Imbezi v Fairmile School Limited & another (Civil Appeal 561 of 2019) [2024] KECA 486 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 486 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 561 OF 2019

MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA

MAY 9, 2024

BETWEEN

JACOB IMBALI IMBEZI .... APPELLANT

AND

FAIRMILE SCHOOL LIMITED .... 1ST RESPONDENT

CHARLES MUSALIMWA .... 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (J. K. Sergon, J.) delivered on 27th September 2019 in High Court Civil Case No. 626 of 2017)

JUDGMENT

1. This is a second appeal from the judgment of the High Court, Nairobi (Sergon, J.) The background to the appeal is that on 11th February 2013, the appellant was in motor vehicle registration no. xxxx that was parked off the road. The 1st respondent was driving motor vehicle registration No. xxxx; owned by the 2nd respondent. That vehicle veered off the road hitting the vehicle that the appellant was in and as a result, the appellant sustained serious injuries. The appellant filed a suit in the magistrate's court claiming damages for pain and suffering, among other prayers. Upon hearing the parties, the trial court awarded the appellant a sum of Kshs 1,300,000.00 as general damages for pain and suffering.

2. The 1st respondent was dissatisfied with the judgement of the trial court and preferred an appeal to the High Court. The appeal in the High Court was by consent of the parties disposed by way of written submissions. The learned Judge, upon considering the submissions, held as follows:

> " Due to the passage of time between the accident and the delivery of the trial court judgement as well as the respondent's injuries, I am persuaded that the learned magistrate arrived at an

inordinately high award of Kshs. 1,300,000.00 and therefore it is necessary to interfere with the same and substitute it with a reasonable award of Kshs. 800,000.00."

3. Aggrieved by that judgement, the appellant filed a notice of appeal dated 30th September 2019 and the memorandum of appeal dated 19th November 2019. The grounds of appeal revolve around only one question; whether the learned Judge was correct in interfering with the award of the trial court.

4. When the appeal was called for hearing on the virtual platform, Mr Kaburu appeared for the appellant and Miss Wangari appeared for the respondents. In view of the fact that the only point of departure was on the sum of Kshs. 400,000.00, the Court requested the parties to discuss and if possible, agree on a reasonable amount. Consequently, the hearing was adjourned to the following day. However, the parties failed to agree and were given time to highlight the written submissions.

5. The appellant's submissions are dated 3rd August 2020. Citing several authorities, the appellant submitted that the learned Judge did not identify any error of law or principle that was committed by the trial court. It stated that the learned Judge did not find that the trial court took into account irrelevant factors or failed to take into account relevant factors. Further, the appellant faulted the Judge for relying on cases that were not cited by the parties and therefore denying them a chance to distinguish or comment on those authorities. It pointed out that those authorities had not been cited before the trial court.

6. The appellant further faulted the learned Judge for failing to take into account the principle of consistency of awards in comparable injuries. He cited the case of *Jackline Kamunyi Kamau v Simon Kiiru Njoki* [2018] eKLR where the same Judge, in a case of similar injuries, awarded a sum of 1.2 million. He pointed out that in that case, the appellant had one fracture on the femur that was operated on, whereas in this appeal, the appellant had multiple fractures on both legs that had to be operated on. In conclusion, he submitted that the Judge reduced the award on the wrong principles and urged this Court to set aside the award and reinstate the award of the trial court.

7. On their part, the respondents filed joint written submissions dated 24th August 2020 in opposition to the appeal. They submitted that the first appellate court, in reducing the damages, was guided by the principles of re-evaluation of evidence and cited the cases of *Selle & anor v Associated Motor Boat Co. Ltd*. [1968] EA 123 and *Peters v Sunday Post Ltd*. [1958] EA 424 in support of this proposition.

8. The respondents submitted that the first appellate court had a duty to re-evaluate the evidence. In so doing, it rightfully concluded that the damages that were awarded by the trial court were on the higher side. Relying on the oft-quoted case of *Mbogo v Shah* (1968) EA 93, the respondent stated that the trial magistrate had misdirected himself on some matters and thus arrived at the wrong decision. Therefore, according to the respondents, the first appellate court was right in interfering with the award for damages. In conclusion, the respondents submitted that the learned Judge did not rely on the wrong principles and therefore the appeal was not merited.

9. We have considered the record of appeal, the respective written submissions as well as the authorities that were cited by the parties. This is a second appeal and therefore only issues of law are for our consideration. In our view, the following issue falls for determination; whether the first appellate court applied the correct principles of law in interfering with the award of the trial court. In deciding this question, it is important to point out that there is no dispute as to the injuries that the appellant suffered. He sustained the following injuries: fracture of the orbit, fracture of the left temporal bone, fracture of the left zygomatic bone, fracture of the left maxilla, lacerations on the left arm and fracture of the left tibia. These injuries were confirmed by the respondents' doctor in the report dated 26th July 2016 as follows: fracture of the left tibia and fibula, non-displaced facial bone fracture involving left

orbit, zygomatic and maxilla and abrasional wound on the left arm. At the risk of belabouring further, the only point of departure between the parties is the amount that was awarded in general damages. The parties have cited several authorities in support of their position.

10. It is also important that we state that no case is similar on all fours as accidents occur in different circumstances and the pain suffered by one person cannot be equivalent to another. Indeed, there is no scale for measuring pain and suffering. People may suffer similar injuries but depending on the level of medical attention that they receive, the pain suffered will be different. So, in awarding damages, all the court tries to do is to ensure that there is consistency in the awards.

11. It is trite that before an appellate court can interfere with the award, it must always give allowance to the fact the trial court had the benefit of seeing the witnesses and a first-hand narration of how the accident occurred, the injuries suffered, the medical attention that was given and any future medical treatment that may be required. This means that the award of damages is not just a game of numbers but an exercise that tries to balance the awards so that similar injuries receive an almost equal amount of compensation. This means that before an appellate court interferes with an award of the trial court, it must be demonstrated the award is so high or so low as to make it an entirely erroneous estimate of the damages, thus making an award an affront to justice.

12. This Court in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages and held that:

> "An appellate court will not disturb an award for general 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..."

13. Similarly, this court in *Gtobu Imanyara & 2 Others v Attorney General* [2016] eKLR held:

> " ...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:
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> "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."

14. Turning to the appeal, it is not in doubt that the appellant suffered serious injuries, a fact that even the respondents admitted. The only difference between the parties in the trial court and the first appellate court is the amount of damages to be awarded.

15. We have examined the award of the trial court of Kshs 1.3 million and the subsequent judgment of the first appellate court. We agree with the appellant that the first appellate court did not in any way demonstrate that the trial court took into account irrelevant factors or failed to take into account relevant factors that would make the award of 1.3 million so inordinately high, that the first appellate

court had to interfere with the award of the trial court. Indeed, as pointed out by the appellant, the same Judge had in similar injuries, given an award of 1.2 million as general damages for pain and suffering.

16. Taking into account all the above, we find that this appeal is merited and it succeeds. Accordingly, we set aside the judgment of the High Court dated 27th September 2019, awarding the appellant Kshs 800,000.00 as general damages for pain and suffering and substitute it with the sum of Kshs. 1.3 million as awarded by the trial court. This award will be subjected to the 20% liability that had been recorded by consent of the parties and adopted as a partial judgment of the trial court.

17. Considering the circumstances of this appeal, each party shall bear their costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR