Odhiambo v Obiero (Civil Appeal E002 of 2024)
[2024] KEHC 15700 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15700 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E002 OF 2024

RE ABURILI, J

DECEMBER 9, 2024

BETWEEN

ELIZABETH ODHIAMBO ..... APPELLANT

AND

HELLEN AKINYI OBIERO ..... RESPONDENT

(Appeal from the judgment and decree of Hon L.N.Kiniale, Senior Principal Magistrate in Nyando SPM CC No. 91 of 2019 delivered on 7/12/2023)

JUDGMENT

Introduction

1. The appellant Elizabeth Odhiambo was sued by the respondent Hellen Akinyi Obiero vide a plaint dated 13th March 2019 and amended on the 9th May 2019 in which she sought general damages following a road traffic accident that occurred on the 1st March 2019. It was the respondent's case that on the 1st March 2019, she was a lawful passenger aboard Tuktuk vehicle registration number KTWB 991P PIAGGIO, owned by the appellant, that was travelling along the Sondu –Pap Onditi road which motor vehicle was so recklessly and negligently driven so as to cause it to veer off the road and cause an accident that led to the injuries sustained by the respondent.

2. The appellant filed her statement of defence dated 6th June 2019 denying the respondent's allegations and putting her to strict proof. The appellant pleaded contributory negligence on the part of the appellant.

3. In his judgement, the trial magistrate found the appellant 100% in negligence and awarded her general damages of Kshs. 700,000.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 6th January 2024 raising the following grounds of appeal:

a. That the learned trial magistrate erred in law and in fact in the assessment of quantum by awarding Kshs. 700,000 for general damages an award which was excessive and an erroneous estimate of the damages awardable compared to the injuries sustained by the respondent.

b. That the learned magistrate erred in law and in facts in pronouncing that the plaintiff sustained Tibia fibula yet the same was not proved as per the evidence in court.

c. That the learned magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages.

d. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.

e. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

f. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that the award on general damages was manifestly excessive to warrant this court's exercising its discretion to interfere with the same. The appellant disputed the fractures of the tibia fibula and elbow as pleaded by the respondent on account that the same were not supported by any evidence on record and contended that the respondent sustained only soft tissue injuries.

7. The appellant submitted that a maximum award of Kshs. 80,000 would be appropriate in the circumstances of the case. In addition to the authorities relied on in the trial court, the appellant relied on the following decided cases:

a. Godwin Ireri v Franklin Gitonga (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee and an award of Kshs. 300,000 was reduced to Kshs. 90,000 on appeal.

b. Lamu Bus Services & Another v Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left thigh and a blunt injury to the left thigh and an award of Kshs. 200,000 was reduced to Kshs. 130,000 on appeal.

The Respondent's Submissions

8. It was submitted that the injuries that the respondent suffered were grievous, particularized in the plaint and confirmed by the respondent's medical notes produced and the doctors who testified on her behalf. The respondent thus urged this court to dismiss the appeal on all grounds with costs to the respondent. The respondent relied on her submissions filed before the trial court wherein she pleaded for general damages of Kshs. 1,000,000 whilst relying on the case of *Godfrey Wamalwa Wamba v Kyalo Wambua Civil Appeal No. 3 of 2016*.

Analysis and Determination

9. I have considered the grounds of appeal, the submissions by both parties' counsel and the decisions relied on. This appeal revolves around the issue of quantum only. The appellant impugns the trial court's judgement on quantum and contends that it was based on injuries pleaded but never proven.

10. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See Sielle v Associated Motor Boat Company Ltd [1968] EA 123.

11. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that:

> " [A]n 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

12. Having considered the record of appeal, the submissions and the authorities relied on by the respective parties and applying the principles set out in the above cited cases, I opine that the only issue for determination is whether the quantum for general damages awarded by the trial court was manifestly high as to call for interference by this Court.

13. It is trite that an appellate court would not easily interfere with the trial courts' discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. This has been stated in many cases following the decision in the Court of Appeal case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia (1985) 1 KAR 727 that:

> " .... 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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

14. The same Court in Odinga Jackton Ouma v Moureen Achieng Odera [2016] eKLR stated that- "comparable injuries should attract comparable awards".

15. The contest is with regard to the injuries suffered by the Respondent. The appellant pleaded that the respondent pleaded injuries of fractures to the tibia fibula and elbow which were not proven. This issue is crucial and must therefore be determined first as assessment of damages is wholly premised on the injuries sustained.

16. As per the amended plaint dated 9th May 2019, the Respondent pleaded that she sustained the following injuries:

    a. Swollen and tenderness on the head

    b. Tenderness of the neck

    c. Back injury

d. Chest injury

e. Fracture of the elbow joint

f. Cut wound on the right leg

g. Fracture of the right tibia

17. The respondent's injuries were reiterated in the P3 form attached in support of his case. PW3 George Mwita, a Clinical Officer at Ahero Hospital. He testified that he had examined the respondent on the 13/3/2019 and made the conclusion that the respondent had suffered harm injuries.

18. In cross-examination, PW3 testified that he sought to rely on the discharge summary from Nyakach Hospital in his examination of the respondent. However, the said discharge summary was never admitted as an exhibit. It was his testimony that when he examined the respondent, he had a x-film and a plaster. Though he admitted that he did not have any X-RAY in court, the P3 form provided that there was management of plaster and that when a patient has a plaster, it is clear that he has a fracture.

19. DW1, Dr. Jenifer Kahuthu, who testified on behalf of the appellant testified that the initial file notes from Nyakach questioned a fracture of the right tibia fibula and the respondent was referred to JOOTRH for the xray. She testified that though there was no indication of an X-Ray being done, she subjected the respondent to a repeat X-Ray and noted the right tibia fibula was normal with no indication of a fracture.

20. DW1 testified that the P3 Form mentioned a fracture but that Ahero was not the treating hospital. She testified that the respondent sustained only soft tissue injuries. It was her testimony that if a fracture was noted, the second X-Ray ought to have shown a healed fracture as a healing fracture is not seamless. She did admit that a fracture is managed by a (POP) plaster.

21. In cross-examination, DW1 stated that she examined the patient after 2 years 8 months after the accident at which time the patient had healed. She further testified that the treatment notes from Nyakach referred the patient for X-Ray and that when she examined the patient, she complained of pain on the right lower limb.

22. In re-examination, DW1 reiterated that if there was a fracture and it healed, there would have been evidence of a healed fracture.

23. What then does the court make of all this evidence on the injuries allegedly suffered by the respondent? The standard of proof in civil cases is on a balance of probabilities. The burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -

107

(1) "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

(2) "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person"

24. The appellant herein pleaded that she had sustained a fracture to the tibia. No X-ray was produced in evidence as an exhibit to support the respondent's claim. PW3 testified that when he examined the respondent, she had a plaster which he testified meant that the respondent had a fracture. DW3 also admitted that there was evidence from the documents that the respondent had given her during the

examination that she had a plaster which is used to manage a fracture. She did testify that a healed fracture can be seen from an X-Ray as a healed fractured site is not seamless and that she did not see any evidence of a healed fracture. DW3 however did not produce evidence of the x-ray which she had carried out on the respondent to show that it was seamless.

25. In my view, the evidence on record all point to the fact that the respondent had a fracture on the tibia. No evidence has been adduced to show that she had a fracture on the elbow. There is ample evidence that the respondent had a plaster on the leg which according to both PW3 and DW1 point to the management of a fracture.

26. The sum of all the above is that I find that the respondent sustained soft tissue injuries as enumerated and a fracture of the tibia. I will now turn to consider the quantum of damages in past comparable cases.

27. In Sammy Mugo Kinyanjui & another v Kairo Thuo [2017] eKLR, the plaintiff suffered fractures of the tibia and fibula bones of both legs. On appeal, the High Court set aside the trial court's award of Kshs 1,000,000/- and substituted it with a sum Kshs 600,000/- in 2017.

28. In Pauline Gesare Onami v Samuel Changamure & another [2017] eKLR, the plaintiff sustained fractures of the tibia and fibula bones of both legs in addition to laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. Omondi J. upheld an award of Kshs 600,000/- in 2017.

29. In John Njenga Maina v Humphrey Kinyua Rukeria [2016] eKLR, the appellant sustained fractures of the tibia and fibula of both legs in addition to laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains. Njuguna J awarded the appellant Kshs 750,000/- in general damages in 2016.

30. In the instant case, I note that the learned trial magistrate awarded general damages without indicating the authorities that she had relied upon so as to arrive at the award of Kshs 700,000, that notwithstanding, I hold the considered view that the said award was within the margins of award in other comparable cases which I have cited above.

31. Accordingly, I do not find that the award for general damages made by the trial court to be manifestly high as to warrant interference by this court considering the injuries sustained and the past trends. I thus uphold the trial court's award on quantum and proceed to dismiss the instant appeal with costs of Kshs 30,000 assessed in favour of the respondent, payable within 45 days of today and in default, the respondent shall be at liberty to execute for recovery.

32. Subject to the costs already assessed and drawing of decree, I order that the lower court file shall be returned.

33. This file is closed.

34. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE