**Kumuyu v Khaemba & 2 others (Civil Appeal 393 of 2019)**
**[2023] KECA 227 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 227 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 393 OF 2019**

**DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA**

**MARCH 3, 2023**

**BETWEEN**

**RASSANGYLLO MULI KUMUYU ..... APPELLANT**

**AND**

**MICHAEL AEKA KHAEMBA ..... 1ST RESPONDENT**

**LAZARUS KINYANJUI KARANJA ..... 2ND RESPONDENT**

**LIKANYA LIMITED ..... 3RD RESPONDENT**

***(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (L. Njuguna, J.) delivered on 19th March 2018inHigh Court Civil Appeal No. 555 of 2015)***

## JUDGMENT

1. In order to put this appeal into context, it is necessary to give a brief background. On September 1, 2012, the appellant had parked his motor vehicle registration number KBL 075 X at Githurai 45 along Thika road. The 1st respondent, who was employed by the 2nd and 3rd respondents, lost control of motor vehicle registration number KBH 589 Y and hit the appellant causing him bodily injuries. The appellant filed CMCC No 4594 of 2013 in the Chief Magistrates' Court at Kiambu against the respondents.

2. Upon hearing the parties, the trial magistrate, (Hon L Kassan, Senior Principal Magistrate), delivered judgment on October 23, 2015 finding the respondents fully liable for the accident, and awarded damages as follows:

> "(a) General damages – Kshs 600,000/=
>
> (b) Future medical care – Kshs 350,000/=
>
> (c) Loss of earning & earning capacity – Kshs 240,000/=

(d) Special Damages - Kshs 15,000/=

(e) Doctor's attendance -Kshs 12,000/=

TOTAL Kshs 1,217,000/=

3. Aggrieved by the judgment of the trial magistrate, the respondents filed an appeal in the High Court. The memorandum of appeal dated November 19, 2015 raised six (6) grounds of appeal. The appeal was canvassed by way of written submissions. Upon consideration of the pleadings, the learned judge (L Njuguna, J) noted that the appeal was on quantum only. The issues, according to the court, were: whether the award of Kshs 1,217,000/- was excessive for the injuries suffered; whether the appellant ought to have been awarded damages for loss of earning; and whether the award for future medical expenses was excessive.

4. The learned Judge overturned the ruling of the trial magistrate and held as follows:

> "On the award on general damages I find that the trial magistrate misdirected himself in awarding excessive damages as to necessitate the intervention of this Court. As rightly observed by the learned magistrate, the injuries as stated by Doctor Bhanji were exaggerated. According to the P3 form and the treatment notes from PCEA Kikuyu Rehabilitation Centre (which were Respondents documents and exhibits), the only injury sustained by the Respondent was fracture of the right femur. There is no mention of any other injury whatsoever. The award of Kshs 600,000 was not commensurate with the injuries suffered and the authorities submitted."

5. On loss of earning capacity, the learned judge held as follows:

> "The occupation of the respondent in this case was not proven. Other than the allegation that he was a watchman, no evidence was produced to prove the same. As was submitted by the Appellant, an award on loss of earning should be specifically proven so that the court can be able to calculate the same based on what the claimant was earning. This award will normally be awarded where a claimant has evidentially proven that he was working and earning a specified amount of salary. This was not the case. The same principle applies in a claim for loss of earning capacity. Therefore, the award of Kshs 240,000/= in loss of earnings was erroneously made and the same is quashed."

6. On future medical costs, the court awarded Kshs 200,000/- and held:

> "On the award of future medical costs, there are conflicting reports on the same from the two medical doctors who testified. PW1 suggested that the Respondent would require Kshs 350,000/= for treatment at Aga Khan Hospital which is a private hospital whereas DW1 suggested Kshs 80,000 for future treatment in a public hospital. From the testimony of the Respondent, he stated that he was treated at PCEA Kikuyu Hospital and not at Aga khan Hospital. No evidence was adduced as to why the Respondent would need to attend Aga Khan Hospital for the future medical needs and not any other hospital. In awarding damages, a court ought to consider the circumstances of the case in whole. Even though medical expert opinion is meant to assist a court in making its determination, the same is not binding on the face of it and ought to be considered in addition to the other evidence adduced before the court."

7. In the end, the appeal partially succeeded, and judgment was entered for the respondent as hereunder:

> "
>
> "(a) General damages for pain and suffering – Kshs 200,000/=
>
> (b) Future medical care – Kshs 200,000/=
>
> (c) Special damages – Kshs. 15,000/=
>
> (d) Doctor's attendance - Kshs 12,000/=
>
> (e) Loss of earning and earning capacity - Nil
>
> Total Kshs 427,000/=
>
> Each party to bear its own costs of the appeal."

8. Aggrieved by the judgment of the High Court, the appellant filed the appeal before us citing three (3) grounds as set out in its memorandum of appeal dated August 16, 2019. It is not necessary for us to recite the said grounds verbatim. We take the liberty to summarize them as follows: that the learned Judge erred in the assessment of the quantum of damages, thus making an inordinately low award on general damages; and that the learned Judge disregarded the medical evidence adduced at trial hence making an erroneous estimate of the damages suffered by the respondent and disregarded the award on loss of earning and earning capacity.

9. The appellant has filed submissions dated November 21, 2022, which Mr Mwangi, counsel for the appellant, adopted at the hearing. In summary, the appellant submits that, in the instant appeal, the injuries suffered by the appellant are substantially undisputed; that the learned Judge referred to the medical report of PW 1 (the appellant's doctor) in analyzing the injuries; that, in his judgment, the trial Court made reference to the injuries suffered by the appellant and further considered the authorities cited by both the appellant and the respondent in support of the awards proposed; that had the learned Judge interrogated the authority provided to the trial magistrate by the appellant, he would have come to a different conclusion on the issue of quantum, but that she failed to do so.

10. The respondents did not file submissions, but made oral submissions at the hearing. In their submissions, the respondents supported the judgment of the learned Judge.

11. We have carefully considered the record of appeal, the written submissions, and the authorities. The appellant prays that this Court allows the appeal, varies the judgment of the High Court dated March 19, 2018 and/ or set aside, and that the same be substituted with a higher award on general damages and loss of earning and earning capacity, and grant the appellant costs of the appeal.

12. In *Kenya Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR, the Court held, *inter-alia*:

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina v Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No 127 of 2007, and Stanley N. Muriithi & another v Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held

inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

13. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, Onyango Otieno, JA expressed himself as follows:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

14. On the issue of damages, the court has pronounced itself in the case of *Butt v Khan* [1978] eKLR 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 either inordinately high or low."

15. In *Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No 2)* [1985] eKLR, Kneller, JA stated:

> " 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 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."

16. We have considered the grounds raised by the appellant and form the view that the issue for determination is whether the sum awarded by the trial Judge for damages was so inordinately high or low, as to represent an entirely erroneous estimate.

17. We have carefully scrutinized the judgment of the learned Judge and note that she properly directed her mind to the relevant legal principles to wit that the appeal before the court was a first appeal, and that the court had to re-evaluate the evidence and render its independent findings.

18. The issue that we have to determine is whether the damages awarded by the learned Judge were so inordinately low or inordinately high, so as to constitute a wholly erroneous estimate. We have carefully read the judgment of the learned Judge. As already indicated, she addressed her mind to the relevant legal principles that a first appellate court should apply. We are satisfied by the findings of the learned Judge in as far as the award for future medical expenses, loss of earning capacity and the special damages are concerned. However, as far as the reduced award of Kshs 200,000/- is concerned, this requires further examination by this court to determine whether it is inordinately low.

19. The medical report and the P3 form that were produced in the magistrate court showed that the appellant suffered a serious fracture of the femur that required future medical care. The learned Judge appreciated as much, and that is why she maintained the award of future medical expenses, albeit at a lower figure. Looking at the authorities that the appellant has submitted to wit Stanley Gicheru Njogo v Kijara Joseph Kagu & another and Agnes Kamene Mulyali v Harvest Limited, it is our finding that, considering the medical report and the authorities, the sum of Kshs 200, 000/- is inordinately low in the circumstances. We will therefore interfere with the award in respect of this head of claim only and increase the general damages to Kshs 400,000/.

20. In the result, we find that this appeal partially succeeds on the claim for general damages only, and that this claim is enhanced from the sum of Kshs 200,000/- which was the award by the learned judge to Kshs 400,000/-. In the end and for avoidance of doubt, The judgment and decree of the High Court (L Njuguna, J) dated March 19, 2018 is hereby varied in the following terms:

    "

    "(a) General damages for pain and suffering – Kshs 400,000/=

    (b) Future medical care – Kshs 200,000/=

    (c) Special damages – Kshs 15,000/=

    (d) Doctor's attendance - Kshs 12,000/=

    (e) Loss of earning and earning capacity - Nil
    Total - Kshs 627,000/=."

21. Regarding costs, we note that the appellant has partially succeeded, and we award him 50% costs of this appeal and costs in the High Court.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.**

**D. K. MUSINGA, (P)**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**