Luke & 3 others v Musyoka (Civil Appeal E032 of 2022)
[2023] KEHC 23883 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23883 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E032 OF 2022

PM MULWA, J

OCTOBER 19, 2023

BETWEEN

JOHN NJERU LUKE ..... 1ST APPELLANT

MONICA KINYUA ..... 2ND APPELLANT

JOSEPH NDIRANGU WAMBUI ..... 3RD APPELLANT

SAMUEL MUGO ..... 4TH APPELLANT

AND

BEATRICE MWIKALI MUSYOKA ..... RESPONDENT

JUDGMENT

1. The appellants herein, were the defendants in Thika CMCC No. 1147 of 2016. This was a claim That arose from a road traffic accident on September 25, 2016. The accident involved motor vehicles registration numbers KBJ 511D and KBB 977P registered in the name of the 2nd and 4th appellants. At the time of the complained accident, the 1st and 3rd appellants were in control of the said motor vehicles which were negligently driven and as a result an accident occurred. The respondent, who was a passenger motor vehicle KBJ 511D sustained injuries. She was awarded Kshs. 40,380/= special damages and Kshs. 3,200,000/= general damages and Kshs. 90,000 for future expenses.

2. The appellants were dissatisfied with the finding on quantum and liability and filed this appeal. The grounds of the appeal are That;

    i. That the learned trial magistrate erred in fact and law and misdirected herself in finding That the Respondent is entitled to general damages of Kshs. 3,200,000/= which amount is excessive for a pelvic fracture.

ii. That the learned trial magistrate erred in fact and law and misdirected herself in finding That the Respondent is entitled to special damages of Kshs. 40,380/= which amount was pleaded but not proved.

iii. That the learned trial magistrate erred in fact and law and misdirected herself in finding That the Respondent is entitled to an award of future medical expenses of Kshs. 90,000/= which amount was neither pleaded but not proved.

iv. That the learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and liability and relevant authorities on quantum and liability cited in the written submissions presented and filed by the appellants.

v. That the learned trial magistrate proceeded on wrong principles when assessing the damages and liability to be awarded to the respondent (to apply precedents and tenets of law applicable)

vi. That the learned trial magistrate failed to apply himself judicially and adequately evaluate the evidence and exhibits tendered on quantum and liability thereby arriving at a decision unsustainable in law.

vii. That the learned magistrate erred in law and fact in arriving at the said decision.

viii. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

ix. That the learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

x. It is proposed to seek the court for the following Orders;

a. That this Appeal be allowed.

b. That the Judgment of the Honourable Chief Magistrate Hon. Ekhubi B.M. on February 18, 2021in Thika CMCC NO.1147 of 2016 on quantum and liability be set aside the same be assessed afresh.

c. That the costs of this Appeal and That of the trial court be awarded to the Appellants.

d. That such further orders may be made by this honourable court may deem fit to grant.

3. The respondent opposed the appeal and contended That it lacked merits.

4. The appeal proceeded by way of written submissions and both parties duly filed their submissions.

5. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind That I did not hear and see the witnesses who testified (see *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).

6. I shall first deal with the issue of liability. This being a first appellate court, I must consider the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind That I did not hear or see the witnesses. The respondent's evidence, was That the appellant's motor vehicle was being driven negligently and That the drivers did not take any measures to avoid the accident. The appellants did not adduce any evidence to rebut or controvert the respondent's evidence.

7. In my assessment at the conclusion of production of evidence, there was sufficient evidence That the respondent herein had been injured on the September 24, 2016. That evidence to this court was

sufficient for purposes of the burden upon the respondent. I thus find no reason to interfere with the findings of fact by the trial court.

8. In the case of *Peters v Sunday Post Ltd* (1958) EA 424, the Court of Appeal held That: –

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon That evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough That the appellate court might itself have come to a different conclusion."

9. Therefore, it is my finding That the evidence which clearly proves negligence against the appellants or the drivers of the appellants' motor vehicles stands and in the absence of evidence to attribute contributory negligence to the respondent I must agree with the trial magistrate's finding That the appellants were wholly to blame.

10. Turning now to the issue of quantum. It remains the law That the duty and task to assess damages is not only discretionary, it is one issue on which valid reasons must be proffered to justify interference by the appellate court, but is equally a difficult task That once undertaken by the trial court ought not to be interfered with readily.

11. An appellate court can only interfere with the sum awarded where the appellant demonstrates That the award is too high or so low to amount to an outright error in assessment of damages, or That in coming to That assessment the court took into account an irrelevant matter or That it failed to take into account a relevant matter.

12. In the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M Lubia & Olive Lubia* [1982-88] KLR 727 the Court of Appeal held:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be That it must be satisfied That wither That 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 damage."

13. In this appeal, the limbs of the award challenged is the sum of Kshs. 3,200,000 being damages for pain and suffering, Kshs. 40,380 for special damages and Kshs. 90,000 for future expenses aggregating to Kshs. 3,330,380. I have perused the record of the trial court and noticed That in assessing the damages, the trial magistrate considered not just the nature and extent of the injuries suffered by the respondent but also past awards for similar injuries.

14. I have also considered the appellant's submissions on the quantum of damages, the authorities cited by counsel in their submissions for this appeal. It must be noted That injuries will never be fully comparable to other person's injuries. What a court is to consider is That as far as possible the same are "comparable" to the other person's injuries, and the after effects.

15. I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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"

16. In the case of *Savanna Saw Mills Ltd v George Mwale Mudomo* (2005) eKLR the court stated as follows: -

> " It is the law That the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

17. From my re-evaluation of the evidence, I find That the learned trial magistrate made reference to the relevant evidence on record. I am satisfied That the award of the lower court is commensurate with the injuries. There is therefore no justification for me to interfere with same.

18. In the premises I find no merit in this appeal and the same is dismissed with costs to the respondent.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 19TH DAY OF OCTOBER 2023

P. MULWA

JUDGE

In the presence of:

Duale – court assistant

Ms. Ongwenyi h/b for Mr. Njuguna - for the appellant

Ms. Mwangi