Kibe v Ngugi (Civil Appeal E035 of 2021)
[2023] KEHC 22405 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E035 OF 2021

FR OLEL, J

SEPTEMBER 22, 2023

BETWEEN

JOSEPH NJUGUNA KIBE ..... APPELLANT

AND

PETER NJOROGE NGUGI ..... RESPONDENT

((Being an Appeal From The Judgment And Decree Of Hon D.N.Sure (SRM) Delivered on 30Th June 2021 in Engineer CMCC No. 112 Of 2019))

JUDGMENT

1. The Appellant was the Defendant in the primary suit, where he had been sued by the respondent as the registered owner and driver of Motor vehicle KBF 947D (hereinafter referred to as the 1st suit motor vehicle). It was alleged that on July 27, 2019, the respondent was lawfully travelling as a fare paying passenger in motor vehicle KCG 147A (hereinafter referred to as the 2nd suit motor vehicle) along Njambini-Flyover Road at Karate Area, when the appellant, his driver, servant and /or agent negligently drove, managed and/or controlled the 1st suit motor vehicle causing it to veer off its left lane and encroach onto the right lane of the 2nd suit motor vehicle thus causing the said motor vehicles to collide on head on collision and due to the impact the Respondent sustained severe injuries.

2. The appellant herein did file his statement of defence dated January 28, 2019 where he denied the occurrence of the accident and stated in the alternative that if at all the accident occurred, (which was denied) then it was caused solely and/ or largely contributed to by the negligence of the Respondent which was particularized in the said statement of defence as filed.

3. After hearing the suit, the learned magistrate in her judgment delivered on June 30, 2021 apportioned Liability at 100% as against the Appellant and proceeded to award the Respondent Ksh 762,755/= as damages plus cost's and interest.

4. The Appellant, being dissatisfied by the judgement did file his memorandum of Appeal on July 9, 2021 and raised several grounds of appeal namely:-

    a. That the learned trial Magistrate erred in law and in fact in awarding Kshs 750,000 under the general damages for pain and suffering which was in ordinately high in the circumstances.

    b. That the learned trial magistrate erred in law and in fact in awarding damages and costs without basis or proof of the same.

    c. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the Apellant's submissions on quantum on applicable principles for assessment of damages.

5. The Appellant herein is thus mainly aggrieved with the issue of quantum of damages as awarded.

Facts of the Case

6. The Respondent did testify that he was lawfully travelling as a fare paying passenger in Motor vehicle 2nd suit motor vehicle, which was being driven along Njabini- Flyover Road at Karate Area when the appellant, his driver, servant and or agent so negligently drove, managed and or controlled the 1st suit motor vehicle causing the said motor vehicle to veer off its left lane and encroach onto the right lane of the 2nd suit motor vehicle thus causing the said motor vehicles' to collide head-on resulting in him sustaining severe injuries due to the impact.

7. The Respondent was then rushed to Engineer District Hospital where first Aid was administered and was later transferred to AIC Kijabe Hospital where he was admitted from August 2, 2019 to August 9, 2019. He reported the accident to Magumu Police Station where he was issued with an abstract and P3 form. The Respondent produced various documents to support his claim. On cross examination, the Respondent stated that the 1st suit motor vehicle left its lane and veered onto the path of the 2nd suit motor vehicle thus causing a collision to take place. He stated that he sustained a fracture on the leg and injuries to the neck.

8. Pw2 was PC John Kanini who testified that he was based at Magumu Police Station and produced the police abstract indicating an accident between the 1st suit motor vehicle and the 2nd suit motor vehicle had occurred and the Respondent got injured in the said accident. He testified that the 1st suit motor vehicle was to blame for the accident because it hit a pot hole causing the collision. On cross examination, PW2 stated that he was not the investigating officer and did not have the police file but it was recorded in the occurrence book that the 1st suit motor vehicle hit a pothole and veered off its lane. He stated that he did not know if the driver of the 1st suit motor vehicle was charged but he was to be blamed for the accident.

9. The appellant did not call any witness to testify on his behalf but by consent of counsel's, he was allowed to produce the 2nd medical report as an exhibit. The trial magistrate proceeded to consider the evidence tendered by the appellant and the respondent and rendered her judgment allowing the suit. The appellant was found to be 100% liable for the accident and the court awarded the Respondent damages of Kshs 762,755/= plus costs and interest.

Appellants Submissions

10. The appellant filed his submissions on March 8, 2023 and framed the issue for determination as to whether the general damages awarded to the Respondent for pain and suffering were inordinately high.

