



**Tarus v Chumo (Civil Appeal 136 of 2019)
[2023] KEHC 17602 (KLR) (Civ) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 136 OF 2019

AA VISRAM, J

MAY 18, 2023

BETWEEN

JOSEPH KIPTUM TARUS APPELLANT

AND

IRENE JEPKEMBOI CHUMO RESPONDENT

(Being an appeal from the judgment of Honourable M.W Murage Senior Resident Magistrate (SRM) delivered on 14th February 2019 in CMCC No.5039 of 2007)

JUDGMENT

Introduction

1. This judgment determines the Appellant's appeal vide its Memorandum of Appeal dated 11th March, 2019.
2. By way of background, the present appeal relates to an award of the lower court for civil damages for criminal acts on the part of the Appellant. According to the Respondent, on 11th October, 2006 or thereabouts, she was violently assaulted by the Appellant, who caused her numerous injuries, including a fracture of her arm. She was hospitalized as a result of the said attack and incurred medical expenses arising from her injuries. Accordingly, she filed Civil Case No. 5039 of 2007 ("the Suit") to compensate her for her injuries and expenses as stated above.
3. The history of the proceedings of the Suit show that the same was listed for hearing as early as one year after the incident, but was thereafter adjourned repeatedly, for one reason or another, for a period of 11 full years.
4. The suit was eventually heard and determined ex-parte. The reason for this was because the Defendant was in breach of court orders at the date of the hearing, and the court accordingly denied him the



audience to participate in the proceedings. In particular, the Defendant had not paid costs arising out of his previous adjournment, which he had been ordered to pay before the hearing.

5. Based on the circumstances as described above, the Magistrate proceeded to hear and determine the suit ex-parte and delivered his judgment on 14th February, 2019. The court found the Appellant 100% liable and awarded the Respondent the sum of Kshs. 516,000/= together with costs and interest.
6. Aggrieved by the said judgment, the Appellant has filed this appeal on the following grounds:
 - a. The Learned Magistrate erred in law and in fact in entering judgment against the Appellant without giving him the chance to conduct his defence hearing.
 - b. The Learned Magistrate erred in law and in fact by denying the Appellant audience on 23rd January, 2018 on account of unpaid costs yet, he and his advocate were present in Court and ready to proceed.
 - c. The Learned Magistrate failed to exercise her judicial discretion judicially by denying the Appellant his right to a fair hearing and access to justice on the basis of unsettled costs.
 - d. The Learned Magistrate failed to consider Article 159 (2) (d) of the Constitution of Kenya which stipulates that justice shall be administered without undue regard to procedural technicalities, in this case being unsettled costs.
 - e. The Learned Magistrate erred in law and in fact in striking out the Appellant's application dated 2nd February for orders to set aside the proceedings on 23rd January, consequently infringing on his right to access to justice.
 - f. The Learned Magistrate erred in failing to consider the application dated 2nd February, 2018 submissions by the Appellant and the authorities submitted on his behalf.
 - g. The Learned Magistrate erred and or misdirected herself by coming to the conclusion that the issue of unsettled costs was reason enough to deny the Defendant audience and subsequently infringe on his right of a fair hearing.
 - h. The Learned Magistrate erred in law and in fact in entering judgment against the Appellant without defense hearing being conducted.
 - i. The Learned Magistrate erred in law and in fact in awarding inordinately high general damages at Kshs. 500,000/=.
 - j. That the Learned Magistrate erred in law and in fact in awarding special damages and costs to the Respondent.

Appellant's submissions

7. In relation to the order of costs, the Appellant submitted that it had been condemned to pay costs totaling Kshs. 14,300/= that were borne out of an application dated 21st March, 2011, seeking to reinstate the suit.
8. That the case was set for hearing on 23rd January, 2018, and on that day, the court ordered the matter to proceed, and stated that the Appellant had no audience until the court's orders were followed.



9. Counsel was of the view that the Magistrate should have given him the opportunity to explain why he had not paid the costs awarded. The court's decision to bar him from the courtroom and deny him the chance to present his case, even though his defence raised triable issues, was excessive.
10. In support of his submission, the respondent relied on the High Court Civil Appeal No. 30 of 2018 *Joseph Njoroge Kimondo & another v (A minor suing through her next friend and father JWM)* (2018) eKLR the Court held as follows:-

“The crux of the matter is whether Learned Counsel for the Appellant had the opportunity to adduce evidence or reasons why the costs of Kshs. 29,000/= had not been paid as earlier ordered by the court. In relation to the blunders or omission made by counsel, did the Appellant know that the inadvertence had backfired rendering the whole trial a travesty of justice. The Applicant in this case had no notice of the impending decision that in absence of payment of ordered cost the case would proceed ex-parte.

The issue of such omissions and blunders is a daily occurrence where human conduct is involved. If the matter in question involves where grave injustice would be occasioned to a litigant, the discretion should be exercised to avoid such hardship or injustice. The court has the power to exercise the discretion to waive the instant payment of costs to abide the final judgment and decree of the dispute.

I can appreciate from the order that there was a genuine dilemma on the part of the Trial Magistrate, in regard to varying the words “payment be made before the next hearing date”. Instead of proceeding with the hearing without hearing any arguments on this issue, the Learned Trial Magistrate had the discretion to stop the trial or vary the directions altogether. I cannot over emphasise that judicial discretion in order to attain procedural fairness in each circumstances remains unfettered. In my judgment, exercise of discretion cannot waive the provisions of the constitution, on access to justice and right to a fair hearing as espoused under Articles 48 and 50 of our Constitution.”

11. Counsel submitted that the denial of audience on 23rd January, 2018; and the subsequent rejection of the application dated 2nd February, 2018, despite the purging of the alleged contempt, all point to a violation of the Appellant's fundamental rights.
12. Further, that the award of Kshs. 500,000/= as general damages was excessively high comparable to awards for injuries of a similar nature.
13. In support of the above argument, the Appellant relied on the decision of the High Court Case in *Jitan Nagra v Abednego Nyandusi Oigo* (2018) eKLR, where the injured party had suffered lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest and bruises on the left femur. The court awarded the said party the sum of Kshs. 1,000,000/= as general damages for pain and suffering which was reversed on appeal to Kshs. 450,000/=.
14. The Appellant urged this court to reduce the award of general damages from the sum of Kshs. 500,000/= to Kshs. 150,000/=.

The respondent's submissions

15. The Respondent clarified that the Appellant had been ordered by the lower court to pay costs on 19th September, 2017, which was to be paid by the next hearing date, scheduled for 6th November, 2017, because the Appellant had not been ready to proceed with the hearing.



16. The suit was eventually scheduled for hearing on 23rd January, 2018, at which point, the Appellant had still not complied with the said order, despite numerous pleas and reminders. As a result, the court directed the Appellant to comply by 10:20 a.m., which was the time the court intended to proceed with the hearing of the Suit. This was not done and the Appellant was accordingly denied audience for failure to comply.
17. Following the hearing of the Suit, the Appellant filed an application to set aside the above proceedings, which was heard and dismissed. The same has not been appealed.
18. The Respondent submitted that the lower court was within its right to proceed with the hearing based on the circumstances set out above. She submitted that Article 159 of the Constitution provides that justice shall not be delayed.
19. Further, she relied on several authorities to the effect that court orders must be obeyed, and the failure to do the same results in contempt, which must first be purged, before the court may entertain any application from that party. (See *Hadkinson v Hadkinson* [1952] 2 ALL ER 576 and *Patrick Lihanda and 4 others v Gedeon Kavisi and 3 others* [2020] eKLR) and cited the decision of the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, where the court held as follows:-

We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory, and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said: -

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

20. The Respondent accordingly, submitted that the court acted within its discretion to safeguard the integrity of the court to ensure compliance with its orders.
21. As regards the award for general damages, the Respondent submitted that the same was justified. She had incurred a 30% permanent disability; a fractured ulna; and a fracture affecting her wrist joint. The award of Kshs. 500,000/= was not inordinate. She further prayed that the award ought to be increased to the sum of Kshs. 1,300,000/= because she spent several days in the hospital. She relied on the decision of the High Court in *Hussein Sambur Hussein v Sharriff A. Abdulla Hussein and 2 Others* (Civil Appeal No.52 of 2020) (2022) eKLR, where the Court awarded general damages in the sum of Kshs. 700,000/= for an injury resulting in a permanent disability of 18%.

Analysis and Determination

22. I have read the record in its entirety and considered the grounds of appeal raised by the Appellant. I have also considered the rival submissions of the parties. The issues that arise for determination are essentially two:-
 - i. Was the lower court entitled to proceed with the hearing of the Suit on account of the Appellant’s failure to comply with its orders issued on 19th September, 2017?
 - ii. Was the lower court correct in its award of damages?



Was the lower court entitled to proceed with the hearing of the Suit on account of the Appellant's failure to comply with its orders issued on 19th September, 2017?

23. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:

“An appeal to this Court from a trial by the High Court is by way of 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 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 in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

24. Looking at the record before me, I see that the facts set out by the Respondent above, are the correct chronology of events. It is evident that the Appellant was in fact ordered to pay costs arising from his adjournment on 19th September, 2017. This issue was raised again on 6th November, 2017 on the date of the rescheduled hearing, where the proceedings show that the Respondent submitted:-

“the Defendant do not have audience, they have not paid Kshs. 14,000/= as ordered by the court”, to which counsel for the Defendant stated “I am not aware of the costs, I am just holding brief...”

25. The proceedings show that again on 23rd January, 2018, the Plaintiff raised the same issue, stating that the Defendant had not complied and had no audience. The Magistrate accordingly, stated that “the matter will proceed at 10:20 am, and the Defendants have no audience till the orders of the court are complied with.” This was never done.

26. Looking at the record, I see that this is a very old case. The Plaint was filed in the year 2007. The Suit was first listed for hearing on 23rd September, 2008, but did not proceed despite the Plaintiff being ready because the Defendant sought his first adjournment. Since then, for over 11 years, for one reason or another, there has been continuous adjournments.

27. Looking at the history of this case, I am of the view that this litigation must come to an end. Article 159 of *the Constitution* mandates this and all our courts to proceed with expedition. It states unequivocally, that justice shall not be delayed.

28. Having stated the above, I have considered the Appellant's submission and authorities in support of his argument that a party ought not to be denied an audience on account of non-payment of adjournment fees, and especially if he did not know the consequences of his non-compliance with the orders.

29. First, based on the record, I am not persuaded that the Appellant did not know the consequences of his non-compliance. The record shows clearly that at the previous hearing, the Advocate for the Respondent raised this issue. Accordingly, he knew that the issue of ‘no audience’ was a live issue in the event he failed to make payment.

30. Second, I think there may be some instances in which a court may be justified in denying a litigant audience. One such scenario is the failure of the litigant to abide by orders of that court. Having ordered



the Appellant to make payment over a year ago, the court, in my view, could not continue to wait indefinitely for the Appellant to comply. My reading of the situation is that the Appellant put the court in a difficult situation, the Magistrate was left with the option to either vacate his previous orders and proceed, or wait for the Appellant to comply at his convenience. This was not appropriate.

31. I note from the record that it is not clear whether or not the court issued the Appellant with a citation of contempt, but what is clear is that an order was made by the lower court, and over a year later, when the matter came up for hearing, and perhaps to date, the same has not been complied with.
32. In the circumstances as described above, I am satisfied that the Appellant was afforded a reasonable opportunity to put his case forward, but chose not to. Such an opportunity to present one's case, to my mind, must be balanced against the right of the Respondent to have the trial begin and conclude without unreasonable delay. This is consistent with a holistic reading of Article 50 of the Constitution and the principle that the Constitution ought to be interpreted in a manner that give effect to its objects, purposes, and values.
33. In balancing the above rights of the parties, I cannot disregard the fact the Appellant was in breach of court orders at the time of the hearing, and perhaps is still in breach at present. There is no evidence to show if he has since paid the outstanding costs of adjournment.

In the circumstances, I cannot help but think that the opportunity to be heard by the court must be afforded in compliance with the rules of civil procedure and orders of the court. Here, the Appellant had over year to comply, from the date of the previous hearing, and he was even given up 10:20 a.m. on the date of the hearing. Still, he failed to comply.

34. It is trite law that orders made by a properly constituted court of law must be obeyed. In the case of *Hadkinson – vs – Hadkinson* [1952] ALL ER, it was held:-

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

35. Further, our own courts have restated this principle in the case of *Econet Wireless Kenya Ltd – vs – Minister For Information Of Kenya & Another* [2005] eKLR, the Court relying on the decision of the Court of Appeal in *Gillab Chand Pupatlal Shah & another – vs -Civil Application No. 39 of 1990* stated that:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.”

36. More recently, in *Teachers Service Commisison – vs – Kenya Union Of Teachers & 2 Others* [2013]eKLR, the court expanded its reasoning in relation to the same principles in the following terms:-

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the court or even the personal ego of the Presiding Judge. Neither is it about placating the Applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice



door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed”.

...

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must, therefore, be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

37. Based on the law and the reasons as stated above, I am of the view that the Magistrate reached a reasonable conclusion on this issue. Accordingly, I decline to interfere with the lower court’s decision on same.

Was the lower court correct in its award of damages?

38. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR Civil Appeal No. 147 of 2020 [2004] eKLR, where the Court of Appeal held:-

“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.”

39. Further to the above, in the Court of Appeal decision of *Butt vs. Khan* (1977) 1 KAR the court stated that the test on whether or not to interfere with an award of damages, is as follows:-

“An Appellate court will not disturb an award for damages unless it is 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.”

40. With regard to the award of general damages, I have considered the range of relevant awards which tend to vary between Kshs. 300,000/= and Kshs. 500,000/=. The Appellant cited the authority of *Jitan Nagra v Abednego Nyandusi Oigo* (2018) eKLR, in which the court awarded the injured party the sum of Kshs. 450,000/= for what the Appellant submitted are similar injuries.

41. I have also considered the Respondent’s prayer that the award for general damages ought to be enhanced to the sum of Kshs. 1,300,000/= based on the decision of the High Court in *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR. Respectfully, I do not think the nature of injuries were similar in the said decision and the authority may be distinguished from the circumstances in present matter.

42. I have further considered the various decisions of the High Court in *George Raini Atungu v Jared Ogwoka Ondari* [2021] eKLR, where the court awarded the sum Kshs. 1,000,000/= for similar injuries, and its decision in *Kimathi Muturi Donald v Kevin Ochieng Aceso* [2021] eKLR, where the court awarded general damages in the sum of Kshs. 1,200,000/= (subject to 20% contribution) for a similar injury.



43. Having considered the variance across the relevant awards as cited above by counsel, which varied between Kshs. 300,000/= and Kshs. 500,000/=, I do not think that the award of Kshs. 500,000/= was inordinate in comparison to similar injuries. I am of the view that the assessment of general damages is not an exact science, and that a certain amount of discretion ought to be left to the trial court subject to the correct legal principles articulated above. I am satisfied that the lower court's award fell within a range of acceptable outcomes.
44. Based on the reasons set out above, I find that the appeal is without merit and the same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF MAY 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant.

.....For the Respondent.

