. 800,000 where the plaintiff had suffered femur fractures and fractures of the tibia fibula.

29. In the case of *Philip Kipkorir Cheruiyot v Nebco K Ltd & Another* [2006] eKLR the plaintiff who had sustained fracture of the right humerus, injury to the right radial nerve due to compressed fracture of the right humerus resulting into radial nerve palsy and fracture of the head of the right humerus with dislocation of the right shoulder joint with 30% permanent disability was awarded a sum of Kshs.600,000/=.

30. I am not persuaded that the award was manifestly excessive or that the Trial court considered a principle by mistake or omission or made an error in arriving at its conclusion. As such this court has no basis of interfering with the award of the Trial Court.

Disposition

31. This appeal therefor has no merit and the same is dismissed.

32. The costs are awarded to the respondent and it is hereby assessed at Ksh 120,000/= all inclusive

33. It is so ordered

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF MAY, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant