Kimani v Tunje (Civil Appeal 51 of 2019) [2023] KEHC 19752 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 51 OF 2019

DKN MAGARE, J

JULY 3, 2023

BETWEEN

STEPHEN KIMANI ..... APPELLANT

AND

ALBERT TUNJE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Honourable Muchoki given on 23/8/2018 in Mombasa SRMCC 1969 of 2017. The appellant was the plaintiff in the Lower court. The Appeal is on quantum only. However, the Appellant raised humongous and prolixious grounds of appeal. Only one ground was necessary, that is the award of damages was too low as to amount to an erroneous estimate of damages.

2. The appellant pleaded the injuries suffered as "comminuted fractures of the right tibia and right fibula leg bones. The P3 showed comminuted fracture of tibia fibula with a distal fracture of fibula right, chip fracture of medical malleolus. This was also on the Diagnosis and treatment notes.

3. Dr. Ajoni Adede indicated that the injuries were comminuted fractures of the right tibia and fibula leg bones, blunt object injury to the right foot. In his prognosis he stated that here was 8% permanent partial disability due to comminuted fractures of the right tibia even if the bones unite and can re fracture.

4. There is expected to be residual stiffness of the right ankle joint.

5. The Court awarded Kshs. 350,000/= for these injuries.

Analysis

The duty of the Court

6. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

7. The court is to bear in mind that if need her seen the witnesses.it is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

8. In the case of *Peters v Sunday Post Limited* [1985] EA 424 where in the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

9. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

10. Regarding the issue of quantum of damages, the Court, pronounced itself succinctly the case of *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.'

11. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British

Columbia Electric Co Ltd, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

12. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

13. It is not enough that I could have assessed damages differently. The most important aspect is that damages must be in line with other damages awarded for similar injuries. In the Koome J as them she was stated as doth: -

> " This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent decision while bearing in mind that it never saw the witnesses testify and make due allowance for that. The principles to be followed by the first appellate court have been settled in several decisions and one such leading authority is the case of Peter v Sunday [1958] E.A. page 429:
>
> "... it is not enough that the appellate court might itself have come to a different conclusion."

14. The court relied on dated authorities. The appellant relied on the submission relied on authority for 2008 and 2002. This cannot help to settle the amount of damages payable for comminuted fractures.

Damages

15. In the case of *Southern Engineering Company Ltd v Musingi Mutia*[1985] KLR 730, the principles which ought to guide a court in awarding damages were set out by the Court of Appeal in where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question."

16. In in the case of *Kimathi Muturi Donald v Kevin Ochieng Aseso* [2021] eKLR, the court awarded Ksh 1,200, 000/= for fracture of the upper right tibia which was operated and fixed with a metal implant, and fracture of the floor of the socket of the hip (acetabulum). These fractures limited the Respondent to the use of crutches for movement and couldn't sit down for long.

17. In *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR the Court awarded Ksh. 1,00,000/=. In awarding the Court relied on the case of James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR, where the court stated: -

> " The Plaintiff therein suffered a compound comminuted fracture of the aright tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 com, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. In that case that was decided in 2015, Ougo J. assessed damages at Kshs 1,500,000/= for pain and suffering and loss of amenities.

..... and Geoffrey Mwaniki"

18. In the case of George William another (the court awarded Kshs. 2,000,000/=.

19. In *Alphonce Muli Nzuki v Brian Charles Ochuodho* [2014] eKLR and *Fred Ogada Azere & Another v Ezekiel Kiariue Nganga* [2019] eKLR the court awarded 800,000/= for was awarded for bruise on the forehead, wound on the right thumb and left wrist joint, wound on the second right finger, comminuted fracture of right tibia and fibula, degloving injury medial aspect of right leg and foot wounds below the right knee. These injuries are commensurate with the injuries suffered herein. Due to inflation and the specific circumstances of the plaintiff who also suffered clip fracture of the media malleolus, I find an award of 850,000/= to be proper. The court's award of 350,000/= was erroneous and was due to reliance of dated authorities.

20. Consequently, I find that a sum of Kshs. 850,000/= is commensurate with the injuries suffered. I therefore set aside the award of Ksh. 350,000/= and in lieu thereof award a sum of Kshs. 850,000/=. The award of Kshs. 350,000/= is so low as to amount to an erroneousness/estimate of damages. The Appellant will have costs.

Determination

21. The upshot of the foregoing is that: -

    (a) I find and hold that the appeal herein is meritorious and I therefore allow the same.

    (b) I set aside and award of Kshs. 350,000/= as general damages and in lieu thereof. I award a sum of Kshs. 850,000/=.

    (c) The appellant was partly to blame for using dated authorities.

    (d) I therefore award the appellant costs of 55,000/=

    (e) The general damages to attract interest from the date of judgment in the lower court.

    (f) All the other terms of the impugned judgment do remain.

    (g) The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF JULY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Otuya for Azei for the Appellant

**No appearance for Respondent