Makungu & another v Mimshak Bay Services Ltd & another (Civil Appeal 120 of 2019) [2024] KEHC 15308 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 120 OF 2019

HM NYAGA, J

DECEMBER 2, 2024

BETWEEN

UNDUSU MAKUNGU ..... 1ST APPELLANT

FRANCIS NGUMBI ..... 2ND APPELLANT

AND

MIMSHAK BAY SERVICES LTD ..... 1ST RESPONDENT

SELLA OYIKA AGUSWA ..... 2ND RESPONDENT

JUDGMENT

1. The 2nd Respondent instituted suit in the Chief Magistrate's Court at Nakuru seeking General and Special Damages for injuries that she sustained in a road traffic accident that occurred on 11th March, 2011 along Eldoret-Nakuru highway.

2. It was the 2nd Respondent's averment that she was a lawful passenger aboard motor vehicle registration number KBN 134f UD Bus. When the 2nd Appellant, who was the driver to the said vehicle do, so negligently drove it that permitted it to cause an accident. The particulars of negligence of the 2nd Appellant were set out in the Plaint.

3. At the conclusion of the trial, the learned Magistrate in a judgment delivered on 28th June, 2019 entered judgment for the 2nd Respondent against the Appellant for Kshs. 2,000,000/- as General Damages, Special Damages and Costs.

4. Aggrieved by the said judgment, the Appellants filed a Memorandum of Appeal dated 11th July, 2019. The Memorandum of Appeal set out two grounds of appeal namely:-

a. That the learned Magistrate erred in law and in fact in according a high award of quantum of damages without considering the evidence and submissions on General Damages on behalf of the Appellant while considering his judgment.

b. That the learned Magistrate erred in law and in fact in disregarding the evidence adduced by the Appellants thereby achieving out a wrong decision as to the quantum payable to the Plaintiff (2nd Respondent).

5. Directions were given that the Appeal be canvassed by way of written submissions. At the time of writing this judgment, only the 2nd Respondent had filed hers.

6. This appeal is an quantum of damages only.

7. As was stated in Kemfro Africa Ltd T/A Meru Express Service, & Another Vs A. M. Lubia and Another (1982-88) 1KAR 727, cited by the 2nd Respondent this court will only interfere with an award made by the lower court on certain grounds. The same were stated to be as follows;

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. In Gitobu Imanyara & 2 Others Vs Attorney General [2016] eKLR, the Court of Appeal held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A 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."

9. It is thus the duty of the court to independently look at the evidence and come to its own conclusion, but bear in mind the principles set at above.

10. From the plaint filed in court, the 2nd Respondent sustained the following injuries;

a. Posterior dislocation of the left hip joint.

b. Fracture of the left acetabulum.

c. Deep cut wound on the left knee.

11. According to the medical documents tendered in evidence, the 2nd Respondent was admitted at the Provincial General Hospital at Nakuru from 11th March, 2011 to 14th March, 2011. She was then transferred to Kenyatta National Hospital where she was admitted until sometime in June 2011. She

was re-admitted for another month between August 2011 and September 2011 and continued with treatment thereafter.

12. The 2nd Respondent was seen by Dr. W. Kiamba who assessed the degree of permanent disability at 30%. The Appellant's doctor assessed the permanent disability at 15% on the affected hip. All the doctors confirmed that the 2nd Respondent had undergone extensive medical procedures which included a total hip replacement.

13. It is clear that the 2nd Respondent sustained severe injuries.

14. The 2nd Respondent in support of her submissions cited the following cases:-

    a. Gatanga Vs Kalunga Civil Appeal No. E034 of 2021 (2022) KEHC 3010 (KLR) where THE High Court enhanced the damages for injuries that were similar to the ones sustained by the 2nd Respondent.

    b. Cold Cat Hire & Tows Ltd Vs Emmanueal Parsmei Mkoitika (2017) eKLR where the Plaintiff sustained a fracture of the right acetabulum and dislocation of the hip joint that required total hip replacement.

15. The principles in assessment of damages were set out in Millicent Atieno Ochunga Vs Katela Richard (2015) eKLR where the court stated that so far as possible comparable injuries should be compensated by comparable awards. The same principles were reiterated in Jabane Vs Clenja (1986)KLR 1, cited by the 2nd Respondent.

16. I have considered the injuries sustained by the 2nd Respondent and the awards made in similar cases. I am of the view that the award by the learned Magistrate cannot be termed as excessive or inordinately high. The 2nd Respondent underwent a torturous journey after sustaining the injuries in the accident. The award by the trial magistrate was, in my view reasonable.

17. In conclusion, I find that this appeal lacks merit and it is dismissed with costs to the 2nd Respondent.

H.M. NYAGA

JUDGE

SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 2ND DAY OF DECEMBER 2024.

H. M. NYAGA

JUDGE

In the presence of :-