George Warukenya Mucuku v Mugo (Civil Appeal E368 of 2021)
[2023] KEHC 20021 (KLR) (Civ) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E368 OF 2021

CW MEOLI, J

JULY 6, 2023

BETWEEN

GEORGE WARUKENYA MUCUKU ..... APPELLANT

AND

SERAH WAMBUI MUGO ..... RESPONDENT

(Being an appeal from the judgment of P. Muholi (Mr.) (SRM) delivered on 22nd January 2020 in Nairobi Milimani CMCC No. 1746 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on 22.01.2020 in Nairobi Milimani CMCC No 1746 of 2019 (hereafter the lower court suit). The suit was brought by Serah Wambui Mugo, the plaintiff in the lower court (hereinafter the Respondent) and was commenced by way of a plaint filed on March 15, 2019 against George Warukenya Mucuku the defendant in the lower court (hereinafter the Appellant). The Respondent's claim was for damages on account injuries sustained as a result of a road traffic accident that occurred on August 08, 2018.

2. It was averred that at all material times the Appellant was the registered owner, beneficial owner, insured owner and or owner in possession of motor vehicle registration number KCJ 998A (hereafter suit motor vehicle) which at all material times was being driven by the Appellant, his authorized driver, servant and or agent. That the Respondent was lawfully walking along a road in Mwiki when the Appellant managed, controlled and or drove the suit motor vehicle so carelessly and or negligently at a very high speed that he lost control of the said motor vehicle which veered off the road and collided onto the Respondent, occasioning her serious bodily injuries, loss and damages.

3. The Appellant filed a statement of defence on April 25, 2019 denying the key averments in the plaint and liability. In the alternative he averred strictly without prejudice to the averments in the statement

of defence that if any accident occurred on August 08, 2018 it was caused by the negligence of the Respondent.

4. The suit proceeded to a hearing during which both parties adduced evidence. In its judgment, the trial court found the Appellant wholly liable and awarded the Respondent damages as hereunder: -

    General Damages – Kshs 400,000.00/-

    Special Damages – Kshs 14,550.00/-

    Total Kshs 414,550.00/-

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the judgment solely on quantum of damages based on the following grounds: -

    1. The learned magistrate erred in law and in fact in awarding excessive general damages for fracture-right 2nd metatarsal bone (foot) and swollen, bruised-right foot injuries in favour of the Respondent without any legal and or evidential justification.

    2. The learned magistrate erred in law and in fact by not considering the written facts, evidence, submissions made and case law filed by the Appellant.

    3. The learned magistrate erred by failing to consider and have due regard to the Appellant case and to the facts and evidence presented in support thereof." (sic)

6. The Appeal was canvassed by way of written submissions. As evidenced by the Appellant's memorandum of appeal, counsel's submissions were riveted on quantum of damages. While reiterating the principles applicable on a first appeal, counsel anchored his submissions on the decision in *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 as cited in *Issac Mworia M'nabea v David Gikunda* [2017] eKLR in urging the court to interfere with the trial court's award on damages.

7. Concerning the award on general damages, counsel restated the Appellant's submissions before the trial court, the Respondent's injuries and attendant sequela in urging the court to review the award of the trial court downwards to Kshs 100,000/-. That the trial court failed to take into account the relevant factors, the Appellant's proposals and precedent. The decision in *Richard Kieti Kathuu v Musee Mutemi* [2018] eKLR, was called to aid in that regard. Addressing the court on whether the learned magistrate failed to consider the pleadings and submissions of the Appellant, counsel contended that the learned magistrate erred in law and fact by not considering the facts, evidence, submissions and decisions relied on by the Appellant. The court was thus urged to allow the appeal as prayed with costs.

8. The Respondent naturally defended the trial court's decision. Counsel for the Respondent contemporaneously addressed the Appellant's grounds of appeal in his condensed submissions on the issue of general damages. He too echoed the principles that guide an appellate court on a first appeal. Counsel further asserted that the trial court's exercise of judicial discretion in awarding damages is not to be interfered with unless it is shown that the exercise was based on wrong principles.

9. Summarily submitting on the Appellant's grounds of appeal and restating the evidence before the trial court, counsel argued that it is inescapably evident that the injuries herein subjected the Respondent to much pain, suffering psychological torture and emotional distress whose effects should not be under estimated. Counsel further relied on the decisions including *Savanna Saw Mills Ltd v Geroge Mwale Mudomo* [2005] eKLR, *Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 Others* [2019] eKLR, *Hussein Abdi Hashi v Hassan Noor* [2004] eKLR, and *Razi Amin Kulaten v Claus Kringer & Amp*. [2004] eKLR to contend that the court ought not to interfere with the award. Which award cannot

be said to be an erroneous estimate or contrary to the evidence tendered regarding the severity of the injuries sustained by the Respondent. The court was urged to dismiss the appeal with costs.

10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in Selle (*supra*) in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> 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 conclusions 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 on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. The appeal before this court uniquely turns on the question of general damages. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that: -

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

12. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 that: -

> " 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".
>
> See also Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; [2004] eKLR.

13. The Respondent particularized her injuries and loss at paragraph 6 of the plaint as follows:

> " 6. By reasons of the matters aforestated, the Plaintiff herein sustained severe injuries and has suffered loss and damage and he claims both general and special damages against the Defendant.
>
> Particulars of Injuries
>
> a. Fracture-right 2nd metatarsal bone (foot).
>
> b. Swollen, bruised-right foot.
>
> Detailed particulars of injuries are set out in the medical report which the Plaintiff shall seek leave of court to refer to at the hearing hereof." (sic)

14. In its judgment, the trial court after restating and examining the respective parties' evidence stated as follows: -

> " 2. Whether the Plaintiff is entitled to damage and if yes how much
>
> .....
>
> The plaintiff relied on the medical report by Dr. G,K Mwaura who confirmed the injuries and noted that the progress was fair. The initial treatment note from St. Francis also confirmed the injuries. Dr. Waithaka Mwaura in his report dated 08/05/2019 confirmed the injuries.
>
> The plaintiff has urged the court to award Kshs. 500,000/= and relied on the case of John Mwangi Kiiru v Salome Njeri Mwangi [2019] eKLR where the court awarded Kshs. 450,000/= for fractures of the metatarsal and soft tissue injuries.
>
> The defendant has urged the court award Kshs. 100,000/= relied on the case of Tonoka Steel Mills v Sylvanus Esikuri Toka [2016] eKLR.
>
> I have considered the authorities, in as much as the injuries would appear similar in the cases, the injury in the defendant's case was sustained in 2005 and that informs why the Kshs. 100,000/= was awarded by the magistrate in 2007 as compared to the one by the plaintiff. It would be manifestly low to award that figure at this time.
>
> I have considered the injuries sustained, the opinion of Dr. G.K Mwaura, the authorities cited and the rate of inflation and I am of the view that an award of Kshs. 400,000/= for pain and suffering is adequate compensation.
>
> I also award special damages of Kshs. 14,550/= as pleaded and proved. The Plaintiff will also get costs of the suit and interest at court rates from date of judgment till payment in full." (sic)

15. During the trial, the Respondent testified as PW1. She produced as PExh.1 the medical report prepared by Dr. G.K Mwaura dated January 04, 2019, a medical summary dated August 08, 2018 from St. Francis Community Hospital as PExh.2, P3 dated August 16, 2018 as PExh.6 and Medical Report by Dr Waithaka Mwaura dated May 08, 2019 which appears not to have been marked by the trial court though apparently produced. The earliest report, PExh.2, was prepared on the date of the accident. It essentially listed the Respondent's injuries to comprise tenderness of the right foot, bruised on the anterior aspect of the foot and fracture at the base of the 2nd metatarsal bone. This injury was not seriously challenged at the trial, and it seems that at the behest of the Appellant, the Respondent was

subjected to a second medical examination to ascertain the degree of the injuries. Hence the medical report by Dr. Waithaka Mwaura dated May 08, 2019

16. PExh.1 was prepared some 5 months after the accident. The report set out in detail the Respondent's injuries and attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

> " Serah Wambui was involved in a road traffic accident on August 08, 2018 she sustained injuries and received treatment at Francis Community Hospital
>
> Healing is fair but:
>
> I. She experiences pain right foot on extension (walking)
>
> II. She sustained grievous harm injuries
>
> III. Prognosis fair" (sic)

17. The medical report by Dr. Waithaka Mwaura dated May 08, 2019 was prepared about 9 months after the accident and the most recent on the Respondent's injuries. The report set out in detail the Respondent's injuries and attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

> " Ms. Mugo sustained both skeletal and soft tissue injuries for which she received appropriate management. She had the plaster cast for six (6) weeks during which period she was not gainfully engaged. The occasional pain/swelling will ameliorate in due court and no residual permanent disability is expected." (sic)

18. Undoubtedly, the injuries suffered by the Respondent herein were relatively severe and must have caused her a great deal of pain and an extended period of morbidity. Equally, from PExh.1 and the medical report by Dr. Waithaka Mwaura dated May 08, 2019, the injuries predisposed her to residual attendant sequela. Nonetheless, as observed by the English Court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345:

> " But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. 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 still must be that amounts which are awarded are to a reasonable extent conventional."

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR and *Kigaraari v Aya* (1982-88) 1 KAR 768.

19. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. Contrary to the assertions by the Appellant's counsel, the trial court restated in detail the evidence and submissions before it in respect of the Respondent's injuries, primarily PExh.1, PExh.2 and the Medical Report by Dr. Waithaka Mwaura dated May 08, 2019. And further considered the authorities and proposals by the respective parties before it.

20. As observed by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001 [2004] eKLR the award of general damages is discretionary 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 in the first instance".

21. The Respondent's injuries in this case, though of relatively severity, did not result in any form of permanent incapacitation. The case of John Mwangi Kiiru v Salome Njeri Mwangi [2019] eKLR cited by the Respondent in the lower court, appeared to somewhat compare with injuries sustained by the Respondent but were slightly more severe as they involved two (2) fractures of the metatarsal bone and other soft tissue injuries. The claimant therein was awarded Ksh.450,000/- in general damages.

22. The Appellant on his part relied on *Tononoka Steel Limited v Sylvanus Esikuri Toka* [2016] eKLR which compares somewhat with this case as the relatively minor injuries sustained by the plaintiff therein were a fracture of the 3rd metatarsal. The claimant therein was awarded Ksh.100,000/- in general damages thus setting base for the Appellant's proposal of Kshs. 100,000/-, which sum would be too low for the slightly more severe injuries of the Respondent in this case. Both parties are guilty of citing on this appeal, authorities not placed before the trial court. This practice is to be frowned upon and this court echoes the sentiments of Ochieng J (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR in that regard.

23. It appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal, that the award for general damages while appearing slightly high is not so excessive as to be an erroneous estimate in the circumstances of this case and the court does not feel justified to interfere especially in view of inflationary trends. The trial court cannot be faulted in awarding the sums it did upon a fairly comprehensive analysis of material before it. This court therefore finds no merit in the appeal which is hereby dismissed with costs to the Respondent

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Kibore h/b for Mr. Botany

For the Respondent: Mr. Kiptanui

C/A: Carol