



Otwori v Freight World Logistics Limited & another (Civil Appeal E08 of 2021) [2023] KEHC 20429 (KLR) (4 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E08 OF 2021**

FR OLEL, J

JULY 4, 2023

BETWEEN

CYRUS MOKAYA OTWORI APPELLANT

AND

FREIGHT WORLD LOGISTICS LIMITED 1ST RESPONDENT

KAHINDI KAZUNGU NYALE 2ND RESPONDENT

(Being An Appeal From The Judgment And Decree Of Hon. Martin Mutia (r.m.) Delivered On 9Th February 2021 In Naivasha Civil Case No 479 Of 2017)

JUDGMENT

1. This appeal is brought against the judgment and decree of Honourable Martin Mutua (RM) delivered on 9th February 2021, where he awarded the Appellant as sum of Kshs 87,795/= plus costs and interest. The appellant was the Plaintiff in the primary suit and had averred that he was lawfully driving motor vehicle registration number KAJ 364 N(hereinafter referred to as the 1st suit motor vehicle) along Nairobi –Mai Mahiu road at Msikitu area, when the 2nd Defendant negligently drove, managed and or controlled motor vehicle registration number KBJ 351 M/ZE 0054 (hereinafter referred to as the 2nd suit motor vehicle), and caused it to violently collided into the 1st suit motor vehicle, thereby causing the appellant to suffer serious injuries. The respondent prayed for General damages, Special damages, costs and interest.
2. The Defendant filed a statement of defense dated 19.09.2017 denying all the contents of the Plaint and stated in the alternative that if indeed an accident did occur, it was caused or substantially contributed to by the driver of Motor vehicle KAT 529L and at the opportune time, they would institute third party proceedings as against the proposed third party. Further the defendant stated that, the said accident was caused by circumstance beyond it control and vicariously liability was thus denied.



3. During trial liability was agreed at 10:90 in favour of the appellant and the same was adopted as a judgment of the court. After hearing the suit, the learned magistrate in his judgment delivered on 9th February 2021 awarded the appellant as follows ;
 - i. General damages Kshs 90,000
 - ii. Special Damages Kshs 7,550
 - iii. Less 10% contribution (Kshs 9,775)
 - iv. Costs
 - v. Interest thereon.
4. Dissatisfied by this decision, the Appellant filed this Appeal seeking to have the judgment on quantum set aside and or reviewed and the same be enhanced plus costs of the Appeal.
5. The Appeal was founded on the grounds that;
 - i. The learned Trial Magistrate erred and misdirected himself in law and in fact in his assessment of damages awardable to the Appellant by awarding damages that were inordinately low in the circumstances
 - ii. The learned Trial Magistrate failed to appreciate and/ or misapplied the principle applicable in the assessment of damages under the circumstances
 - iii. The learned Trial Magistrate erred in law and in fact in awarding the Appellant an inordinately low award in respect of general damages.
 - iv. The learned Trial Magistrate erred and misdirected himself in law and in fact by not properly analyzing the appellant’s testimony and his witnesses in court, medical documents produced and his submissions on the severity of her injuries.

Facts of the Case

6. The appellant testified that on 16.05.2017, he was driving the 1st suit motor vehicle and they were hit from behind by the 2nd suit motor vehicle, which caused the 1st suit motor vehicle to roll of the road. He was injured and was taken to St Mary’s hospital for first Aid and later treated at Kaptatet District Hospital and Nakuru county Hospital. The appellant produced all the documents in his list of documents as Exhibits, except the police abstract and medical report, which were later admitted into evidence after consent on liability was adopted. Further he stated that he was the driver of the 1st suit motor vehicle and his vehicle was stationary when it was hit from behind. He blamed the driver of the 2nd suit motor vehicle as he failed to keep distance. He had fully healed from the injuries sustained. In cross examination the appellant stated that the 1st suit motor vehicle rolled on the left upon impact. The Respondent in this appeal did not call any witness in the primary suit.
7. The Appeal was disposed of by way of written submissions. At the time of writing this judgment, only the Appellant’s submissions were on record.

Submissions

8. The Appellant filed submissions on 13.01.2023 and expressed himself on the issue of quantum. Counsel relied on the case of *Kemfro Africa Limited t/a Meru Express Services & Another v AM Lubia and Another* No 2 (1982-88) L KAR 727, *Butt v Khan* [1981] KLR 349, *Francis Ochieng & Another*



v Alice Kajimba [2015] eKLR, It was contended that based on the medical documents that were produced, including Dr. Omuyoma’s medical report, the Appellant sustained blunt injury to the left knee joint, blunt injury to the chest, blunt injury on the right shoulder and soft tissue injury on the left leg leading to soft tissue injuries.

9. Further, that the injuries sustained in the case law of Ndungu Dennis v Ann Wangari Ndirangu [2018] eKLR that was relied upon by the Trial Court in making its judgment are not comparable to the ones sustained by the Appellant herein. The award of Kshs 90,000 did not take into account factors such as inflation, and severity of injuries of the Appellant.
10. The court was urged to enhance the award and increase the award to between Kshs 300,000 and Kshs 500,000. This point was buttressed by the case of Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR, Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR and Lucy Ntibuka v Benard Mutwiri & others [2005] eKLR.

Analysis and Determination

11. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
12. As held in Selle & another v Associated Motor Boat Co Ltd & others (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 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. (Abduk Hammed saif V Ali Mohammed Sholan (1955), 22 EACA 270

1. Guided by the above case, the duty of this appellate court is cut out. The only issue raised in this Appeal is that of quantum and the question is whether this court should interfere with it by enhancing the same.
2. The Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No 284 of 2001[2004] eKLR 55 set out circumstances under which an appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage’s awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended



the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

10. Similarly, in *Jane Chelagat Bor v Andrew Otieno Oduor* [1988] – 92] eKLR 288 [1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

11. From the Complaint, the Appellant pleaded that he sustained the following injuries; blunt injury to the knee joint, blunt injury to the chest, blunt injury to the right shoulder and soft tissue injury on the left leg. These injuries were corroborated by the medical Report dated 13.7.2017 by Dr. Obed Omuyoma and in whose opinion the degree of injury was harm. These injuries are also consistent with the injuries captured in the P3 form filled at Naivasha District Hospital.

12. At the trial court, the Appellant relied on the case of *Francis Ochieng & Another v Alice Kajimba* [2015] eKLR which I looked at and in that case, the Respondent sustained the following injuries; a cerebral contusion with loss of consciousness for 2 hours, massive haematoma on the right parietal head, sub conjunctival haematoma of the right eye, peri-orbital haematoma, loss of 5 anterior lower and 2 upper teeth, peri-orbital ecchymosis, nuchal stiffness, cut wound on the right hand and the right knee. These injuries are more serious than those sustained by the Appellant in this case and therefore cannot be relied upon to gauge the quantum.

13. In the case of *Ndungu Dennis v Ann Wangari Ndirangu* [2018] eKLR that was relied upon by the Trial Court in making its determination, the Respondent sustained the following injuries;

“minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg. The court concluded that the injuries are “soft tissue injuries.”

14. 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 is either inordinately high or low. This was stated in the case of *Butt v Khan* (1977) KAR 1. Thus, I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:

1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or
2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

15. The Appellant contends that the award of Kshs 90,000 did not take into account factors such as inflation, severity of injuries of the Appellant and the age of the legal citations. The decision’s relied on by the Appellant namely; *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* {2005} eKLR & *Patrick Kinoti Miguna v Peter Mburunga Muthamia* (2014) eKLR, are not good law and are manifestly excessive given the nature of injuries suffered. The decision’s in *PF (Suing as next friend and*



father of SK (Minor) v Victor O Kamadi & another (2018) eKLR & *Ndungu Dennis v Ann Wangari Ndirangu & another* {2018} eKLR are more reflective of the correct quantum awarded for similar injuries.

16. The accident herein occurred in 2017 and judgment delivered in 2021. The award is generally reflective of similar award for similar injuries. I find that no reason to disturb the award of the Trial Court. The court did take into account all the relevant factors in making its determination and it has not been shown otherwise.

Disposition

17. This appeal thus has no merit, the same is thus dismissed with no orders as to costs.

18. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 4TH DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 4th day of July, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