11. The appellant submitted that according to the plaint, as a result of the accident, the respondent sustained the following injuries: Fracture medical malleolar of the right ankle joint, dislocation of the right ankle joint, soft tissue injury of the face, blunt injury to the neck leading to soft tissue injuries and soft tissues injuries of the left hand. The appellant further submitted that the injuries had also been evidenced in the P3 form and the medical report by Dr.Obed Omuyoma. The injuries noted in the said documents, were similar to those stated in the plaint.

12. The appellant did submit that an award of Kshs 750,000/= was high considering the injuries sustained by the respondent and that a sum of Kshs 500,000 would have been sufficient and adequate compensation. Reliance was placed in the case of *Power Lighting Company Limited &Another v Zakayo Saitoti Naingola & Another* [2008] eKLR, *SAO (minor suing through a next friend) MOO v Registered trustees, Anglican Church Of Maseno North Parish* [2017] eKLR, *Edward Shoboi Gambo v Fatma Osman Ahmed &Another* [2020] eKLR and *Savanna International Ltd Muka* (Civil Appeal 31 0f 2018) [2022]KLR

13. The court was urged to set aside the judgement of the trial court and reassess the quantum. The appellant prayed that the appeal be allowed and cost to be awarded to the appellant.

Respondent Written submission

14. The Respondent did file his written submission on March 27, 2023 in opposing the appeal. It was submitted that the award of the trial court was proper and consistent with the injuries sustained by the respondent.

15. It was submitted that the medical report by Dr. Obed Omuyoma produced during trial stated that the respondent sustained grievous harm injuries and assessed the permanent degree of incapacity at 20% thus the sum award of Kshs 750,000/= was not manifestly excessive as to warrant interference by the court. Reliance was placed on the following authorities: *Metal Crowns Limited v Eliud Musembi Nthalika* [2019]eKLR, *Titus Nganga & Ano v Samuel Muchiri Mbugua*[2018]eKLR.

16. It was finally submitted that the award of Kshs 750,000/= general damages was within the range of comparable awards and there was no need of the court to interfere with the same. Reliance was placed on the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M Lubia and Olive Lubia* 91985) 1 KAR 727. The court was urged to dismiss this appeal with cost to the Respondent.

Analysis and Determination

17. 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. As held in *Selle & Another v Associated Motor Boat Co ltd & others* [1968] EA 123 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 principals 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 E.A.C.A 270,

18. In *Coghlan v Cumberland* [1898] 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

19. Also in the court of appeal case of *Ephantus Mwangi and Another v Duncan Mwangi* Civil Appeal No 77 of 1982 [1982-1988]1KAR 278 the appellate court did state that;

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. The only issue for determination in this appeal is whether the quantum awarded was inordinately high to warrant interference of the same by this court.

21. As regards quantum, in *Woodruff v Dupont* [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not

entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

22. The Court of Appeal in *Southern Engineering Company Ltd. v Musingi Mutia* [1985] KLR 730 also restated thee principles which should guide the court in awarding damages, 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 prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured.

23. In *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

24. 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."

25. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted.

26. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award. It need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between

the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion.

27. The appellant suffered various injuries which include, fracture medial malleolar of the right Ankle joint, dislocation of the right ankle, soft tissue injuries to the face, blunt and soft tissue injuries to the Neck and soft tissue injuries to the left hand. Both medical reports produced did confirm the nature of injuries suffered.

28. Though the appellant did submit that the award was excessive in the circumstances, they have not shown by evidence which irrelevant factor was considered by the trial court and/or in what way was the quantum awarded inordinately high. The Appellant relied on *SAO (minor suing through a next friend) MOO v Registered trustees, Anglican Church Of Maseno North Parish* [2017] eKLR, *Edward Shoboi Gambo v Fatma Osman Ahmed &Another* [2020] eKLR. The awards in these citations were Kshs 600,000/= to Kshs 650,000/= for similar injuries being fracture of the ankle and soft tissue injuries.

29. The Respondent also similarly relied on M*etal Crowns Limited v Eliud Musembi Nthalika*[2019]eKLR, *Titus Nganga & Ano v Samuel Muchiri Mbugua*[2018]eKLR. Where an award of Ksh 600,000/= to Ksh 800,000/= was awarded for similar injuries. There is therefore no basis upon which this court can interfere with damages as awarded as it was proportional and reflected the trend of previous, recent, and comparable awards.

Disposition

30. Having exhaustively analyzed all the issues raised in this appeal I find that the same is wholly unmerited and dismiss the same with costs to the Respondent.

31. The costs of this appeal are assessed at Ksh 180,000/= all inclusive.

32. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 22ND DAY OF SEPTEMBER, 2023.

In the presence of;

.....for Plaintiff

.....for Defendant

.....Court Assistant