



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 30 OF 2019

RENTWORKS EAST AFRICA LIMITEDAPPELLANT

VERSUS

COLEY NJERU BILDAD.....RESPONDENT

(Being an Appeal from Judgment in Chuka Chief Magistrate's Court Civil Case No.235 of 2018 delivered

by Hon. J.M. Njoroge (CM) on 14th August, 2019.)

J U D G M E N T

This appeal arises from the Judgment in ***Chuka Chief Magistrate's Court Civil Case No.235/2018***. The respondent Coley Njeru Bildad who was the Plaintiff in the lower court had filed the suit seeking compensation by way of general damages for pain and suffering and loss of amenities, future medical expenses as well as special damages for injuries sustained in a road traffic accident which occurred on 14/11/2016. The respondent's claim was that he was a passenger in motor vehicle registration number GKB 485 H Toyota Land Cruiser which was owned by the appellant when it was negligently and carelessly driven that an accident occurred and he sustained serious bodily injuries. As a result of the injuries he was admitted in hospital for over week and as a result of the injuries, he suffered memory loss, incapacitation as well as frequent stomach aches and headaches.

1. During trial before the magistrate's court the respondent relied on medical reports by various doctors. One of the Doctors, Wambugu adduced evidence that the respondent suffers memory loss, which was termed as a continuing disability. Doctor Wokabi on his part stated that the respondent sustained closed head injuries and has developed post traumatic disorders characterized by panic attacks, Insomnia, nightmares and forgetfulness for which he is undergoing psychiatric treatment. He further stated that there was no obvious abnormality neurologically but it seemed the patient developed a rare complication of PTSD for which he will not recover. A report by doctor Wambugu dated 30/10/17 stated that the respondent face was deviated due to facial palsy and had tearing of the left eye. The doctor also noted forgetfulness while talking to the patient and concluded that the respondent had not recovered fully.

On his part the respondent testified that he continues to attend clinics at a cost of Kshs.12,000/- per month which he was however unable to support with receipts or any medical records.

2. The defence case was that the respondent assumed risk when he boarded the defendant's motor vehicle for his own benefit as a passenger. They also alleged that the passenger failed to fasten the safety belt which was provided and attempted to obtain control of the motor vehicle from the driver. They also contended that the plaintiff failed to take due care and attention of his own safety.

3. When the matter came up for hearing before the trial magistrate, the parties entered a consent on liability and it was agreed that Judgment on liability be entered in the ratio of 80:20% in favour of the respondent against the defendant. The trial magistrate entered judgment for the respondent in the sum of Kshs.2,000,000/- being general damages for pain and suffering and loss of amenities and future medical expenses. The appellant was aggrieved by the judgment of the trial magistrate and filed a memorandum of appeal whose main prayer is that the judgment of the lower court be set aside and the court do re-assess the damages to be awarded and award any other reliefs that it may deem fit. They have condensed the grounds of appeal and contend that the award was manifestly excessive, that the court based its findings on irrelevant factors not supported by evidence and the court failed to rely on any expert opinions on the injuries. It is also asserted that the court did not assess the appellants submissions on quantum and the trial magistrate did not consider the effect of such a huge award on the economy.

The parties agreed to canvass the appeal by way of written submissions.

APPELLANT'S WRITTEN SUBMISSIONS

The Appellant filed written submissions on 23/9/2020.

The appellant submits that the doctors were unable to assess the degree of permanent injury because he suffered a single closed head injury. They submit that the injuries which the trial court was to assess damages on were the ones which state that the plaintiff had totally recovered and that as per the date of trial, there was no mention of PTSD by the Respondent's doctor. They also state that there was no evidence of any psychiatrist that the respondent has been seeing yet the court considered this while assessing damages. They also submit that the PTSD claim cannot be entertained without the report of a psychiatrist. They submit that without the proof of PTSD, the resulting injuries for assessment are soft tissue injuries. They state that the magistrate relied on quantum from cases which were awarded for more severe injuries and did not have similar circumstances thus causing the court to arrive at an excessive award. They also noted that the respondent was continuing in his employment as a head teacher. They beg the court to award a sum of Kshs. 500,000/=.

He relies on the cases of James Katua Peter -v-Simon Mutua Muasya, Machakos High Court CC135/2002, John Masemo Ngala & General Motors Limited-v- Dan Nyamamba Omare (citation not given)

RESPONDENT'S WRITTEN SUBMISSIONS

The Respondent filed his written submissions on 7/10/2020. The respondent contends that the record of appeal is defective as it does not include a certified copy of decree as it was filed prematurely and is thus defective. They dispute the submission that the award was inordinately high and rely on the documents they produced, more so the two medical reports, which confirm that the plaintiff had suffered life threatening head injuries, from which he had not recovered. They also state that awards are discretionary and the court should be slow to interfere with the same. They urge the court to dismiss the appeal for being unmerited and fatally defective.

The respondent raises an issue that the appellant herein did not file a decree from the lower court and thus the appeal is fatally defective for failure to comply with **Order 42 rule 2 Civil Procedure Rules**.

Order 42 Rule 2 of the Civil Procedure Rules provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides;

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

I have considered this ground. There is a supplementary record of appeal dated 10/8/2020 and filed in this court on 12/8/2020. The documents enclosed in that supplementary record include a certified copy of the Judgment in Chief Magistrate's Court Civil Case No.235/2018, a certified copy of the deposit receipt issued by the court and typed and certified copies of the court proceedings. The applicant has therefore not included a copy of the decree issued in the lower court.

4. The High Court and the Court of Appeal have approached this issue differently.

The Court of Appeal in *Chege v Suleiman [1988] eKLR* firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were

formally extracted as the basis of the appeal.”

Kamau J in KILONZO DAVID T/A SILVER BULLET BUS COMPANY V KYALO KILIKU & ANOTHER [2018] EKLR stated that seeing as the appeal had already been admitted to hearing, then he should have his day in court and be given a chance to file the same. The court stated;

“ Indeed, this court’s position was buttressed by the fact that Order 42 Rule 13 (4) (f) of the Civil Procedure Rules provides that before allowing the appeal to go on hearing, the court shall satisfy itself that the judgment, the order or appeal appealed from forms part of the court record.

A perusal of the Record of Appeal showed that the Appellant enclosed the certified copies of the proceedings. There was, however, no certified copy of the decree. There was also no copy of the letter requesting for the certified copies of the proceedings and decree. There was no evidence from the lower court file that the Appellant applied for a Certificate of Costs and Decree.

It was very clear that the Appellant’s omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of Ndegwa Kamau t/a Sideview Garage vs Isika Kalumbo [2016](Supra), Kulwant Singh Ropra vs James Nzili Maswii [2014] (Supra) and Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014](Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court took a different position that it would be too draconian to strike out the Appeal herein.

This court’s thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own.

Further, the court has power under Order 42 Rule 2 of the Civil Procedure Rules to grant leave to an appellant to file such certified copy of the decree as soon as possible and in any event within such time that it may order.

In addition, the decision of Kyuma vs Kyema (Supra) that Ngaah J relied upon in striking out the appeals therein was decided in 1988, way before the promulgation of the Constitution of Kenya, 2010 which mandates courts to administer justice without undue regard to technicalities.

Accordingly, having considered the Written Submissions, it was the finding and holding of this court that although there was merit in the 2nd Respondent’s argument that the Appeal herein, it was in the interest of justice that the Appellant be given his day in court.”

5 I take the view that a decree is a statement of the summary of the Judgment. Decree is defined in the Black’s Law Dictionary, 10th Edition as follows:-

“traditionally, a judicial decision in a Court of equity, admiralty divorce or probate- similar to a Judgment of a court of law. A court’s final Judgment; Any court order, but especially one in matrimonial case (divorce decree)”

The term Judgment is frequently used in a broad sense to include decrees in equity, See A treatise of Law of Judgments, 12th Edition 23-24.

The current approach in determination of the disputes mandates courts to administer justice without undue regard to the procedure technicalities. This has come about with the promulgation of the new Constitution which at **Article 159(2) (d)** has provided that the courts which have judicial authority as well tribunals, shall be guided by the principle that-

“ Justice shall be administered without undue regard to procedural technicalities.”

This is further buttressed in the overriding objectives as provided for under the **Civil Procedure Act. Section 1A and 1B** provides.

“ 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

This is further provided for under **Section 3A of the Civil Procedure Act** which gives the court wide discretion to make such orders as the justice of the case may demand. **Section 3A Civil Procedure Act** provides:-

“ Nothing in this Act shall limit or otherwise affect the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Although parties should not disregard the procedural rules as they govern the practice in our courts to maintain orderlies and have been stated to be the handmaidens of justice, the courts will proceed to do justice even where they are not complied with as long as it is necessary for the ends of justice, to prevent abuse of court process and where no prejudice will be occasioned to the adverse party. Having considered the above provisions, it is my view that since the Judgment of the lower court which is certified was filed in court in the supplementary record, I should proceed and consider the merits of the appeal notwithstanding that the decree was not filed. This bearing in mind that the decree is a summary while the Judgment contains details which the court has to consider to determine the appeal. This approach has been upheld by the Court of Appeal in the case of ***Emmanuel Ngade Nyoka -v- Kitheka Mutisya Ngata Civil Appeal No.63/2016 (2017) eKLR***. Court of Appeal-

“ According to the Judge the record of Appeal before him had a certified copy of the Judgment of the court. Consequently, he reasoned, that the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record. We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was mere technicality that could not have sat well with the current constitutional dispensation that called upon courts to go to substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the Civil Procedure Act.

Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

I should therefore proceed to determine the Appeal as the certified copy of the Judgment of the trial magistrate which is certified has been filed.

Assessment of damages

The court of Appeal in ***MOHAMMED JABANE V HIGHSTONE T. OLENJA (Case No. 2 of 1986 [Vol. 1 KAR 982]*** stated the principles for the correct approach in assessment of damages as follows:

- i. Each case depends on its own facts;**
- ii. Awards must not be excessive and must take into account the need to avoid escalation of insurance premiums, medical fees, expenses in the body policy;**
- iii. Comparable injuries should attract comparable awards;**
- iv. Inflation should be taken into account.**

The principles for setting aside the Judgment of the trial court on assessment of damages were laid down in the case of ***Kemfro Africa Limited Trading as Meru Express Services (1976) & Another (N0.2) (1987) KLR 349*** where the holding was that- ***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to present 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 arrived at a figure which was either inordinately high or low.”***

5. The principle which the court should consider are the therefore the facts of the individual case, the award should not be so high (excessive) or too low as to present a wrong approach in assessing the damages comparable injuries should attract comparable awards and factors such as inflation and the need to avoid escalation of premiums leading to insurance being out of reach. The award of damages must therefore seek to compensate a party for the injuries and loss of amenities but not for enrichment. There must be fairness to the claimant and the defendant in the assessment of damages and the award must be seen to have considered all the above principles. See the persuasive decision which has also considered the principles.

RE ESTATE OF E S M K [2017] EKLR the case of where the court stated;

“38 Honestly speaking, money cannot renew a physical frame that has been battered and shattered and all that courts can

do is to award sums which must be regarded as giving reasonable compensation and the award must be fair to both the Plaintiff and Defendants .What is summed up by all the authorities relied on is that injuries suffered must be compensated adequately by way of damages. While it is true that no amount of Damages can restore the Plaintiff to what he/she was prior to the accident, nevertheless the award of damages must try as much as possible to re-assure the Plaintiff that efforts are being made, by way of damages to restore him to what he was prior to the accident. The essence of damages is to keep on trying to re-settle the victim to as much as possible the position he was before the accident by “repairs’ so as to be back to normal.”

Having considered the above, the following cases may guide in consideration of actual quantum awarded in somewhat similar circumstances.

Majanja J in **DUNCAN MWENDA & 2 OTHERS V SILAS KINYUA KITHELA [2018] EKLR** awarded the sum of Kshs 350,000/= where the claimant suffered a blunt head injury with hematoma, injury to the middle finger and soft tissue injury to the head.

Onyancha J in **JAMES MUTUNGI V DAVID MUASYA NDELEVA [2015] EKLR** upheld the trial court award of Kshs 500,000/= where the claimant had suffered severe closed head injury with loss of speech which required physiotherapy. In this case, there were also some cut wounds on the leg and face.

Njagi J in **ALEX WANJALA V PWANI OIL PRODUCTS LIMITED & ANOTHER [2019] EKLR** award the sum of Kshs 600,000/= where the claimant had suffered a closed head injury that rendered him unconscious for several weeks. In this case, the claimant had also suffered two fractures to the humerus and femur.

The respondent sustained the injuries which I have analysed above in the medical reports which were produced in court.

The respondent did not avail a medical report to prove P.T.S.D (Post Traumatic Stress Disorder). He did not produce evidence to prove that he has been seeing a therapist.

The award of damages is an exercise of judicial discretion which must be exercised judicially. In this case the respective medical reports did not assign any degree of permanent disability. They all agree that the respondent sustained closed head injury and all test returned a result that all was normal. The respondent did not suffer loss of consciousness and has never sustained epileptic seizures. There was no material laid before court showing that he continued with treatment. It follows that he recovered fully. I agree with the appellants counsel submission that the trial magistrate took into account an irrelevant fact which was also not proved, that of future medical costs which were not claimed and not proved. The award was not based on any evidence.

The damages were lumped together. The damages awarded were excessive and based on unproven information. This being the case, I find that I have reasons to interfere with the award of damages. Based on the injuries suffered and considering the comparable awards for the comparable injuries, I find that an award of **Kshs.600,000/-** is adequate. I therefore find that the appeal has merits and is allowed. I order as follows: -

- 1) The Judgment of the trial magistrate on the award of general damages is set aside.
- 2) I enter Judgment for the respondent in the sum of **Kshs.600,000** general damages for pain and suffering and loss of amenities. This will be less 20% the respondent’s apportioned liability.

Total Award	= 600,000/-
Less 20%	120,000/-
Due to the Respondent	- 480,000/-

- 3) The appellants shall have the costs of the costs of the appeal.

Dated, signed and delivered at Chuka this 11th day of March 2021.

L.W. GITARI

JUDGE

12/3/2021

The Judgment has been read out in open court.

L.W GITARI

JUDGE

11/3/2021