



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CROSS APPEAL NO 48 OF 2019

CHRISTINE ALOO.....APPELLANT

VERSUS

JANE AJWANG ODHIAMBO.....RESPONDENT

JUDGMENT

1. The Appellant herein lodged this Cross Appeal to **HCCA No 13 of 2019 Christine Aloo vs Jane Ajwang Odhiambo** on 3rd April 2019 vide a Memorandum of Appeal dated 28th March 2019. She relied on six (6) Grounds of Appeal.

2. The Appellant herein had appealed on both liability and quantum. Having said so, on 27th September 2021, the court herein delivered its decision on the question of apportionment of liability in **HCCA No 13 of 2019 Jane Ajwang Odhiambo vs Mary Atieno Ouma** where it found and held that the Appellant herein was wholly liable for the negligence that was occasioned by her driver at the material time of the accident. This therefore disposed of Grounds of Appeal Nos (1), (2), (3), (4) and (5).

3. The only remaining issue that was therefore pending for determination in this court was the question of quantum which the Appellant had argued as having been excessive in the circumstances of the case herein.

4. Both parties filed Written Submissions in respect of this Cross Appeal and therefore this Judgment is based on the said Written Submissions which they relied upon in their entirety.

LEGAL ANALYSIS

5. This court found it prudent to first determine the preliminary issue of whether or not the Cross Appeal ought to be struck out. The Respondent had argued that the Cross Appeal was defective, null and void *ab initio* first because the Appellant's Memorandum of Appeal filed on 3rd April 2019 indicated that this Appeal had arisen from the Judgment and Decree dated 20th January 2019 in **Civil Case No 530 of 2014 Mary Atieno Ouma VS Christine Aloo**, yet there was no Judgment and or Decree of such a date. She argued that the Judgment in **Civil Case No 530 of 2014 Mary Atieno Ouma vs Christine Aloo** was delivered on 22nd January 2019.

6. Secondly, the Respondent contended that the Appellant's Cross Appeal had been filed out of time and without leave of court contrary to the provisions of Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya.

7. In response to the Respondent's Submissions, the Appellant argued that a cross-appeal could only be filed after an appeal has been served upon a respondent in the appeal. It was her contention that while there was provision stipulating the period within which an appeal could be filed in the Civil Procedure Rules, there was no such provision in respect of cross appeals, courts only having held that cross-appeals should be filed within a reasonable period.

8. In this regard she relied on the cases of **Mombasa HCCA No 90 of 2014 Kenya Power & Lighting Co Ltd vs Peter Langi Mwasi** (eKLR citation not provided) and **Busia HCCA No 1 of 2018 Bulisho Trading Company Ltd vs Rosemary Likhola Mutakha & Another** (eKLR citation not provided). She did not also furnish the court with copies of the said decisions for perusal.

9. She invoked the doctrine of estoppel and contended that the Respondent was estopped from raising the issue of time as it was too late to do so. She was categorical that the said cross appeal had been admitted for hearing and directions given and any objection by the Respondent should have been raised at the time the court was giving directions as to the hearing of the same.

10. It was her contention that the date of judgment on the memorandum of cross-appeal was a typographical error, an incidental slip/error and or an error in the want of form which can be corrected at any stage of the proceedings and urged the court to correct the same on its own motion in view of the fact that the decree on record reflects the date of the Judgment. In this regard she relied on Article 159 (2) (d) of the Constitution of Kenya 2010, Section 1A, 1B, 3A, 100 of the Civil Procedure Act and Order 2 Rule 4 of the Civil Procedure Rules.

11. She further contended that the error was of the nature that did not affect the merits of the cross appeal. She added that the Respondent had not demonstrated the prejudice she would suffer as a result of the said defect and urged the court to dismiss the Respondent's submissions on the said issue.

12. Notably Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

13. Although the Appellant herein had contended that cross-appeals are not provided for under the Civil Procedure Rules, Order 42 Rule 32 of the Civil Procedure Rules states as follows:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal (emphasis court).”

14. Having said so, the memorandum of appeal herein was filed on 3rd April 2019. The same was consolidated with **HCCA No 15 of 2019 Christine Aloo vs Mary Atieno Ouma**. By the time the Memorandum of the Cross Appeal was filed, directions pursuant to Order 42 Rule 11 of the Civil Procedure Rules, 2010 had not been given in **HCCA No 15 of 2019 Christine Aloo vs Mary Atieno Ouma**.

15. Notably, Order 4 Rule 11 of the Civil Procedure Rules provides that:-

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.”

16. As the Appellant correctly submitted, the Respondent herein did not raise any objection to directions being given regarding the Cross Appeal on account of the same having been defective or having been filed out of time. It was the considered view of this court that a cross-appeal would have to be dealt with alongside the main appeal which therefore means that the procedure that is to be adopted ought to be the procedure of hearing the appeals.

17. In the case of **Kenya Power & Lighting Co Ltd v Peter Langi Mwasi [2018] eKLR** which this court fully associated itself with, it was held that whereas the timelines for filing of cross appeals was not provided for in the Civil Procedure Rules, the same ought to be filed without any delay. In the mind of this court, the cross appeal ought to be filed at least before directions under Order 42 Rule 11 of the Civil Procedure Rules have been given in the main appeal.

18. In the instant case, Respondent filed **Kisumu HCCA No 13 of 2019 Christine Aloo vs Jane Ajwang Odhiambo** on 26th March 2019. The Appellant herein filed her Cross Appeal on 3rd April 2019. The court gave directions under Order 42 Rule 11 of the Civil Procedure Rules on 8th June 2021.

19. This court thus found that there was no merit in the Respondent's submissions that the Cross-Appeal was defective, null and void *ab initio* and was not therefore not persuaded that it should strike out the Appellant's Cross Appeal herein.

20. Turning to the substance of the cross appeal on quantum, the Appellant submitted that the Learned Trial Magistrate misdirected herself in awarding damages which were inordinately high. The Respondent did not raise this as a ground of appeal in her Memorandum of Appeal dated 11th February 2021 and filed on 12th February 2021. She did not also submit on the issue of quantum. This court came to the conclusion that she was satisfied with the quantum she was awarded by the Learned Trial Magistrate.

21. It is trite law that an appellate court will not interfere with the assessment of damages merely because it could have awarded a higher or lower figure. The principles under which an appellate court can interfere with an award of quantum has been propounded in several cases amongst them the case of **Butt vs Khan [1981] KLR 470** and **Kitavi vs Coastal Bottlers Ltd [1985] KLR 470**

22. The common holding of these cases is 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 trial judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

23. According to the Complaint, the Respondent sustained injuries comprising of bruises, cut wounds, tenderness and loss of a tooth.

24. This court reviewed both parties' submissions before the trial court to satisfy itself whether the Learned Trial Magistrate misdirected himself when he awarded the Respondent herein, general damages in the sum of Kshs150,000/=.

25. Applying the principles of an appellate court interfering with awards of quantum, this court did not find the award of damages to have been inordinately high or inordinately low to have represented a wholly erroneous estimate. However, bearing in mind that the Learned Trial

Magistrate awarded the Respondent's co-passenger, Mary Atieno Ouma, a sum of Kshs 130,000/= for a dislocation of her right shoulder, chest pain, back pain, pain on the rib and tenderness on the lower limbs, it was only fair that the Respondent herein be awarded a similar sum for the reason that the seriousness of her injuries were similar to those of her said co-passenger who in **Mary Atieno Ouma who in HCCA No 15 of 2019 Mary Atieno Ouma vs Christine Oloo**, this court found a sum of Kshs 130,000/= general damages to be fair and reasonable in the circumstances of the case.

26. For the avoidance of doubt, this court merely reduced the same sum for consistency purposes.

27. In arriving at the said conclusion, this court had due regard to the following comparable cases:-

1. Fred Barasa Matayo v Channan Agricultural Contractors [2013] eKLR

The appellate court reviewed an award of Kshs 250,000/= to Kshs150,000/= where the appellant therein had sustained moderate soft tissue injuries that were expected to heal in eight months' time.

2. Dickson Ndungu vs Theresia Otieno & 4 Others [2014] eKLR

The appellate court reviewed the award of Kshs 250,000/- to Kshs127,500/= where the 5th respondent therein sustained soft tissue injuries which healed.

3. Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd [2015] eKLR

The appellate court reduced an award of Kshs 700,000/= to Kshs150,000/= where the appellant therein had sustained injuries to the left elbow, pubic region, lower back and right ankle.

DISPOSITION

28. For the foregoing reasons, the Appellant's Cross appeal that was lodged on 3rd April 2019 was merited and the same be and is hereby allowed. The effect of this decision is that the decision of the Learned Trial Magistrate that was delivered on 22nd January 2019 be and is hereby set aside and/or vacated and the same be and is hereby replaced with an order that judgment be and is hereby entered in favour of the Respondent against the Appellant for the sum of Kshs 130,000/= general damages plus costs and interest at court rates from the date of the judgment of the lower court until payment in full.

29. There will be no order as to costs as the Appellant was partly successful in her Appeal. Each party will bear its own costs of this Appeal.

30. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE