Muganda v Oceanic Oil Limited & another (Civil Appeal 121 of 2017) [2022] KECA 858 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 858 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 121 OF 2017

W KARANJA, PO KIAGE & F TUIYOTT, JJA

MAY 13, 2022

BETWEEN

COLLINS OMONDI MUGANDA ..... APPELLANT

AND

OCEANIC OIL LIMITED ..... 1ST RESPONDENT

JOSEPH KAUBA ..... 2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu (Cherere, J.) dated 20th April 2017 in CIVIL APPEAL NO. 31 OF 2016)

JUDGMENT

1. Collins Omondi Muganda, the appellant, filed a plaint at the Magistrates Court in Kisumu under Civil Suit No. 537 of 2014. He pleaded that on 5th February, 2014, while he was lawfully riding a motorbike along Kisumu - Busia road, Joseph Kauba, the 2nd respondent recklessly drove a Mercedes Benz Prime Mover registration number KBB 824F (lorry) and had a head on collision with him causing severe injuries which included; a head injury with base of skull fracture; extensive laceration on the face; right posterior rib fracture with lung contusion; comminuted fracture right proximal femoral shaft in the sub trochanteric region; distal tibia (tubular fracture compound); and pulmonary haemorrhage of the right lung.

2. The lorry, which was owned by Oceanic Oil Limited, the 1st respondent, caused such extensive injuries that the appellant required two surgeries, subsequent physiotherapy and orthopaedic treatment. The appellant prayed for judgment against the respondents as follows;

    a. General damages for pain and suffering and loss of amenities.

    b. Special damages as particularized that amounted to Kshs. 642, 201.

c. Costs of the suit.

d. Interest on (a), (b) and (c) at court rates.

3. The respondent filed a defence and denied any liability for the accident and in the alternative contended that the appellant contributed to it due to his own negligence.

4. At the conclusion of the hearing, the trial magistrate Obutu, PM, considered the evidence tendered before the court and the rival submissions, and delivered judgment in favour of the appellant. On liability, he found that the respondents were 100% liable for the accident as they did not proffer any evidence to contradict that of the appellant and since the 2nd respondent was charged for causing the accident, it was further proof of his guilt. On quantum, he relied on *Edward Mzamili Katana -vs- Cmc Motors Group Ltd & Another* [2006] eKLR where the High Court awarded Kshs. 2,000,000 based on similar injuries. He ordered as follows;

a) Liability - 100% against the defendants jointly and severally.

b) General damages at Kshs. 2,000,000

c) Special damages (pleaded and proved by receipts) at Kshs. 642,201

5. Aggrieved by the outcome, the respondents appealed against it to the High Court. T. Cherere, J considered the submissions and evidence presented before the court and concluded that the sum of Ksh, 2,000,000 was inordinately high given the injuries suffered. She pointed out that in *Edward Mzamili Katana -vs- Cmc Motors Group Ltd & Another* (supra) the court in actual fact awarded Kshs. 1,300,000. The learned Judge further found that the claim of Kshs. 642,201 as special damages was not supported by receipts save for the sum of Kshs. 12,800. Consequently, she set aside the award of the trial court and substituted it with;

a Kshs. 1,000,000 as general damages.

b. Kshs. 12,800 as special damages.

c. Costs of the appeal to the respondents while the appellant maintained costs for the suit at the lower court.

6. Understandably, the appellant was disgruntled by the turn of events and filed this instant appeal based on 5 grounds, condensed as, the learned Judge erred by;

a. Wrongly re-evaluating the judgment of the lower court and considering issues that were not pleaded.

b. Interfering with the decision of the lower court when she did not have the opportunity to see the appellant in order to make an informed decision concerning his injuries.

c. Wholly misunderstanding the appellant's case.

10. The firm of Otieno, Yogo, Ojuro & Company advocates is on record for the appellant while the firm of L.G Menezes is on record for the respondents.

11. The appellant submitted that the learned Judge erred by considering the issue of special damages while the same was not raised in the memorandum of appeal. Since no appeal lay against the judgment of the trial court on the issue of special damages, the learned Judge ought not to have entertained it. In any case, the appellant proved his claim on the special damages with receipts amounting to Kshs. 642,201. On the award of quantum, the learned Judge erred by reducing the amount as given by the trial court

whilst acknowledging the severity of the injuries sustained by the appellant. Thus, the learned Judge acted on wrong principles of law and as such, we were urged to allow the appeal and reinstate the judgment of the trial court.

12. The respondent asserted that the High Court sitting as a first appellate court had jurisdiction to re-evaluate the facts and evidence presented at the trial court and arrive at its own independent finding. Therefore, the learned Judge had the power to interfere with the award if satisfied that the principles of law were erroneously applied or that irrelevant factors were taken into consideration at the arrival of the award. Contrary to the assertions made by the appellant, they raised the issue of quantum in the memorandum though they did not specifically mention special damages, just damages. The respondents maintained that the appellant did not strictly prove the entire amount sought as special damages. Some of the documents submitted in evidence were invoices and the same are not sufficient proof for special damages as contemplated in Section 107 of the *Evidence Act*. Finally, the respondents contended that this appeal, as a second appeal, does not raise any issues of law and we were urged to dismiss it with costs.

13. We have carefully considered the record of appeal and the rival submissions and distilled the following as issues for determination; whether this appeal raises issues of law; whether the learned Judge erred by interfering with the quantum award; and whether the learned judge erred by disregarding the invoices tendered in evidence as proof of special damages.

14. We are aware that our duty as a second appellate court is limited to issues of law. Our approach, as expressed by Onyango Otieno, JA in his oft cited dicta in *Kenya Breweries Limited -vs- Godfrey Odoyo* [2010] eKLR is this;

> " 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." (See Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125)

15. The respondent contends that the appeal herein does not raise any issues of law. Matters of law have three elements namely; the technical; the practical; and the evidentiary one which involves the evaluation of the conclusions of a trial court on the basis of the evidence on record. See *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 3 Others* [2014] eKLR. While relying on the foregoing decision on the evidentiary element as an issue of law, this Court in *Dickson Taabu Ogutu (suing As The Legal Representative Of The Estate Of Wilberforce Ouma Wanyama -vs- Festus Akolo & Another* [2020] eKLR stated;

> " From the foregoing, we distil that the issue before this Court is not just a matter of fact but one of law as well since the Court has been called upon to evaluate the evidentiary conclusion of the High Court."

16. We are persuaded by this holding and find indeed we are called upon to evaluate the evidentiary conclusion of the High Court and thus this appeal raises issues of law and we have jurisdiction to determine it.

17. From the record, the learned Judge found the Kshs. 2,000,000 awarded by the trial court to be too high considering to the injuries suffered and reduced the same to Kshs. 1,000,000. She lamented that the cases relied upon by the trial Magistrate was at best old and "better" ones ought to have been relied

upon. She went ahead and based her finding on other comparable cases namely; *Isaac Waweru Mundia -vs- Kiilu Kakie Ndeti T/a Wikwatyo Services* (2012) eKLR where the court awarded Kshs. 1,000,000 for similar injuries; Francis Mwangi Muchiri -vs- Francis Kimani Mbugua Nairobi Hcc No. 2637 Of 1994 where the court awarded Kshs. 100,000 for 25% percent disability; and Edward Mzamili Katana -vs- Cmc Motors Group Ltd & Another [2006] eKLR which was relied on by the trial Magistrate, the learned Judge stating that the same awarded Kshs. 1,300,000 for similar injuries and not Kshs. 2,000,000.

18. Time and time again, this Court has reiterated the principles that ought to guide an appellate court on the award of damages. The said principles were identified by Kneller JA in *Kemfro Africa Limited -vs- Lubia & Another,* (No. 2) 1987 KLR 30, 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 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 wholly erroneous estimate of the damage."

19. We find that the learned Judge's disturbance of the award as given by the trial court was not in keeping with the foregoing principles. Rather she based on her finding on "better" comparable cases which, according to her, were more relevant than the ones relied on by the trial Magistrate. She interfered with the award on quantum on the basis with respect, of personal preference, in that had she been the trial Magistrate she would have come to a different conclusion, and not in accordance to the principles that ought to guide a court on appeal. We associate ourselves with the view of this Court in *Peter M. Kariuki -vs- Attorney General* [2014] eKLR, that;

> " The challenge, in our view is not limited to assessment of damages in personal injuries claims alone; it extends to all assessment of general damages that are essentially at large. In addition, this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive."

20. We find that the trial magistrate's award was not inordinately high. He did not take irrelevant factors into consideration and neither did he leave out some relevant factors. We therefore find that the learned Judge erred in interfering with the quantum when she had no proper basis for doing so.

21. Regarding special damages, the appellant's complaint is that, the learned Judge unilaterally, at nobody's invitation, delved into and overturned the trial court's award of Kshs.642,201 and substituted therefor the sum of Kshs. 12,800. This was on the basis that the receipts produced at trial amounted to the latter sum. We think, with respect, that the appellant's contention is not without substance. We have perused the respondents' memorandum of appeal dated and filed on 4th May, 2016 in the High Court. It raises some five grounds of appeal but none of them impugned the trial magistrate's award of special damages.

22. We think it quite plain that an appellate court is devoid of jurisdiction to overturn a finding of the court appealed from absent a challenge thereto by an appellant. To do so is to defy the fundamental principle that ours is an adversarial system where courts decide only those matters that have been properly laid before them. There can be no basis upon which a Judge can gratuitously and unilaterally overturn a finding, because the Judge is not an appellant. Moreover, to do so offends the basic tenet that a party

ought to be heard before an adverse order, in this case depriving him of a favourable judgment, is made against him. The learned Judge committed a patent error that calls for reversal.

23. The upshot is that this appeal succeeds in totality. We set aside the judgment of the High Court and reinstate the judgment of the trial court. The costs of the suit as awarded to the appellant still stand and interest shall run from the date of the judgment. He will also have the costs of this appeal and of the first appeal.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I confirm that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR