Onunga v Jonathan (Civil Appeal 20 of 2019)
[2024] KECA 46 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 46 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 20 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

SILVIA A. ONUNGA ..... APPELLANT

AND

MWAVITA JONATHAN ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (D.S. Majanja, J) dated 20th November, 2017 in Civil Appeal No. 17 of 2017)

JUDGMENT

1. This is a second appeal arising from a suit originally filed by the appellant, Silvia A. Onunga (Silvia), against the respondent, Mwavita Jonathan (Mwavita), in the Chief Magistrate's Court at Kisumu. In the suit, Silvia had sought general and special damages for personal injuries she suffered following a road traffic accident.

2. The accident occurred on 6th December 2013 when Silvia was knocked down by Motor Vehicle Registration No. KBB 465W belonging to Mwavita. Silvia sustained personal injuries which she listed in her plaint as a comminuted fracture of the right leg tibia shaft, transverse fracture of the right leg fibula bone, left hip comminuted intertrochanteric fracture, fracture of the right femur, dislocation of the lumbar-sacral spine of the back, wounds on the right lower limb, pain on the waist, sprain at the cervical spine of the neck and the lumbar-sacral spine of the back, deep wound on the left lower leg, chest pain, pain on the upper arm and a dislocated right knee joint.

3. The issue of liability was settled by a consent entered into by the parties in the ratio 70:30 in favor of Silvia. After conducting a hearing, the trial magistrate delivered a judgment in which Silvia was awarded general damages of Kshs 1,000,000, and special damages of Kshs. 327,518, less the agreed 30% contribution. Silvia was also awarded the costs of the suit.

4. Mwavita, being dissatisfied with the judgment of the trial court, lodged the first appeal in the High Court in which he faulted the trial magistrate for awarding damages without considering the nature of the injuries that Silvia had suffered, failing to consider the principles for awarding damages, and awarding damages that were manifestly excessive.

5. Silvia supported the decision of the trial magistrate maintaining that the trial magistrate appreciated the nature and extent of her injuries, took in to account relevant decisions cited to him, and came to a correct conclusion in assessing the general damages.

6. In its judgment the High Court found that Silvia sustained a fracture at the hip joint, for which she underwent corrective surgery involving insertion of surgical plating and screws; that the other injuries she sustained were soft tissue injuries; that Silvia cited cases where the claimants sustained more serious injuries and awards were on the higher side; and that although Mwavita cited decisions that were of comparable injuries with awards ranging between Kshs 250,000 and Kshs 300,000, the trial magistrate relied on a single authority cited by Silvia. Consequently, the award made was excessive, necessitating the intervention of the High Court. The learned Judge therefore allowed the appeal, set aside the award of general damages of Kshs. 1,000,000 made by the trial court, and substituted thereto an award of Kshs. 400,000 as general damages.

7. Silvia is now before us as an appellant in this second appeal, in which she has filed a memorandum of appeal dated 6th February, 2019. She impugns the decision of the High Court on the grounds that the learned Judge erred in failing to consider the principles for awarding damages, and without any basis, reduced the general damages that were awarded by the trial court. She further takes issue with the award of costs against her.

8. In her submissions dated 10th May, 2023, Silvia restated the injuries she sustained as had been pleaded in her plaint. She relied on the treatment notes from Jaramogi Oginga Odinga Teaching and Referral Hospital, the discharge summary from St. Luke's Orthopedic and Trauma Hospital, the X-ray report from Avenue Hospital, the medical report prepared by Dr. Manase Onyimbi and the medical report prepared by Dr. Olima, which in her view, all confirmed her injuries. She pointed out that Dr. Olima who examined her one year after the accident, at the request of the respondent, also confirmed her injuries and the fact that she was still in pain. She argued that the learned Judge of the High Court erred in failing to correctly appreciate her injuries and failing to appreciate the medical evidence that was adduced in the trial court. In addition, she faulted the learned Judge for failing to appreciate the findings of the trial magistrate.

9. Silvia referred to several authorities on the principles regarding when an appellate court can interfere with the quantum of damages awarded by the lower court. These included *Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini v AM Lubia and Olive Lubia* [1985] 1 KAR 727; *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 88] KAR 5; *Gitobu Imanyara and 2 others v Attorney General* [2016] eKLR; and *Shabani v City Council of Nairobi* [1985] KLR 516.

10. Silvia asserted that the authorities she relied on in the trial court were of comparable injuries, and the award of Kshs 1,000,000/- that was made by the trial court was appropriate and the learned judge had no reason to interfere. She therefore urged the Court to allow the appeal, set aside the judgment of the High Court and reinstate the award that was made by the trial court.

11. Mwavita also filed written submissions in which he maintained that the High Court did not err in interfering with the award that was made by the trial court. He pointed out that the judgment of the High Court revealed that the learned Judge analyzed the medical reports that were prepared by Dr. Olima and Dr. Onyimbi on the injuries that were suffered by Silvia. The reports showed that Silvia

suffered a left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumber - sacral spine of the back and deep would on the left lower leg. Mwavita maintained that the Judge also took in to account Dr. Onyimbi's opinion that Silvia had suffered a disabling grievous harm with a disability of 85%; and that reasonable recovery could only be realized in the next five to four years' subject to diligent follow up. That in addition, the Judge also considered Dr Olima's opinion that the appellant had suffered a fractured cervical neck of the right femur that had not united well with internal fixation.

12. As regards the authorities cited, Mwavita argued that the learned Judge considered all the cases that were cited to him by Silvia, and the ones that Mwavita cited, before finding that the cases cited by Silvia showed more serious injuries than the injuries that were sustained by Silvia, while those cited by Mwavita were of similar injuries to those suffered by Silvia. Mwavita argued that this finding justified the conclusion of the learned Judge that the award of general damages made by the trial court was excessive. He therefore urged the Court to dismiss the appeal. With regard to award of costs of the appeal in the High Court, Mwavita argued that costs follow the event and since he had succeeded in his appeal, he was entitled to costs as against Silvia.

13. We have considered this appeal, the contending submissions of both parties and the authorities cited. The pertinent issue that arises for our determination is whether the learned Judge was right in interfering with the quantum of damages that was awarded by the trial court as general damages.

14. The appellant has cited several relevant decisions of this Court on the principles under which an appellate court can interfere with an award of damages made by a trial court. This included *Kemfro Africa Limited T/A Meru Express Services [1976] and another v Lubia and another (No.2)* [1985] eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

> " 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 either 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. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

15. *Shabani v City Council of Nairobi* [1985] KLR 516 is another cited case where at page 518, Hancox, JA stated as follows:

> "The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal No. 40 of 1997 (a case referred to in another context by the learned Judge), as follows:
>
> > '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 so inordinately high or low.'
>
> This discretion has since been followed frequently by this Court."

16. Similarly, in *Gitobu Imanyara and 2 others v Attorney General* [2016] eKLR, this Court held as follows:

> " 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 principles 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."

17. The learned Judge of the High Court was clearly alive to the principles stated in the above cases. This is how he rendered himself:

> 12. The parties agree that the extent to which an appellate court may interfere with an award of damages (sic). It must be shown that the trial court, in awarding of the damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* [1981] KLR 349).

18. The following paragraph in the judgment gives the reason for the learned Judge's interference with the award that was made by the trial magistrate:

> " 15. Looking at the cases cited by the appellant and respondent before the trial court, it is easy to see that the respondent cited cases where the injuries were more serious and awards on the higher side. The respondent cited several cases where the claimants sustained injuries similar to the case at hand. From the judgment, the trial magistrate elected to look at one case; *Eldoret Steel Mills Limited v Elphas Victor Espila* (Supra) and noted that it was decided in 2006. This was an error because the case relied on affirmed a decision of the trial court in 2013. Nevertheless, the appellant cited decisions made between 2013 and 2016 with a range of awards between Kshs. 250,000/- and Kshs. 300,000/-. The cases cited by the respondent were outliers and the preponderance of decisions cited by the appellant were more reflective of comparable of inflation an increase of the award by a factor of three over a period of 3 years resulted in an award that that was too high and excessive in the circumstances.
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> 16. Since the award of general damages was excessive, this court is entitled to intervene. The respondent sustained a fracture at the hip joint which (sic) corrective surgery involving insertion of surgical plantings and screws. The other injuries she sustained were in the nature of soft tissue injuries. The latest examination revealed malunion of the joint at the fracture point leaving her to walk with crutches and pain. Unlike the cases cited where the level of permanent disability was less than 40%, in this case Dr Onyimbi assessed disability at 85%. When considered against the decisions cited, I am of the view that a sum of Kshs. 400,000/- would be reasonable in the circumstances."

19. The learned Judge had earlier in his judgment directed himself as follows:

> " 13. This appeal concerns the award of general damages. General damages are damages at large and the court does the best it can in reaching an award

> that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR that:
>
> Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
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> 14. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards which must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and *Jabane v Olenja* [1986] KLR 661).

20. The above extracts reveal that the learned Judge considered appropriate precedent and appreciated the principles for interfering with an award made by the trial court. In addition, the learned appreciated the injuries that were suffered by Silvia, and formed the opinion that the cases cited by Silvia were of more serious injuries, and that the cases cited by Mwavita were more reflective of comparable injuries. The learned Judge also noted that the latest examination of Silvia revealed a malunion of the joint at the fracture point, which resulted in her walking with crutches and in pain; and that Dr Onyimbi's assessment of Silvia's disability at 85%, differed from the cases cited by Mwavita where the level of permanent disability was less than 40%.

21. }We take cognizance of the fact that the injuries as stated in Silvia's plaint and restated in her written submissions included comminuted fracture of the right leg tibia shaft, transverse fracture of the right fibula bone, and dislocation of the lumbar spine of the back, which injuries were not established as they were not referred to in any of the medical reports.

22. The injuries established as per the X-rays reports from Avenue Hospital, and St Lukes Orthopeadic & Trauma Hospital, the Discharge summary from St Lukes Orthopeadic & Trauma Hospital, and medical reports from Dr Otieno, Dr Onyimbi and Dr Olima, was that Silvia sustained a comminuted intertrochanteric fracture of the hip joint with corrective surgery involving the insertion of surgical plantings and screws. In addition, she suffered a blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck, lumbar-sacral spine of the back, and a deep wound on the left lower leg.

23. As a result of the injuries, she could not walk without the aid of crutches. Her disability was assessed at 85% by Dr Onyimbi who concluded that her injuries were serious, and reasonable recovery could be realized in the next 4 to 5 years. Dr Olima who examined Silvia a year later and who had opportunity to review the earlier reports that had been prepared, including that of Dr Onyimbi, found that Silvia was still experiencing pain at the fracture and could not walk without crutches, and that the fracture had not united well despite the internal fixation. Dr Olima did not contradict Dr Onyimbi's assessment of Silvia's disability being at 85%.

24. Dr. Onyimbi's conclusion, medical opinion and advice on Silvia's injuries reflected the gravity of the damages as follows:

> " The serious damage of the left lower limb has impacted a devastating negative impact on her wholesome physical fitness and optimal productivity in performance of the essential gainful activities and domestic chores.
>
> She is rendered permanently disabled at about 85%. The metallic implants and screws will remain in her lower limb for life.
>
> The patient is bound to attend continued orthopedic consultation and review for a prolonged period of time, at astronomical costs in terms of continued medication and other concomitant expenditures.
>
> The prognosis for her reasonable recovery may be realized in the next four to five years from now subject to diligent follow up as indicated above"

25. The trial magistrate in his judgment, rightly rejected the two decisions that were relied upon by Silvia, as the injuries suffered in those cases, that is, *Charles Wanyoike Githuka & another v Joseph Mwangi Thuo*, Nakuru HCCC No. 68 of 2005 and *Millicent Atieno Ochuonyo v Katola Richard*, Nairobi HCCC N0. 38 of 2012, were not comparable with those suffered by Silvia. The trial magistrate chose to rely on *Eldoret Steel Mills Limited v Esipila* [2013] eKLR, a decision cited by Mwavita, in which the appellate court upheld an award of Kshs. 300.000/- made by the trial magistrate for a sub intertrochanteric fracture of the right femur, fracture of the metatarsal bone and soft tissue injuries with permanent disability assessed at 35%.

26. This is how the trial magistrate in Silvia's case addressed the issue of damages:

> " I choose to be guided by the case of Eldoret HCA No.72 of 2006, *Eldoret Steel Mill Limited v Elphan Espila* relied on by the defendant, though the injuries herein are slightly lesser as compared to the present case. It is also important to note that the case was filed in 2006. Lastly, I wish to state that the plaintiff was treated in several hospitals and had not healed fully by the time of the hearing of this case. That will only mean that indeed the injuries were serious.
>
> Doing the test (sic) I can and being guided by the authorities cited, I am of opinion that a compensation of Kshs. 1,000,000/- as general damages will be reasonable"

27. We have perused the judgment of the High Court in *Eldoret Steel Mills Limited v* (*supra*), and do find that of the two medical reports that were produced and relied upon in that case, Dr.S. I. Aluda noted that the injuries suffered were severe and there was need of a future major surgery to remove the plate and screw. The second doctor, Dr. Z. Gaya noted that the injury on the right limb had healed with a permanent shortening of the lower part of the limb by two (2) centimeters. He assessed the degree of permanent loss at 35%. An amount of Kshs 300,000/ was awarded on 25th May, 2006, by the trial magistrate as general damages, and confirmed on appeal by the High Court on 13th March, 2013.

28. While we are alive to the fact that no two cases can be exactly the same, it is evident that the trial magistrate exercised his discretion in awarding damages by endeavoring to make an award that reflected the gravity of the injuries suffered by Silvia. He was very much aware that while the circumstances in the two cases were similar to the extent that the injuries involved intertrochanteric fracture of the femur, the gravity of the injuries was not the same as reflected by the degree of permanent disability assessed by the doctors which was 35% in the comparable decision as against 85% in Silvia's case.

29. The trial magistrate also correctly took in to account the element of inflation as the award in the *Eldoret Steel Mills Limited vs Esipila* (*supra*) was made more than 10 years earlier, that judgment having been delivered on 25th May 2006, while the trial magistrate in Silvia's case delivered his judgment on 20th January 2017. There was an element of inflation which the trial magistrate correctly based on the date of the original trial court judgment, though he wrongly referred to it as date of filing. In this regard the learned Judge of the High Court misdirected himself by referring to 13th March 2013, the date the appellate court decision affirmed the judgment of the trial court, as the date from which inflation should be considered.

30. With due respect, we come to the conclusion that the trial magistrate correctly used the award in *Eldoret Steel Mills Limited v Esipila* as a guide and properly exercised his discretion in assessing the quantum of general damages giving reasons why he found it necessary to award Silvia a much higher figure.

31. In the circumstances `we find that there was no justification for the learned Judge to interfere with the award as the trial magistrate proceeded on the correct principles and took in to account relevant factors, and the award to Silvia was not so inordinately high as to justify interference.

32. The upshot of the above is that:

    i. We allow the appeal and set aside the judgment of the learned Judge dated 20th November, 2017.

    ii. We reinstate the award of Kshs 1,000,000/- that was made by the trial magistrate as per his judgment dated 20th January 2017

    iii. Silvia having succeeded in this appeal she shall have the costs of the appeals in both the High Court and this Court.

    Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR