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Omanga v Ouko (Civil Appeal E044 of 2020)
[2025] KEHC 1582 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E044 OF 2020

DKN MAGARE, J

FEBRUARY 25, 2025

BETWEEN

ELIJAH OMANGA .... APPELLANT

AND

ELIZAPHAN MAGETO OUKO .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G.N. Barasa, RM given on 12.4.2020 in Ogembo PMCC 175 of 2017)

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. G.N. Barasa, RM, given on 12.4.2020 in Ogembo PMCC 175 of 2017. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:

    a. Liability 100%

    b. General damages Ksh. 2,400,000/=

    c. Special Damages Ksh. 13,000/=

    d. Costs of the suit.

2. The Appellant was aggrieved and filed a precise Memorandum of Appeal on quantum and set forth the following grounds of appeal:

    a. That the learned trial magistrate erred in law and in fact, in failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.

b. That the learned trial magistrate erred in law and in fact, in awarding Ksh 2,413,000/= for pain and suffering, which amount was inordinately high, unjustified and contrary to the evidence on record.

c. That the learned trial magistrate erred in law and, in fact, by failing to consider the appellant's evidence on record, thereby arriving at an excessive award.

Pleadings

3. Being an appeal on quantum, going to the pleadings related to liability is unnecessary. The Respondent filed suit on 29.8.2017, claiming damages from an accident on 3.2.2016 along Kisii-Kiligoris road at Nyansongo. The Appellant was the owner of motor vehicle registration number KCA 347 L. The Respondent was a passenger. The Respondent pleaded that he suffered the following injuries:

    i. Compound fracture of the left radius

    ii. Compound fracture of the left ulna

    iii. Left posterior hip dislocation, chest contusion

    iv. Fracture of the posterior wall/rim of acetabulum

    v. Fractures of the head of the left femur

Evidence

4. PW1 was the Respondent. He relied on his witness statement dated 16.2.2017 as well as the bundle of documents. It was his case that he was travelling in the accident motor vehicle. It was being driven at a high speed and it hit another motor vehicle registration number KBL 898Y. He suffered injuries and was taken to Kisii Level 6 Hospital. He was later treated and admitted at Tenwek Hospital for two weeks. He was also subsequently treated at the Nairobi West Hospital. He was at the time still getting treatment at the Kenyatta National Hospital.

5. On cross examination, it was his case that he fractured his left leg and was put on metals. He also suffered injuries to his head and back.

6. PW3 was Dr. Morebu Peter Momanyi. He produced his medical report dated 18.11.2016. The conclusion was that the Plaintiff sustained compound radio ulnar fracture with left hip dislocation and fractured the head of the left femur. In his evidence and testimony, it was the case of PW3 that the injuries sustained were compound fracture of the right arm (2 bones), left hip dislocation, fracture of the left thigh bone and pelvic fracture.

7. PW4 was Mutunga Laura, resident doctor in Nairobi West Hospital. She produced the X-ray report, CT scan and discharge summary. Elizaphan Mageto, according to her was admitted with fractures fore arm and dislocation of the hip joint. The fixture of the bones was not successful. She assessed permanent incapacity at 30%.

8. PW5 was Lydia Maritim from Tenwek Hospital, Medical Records Officer. She testified that the Respondent was admitted on 3.2.2016 and discharged on 16.2.2016. He had open forearm fracture and hip dislocation.

9. Liability was by consent recorded at 80:20 in favour of the Respondent and the Appellant closed its case without calling witnesses.

Submissions

10. Parties filed submissions in support of their respective positions in the matter. The Appellant indicated that a sum of Kshs. 800,000/= will suffice as general damages. They relied on Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR, where the court gave judgment of Kshs.700,000/= on 23.11.2018 for fractures of the right femur, compound fracture (r) tibia, compound fracture right fibula, shortening right leg, and episodic pain (r) thigh with the inability to walk without support.

11. The second authority was the case of George Raini Atungu v Jared Ogwoka Ondari [2021] eKLR, where R.E. Ougo J confirmed the award by the lower court for a sum of Ksh.1,000,000/=. The injuries suffered by that claimant were head injury with cut wounds on the left parietal region of the head, chest contusion, fracture of the ribs on the right side, multiple bruises on the upper limbs bilaterally, fracture of the right tibia/fibula bones, fracture of the pelvis; and multiple bruises of cut wounds on the lower limbs.

12. They also relied on an authority of no relevancy, which I shall not mention for the economy of space. The last decision the Appellant relied on was the case of SBI International Holdings (AG) Kenya v William Ambuga Ongeri [2018] eKLR. The injuries are different from the ones suffered by the Respondent herein.

13. The Respondent filed submissions dated 3.4.2023 supporting the award. They indicated that liability had been settled at 80:20 by consent. They relied on the case of Joseph Kahinda Maina v Evans Kamau Mwaura & 2 others [2014] eKLR. In the case the claimants suffered, the plaintiff sustained an unstable pelvic fracture, injuries to the right rib and chest, and multiple dental injuries.

Analysis

14. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the Appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. The jurisdiction for this court to review the evidence in the lower court should be done but with caution. In the cases of Peters v Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

16. The duty of this court in the appeal is thus to reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " …this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in

mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

17. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd V Meru Express Servcie V. A.M Lubia & Another 1957 KLR 27 as follows: -

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

18. For the Appellate court to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> "The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

19. Therefore, where damages are proved to be at large, they must be commensurate with similar injuries. The injuries suffered were as follows:

    i. Compound fracture of the left radius

    ii. Compound fracture of the left ulna

    iii. Left posterior hip dislocation Chest contusion

    iv. Fracture of the posterior wall/rim of acetabulum

    v. Fractures of the head of the left femur

20. The Appellant did not present any medical evidence. As such, the evidence of the Respondent was uncontroverted. In the case of Janet Kaphiphe Ouma & Another –v- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –v- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* stated that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

21. The defence filed by the Appellant in the lower court thus contains mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove her case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –v- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

22. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –v- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

23. The balance of probabilities is also about what is likely to have happened than the other. In Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 it was held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

24. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –v- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –v- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other

which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

25. The injuries pleaded in the plaint dated 16.2.2017 were proved. The medical reports and evidence of PW3 confirmed the injuries suffered by the Respondent. The contention by the Appellant that the Respondent did not sustain a fracture of the radius ulna, acetabulum, and hip dislocation is untenable. The cogent evidence on record was that the injuries occurred.

26. The second aspect is whether the award of general damages was excessive and not commensurate with the injuries. The Appellant did not appeal against special damages and I will not consider it part of the appeal.

27. As regards general damages, the lower court relied on Kiambu Civil Case No. 12 of 2016- Christine Mwigina v Samuel Kairu and awarded Ksh. 3,000,000/-. It is as a result of the liability of 20% against the Appellant that the general damages were reduced to Ksh. 2,400,000/. I have to analyze whether the award of Ksh. 3,000,000/- was inordinately high in the circumstances of this case. In the case cited by the lower court, the Plaintiff suffered the following injuries:

    a. Fracture of the right femur;

    b. Fracture of the ribs 3-6;

    c. Pain in the right side of the chest and the right thigh;

    d. Persistent pain in the right knee.

28. In my view, the injuries in the above case are not similar to those in the instant case. The Appellant submitted Ksh. 800,000/- as adequate compensation in general damages. They relied on the case of Joseph Mwangi Thuita v Joyce Mwole HCCA 177 of 2011 (2018) eKLR. There the injuries were a right femur fracture and a compound fracture of the right tibia with shortening of the thigh, and the award was Kshs. 700,000/-.

29. They also relied on George Raini Atungu v Jared Ogwoka Ondari (2021) eKLR. I do not find the injuries herein to be similar to the instant case as I note therein the Plaintiff suffered a fracture of the ribs and fracture of the tibia and fibula, which are not in this case.

30. The damages must be commensurate to the injuries for consistency in the judicial award. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

31. The principle on the award of damages is settled. In Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but are not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

32. In Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> “This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975]EA 285 (CA-K). None, alas, has been cited to us.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one’s own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR,114).

33. The medical report by Dr. Morebu Peter Momanyi is dated 18.11.2016. The conclusion was that the Plaintiff sustained a compound radio ulnar fracture with left hip dislocation and fracture in the head of the left femur. In his evidence and testimony, it was the case of PW3 that the injuries sustained were a compound fracture of the right arm (2 bones), left hip dislocation, fracture of the left thigh bone, and pelvic fracture. In my view, the injuries pleaded in the plaint were proved.

34. I proceed to establish related injuries. In Kennedy Ooko Ouma Dachi v Joseph Maina Kamau & Another [2018] eKLR, the court substituted the award of Ksh. 1,000,000/= with Ksh. 1,400,000/= for a fracture to the acetabulum. Noting the seriousness of a hip fracture, the learned judge stated:

> “A fracture to the tibia or femur for instance, is very different from a hip fracture, especially in terms of long-term consequences to the victim’s health, and especially mobility. Besides, the awards in the authorities cited by the Respondents are too low. In my view, the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis.”

35. In the case of Cold Car Hire Tours Limited v Elizabeth Wambui Matheri [2015] eKLR, the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement. The trial court award of Ksh. 1,400,000/= as general damages and was upheld by the High Court on appeal.

36. Further in Joshua Ouma Ouko v Raymond Olendo [2021] eKLR the appellant was awarded Ksh 3,000,000/= general damages for fracture of the right femur (comminuted), fracture of the right ulna, right maxillary sinusitis, fracture of the left radius; and contusion on the neck.

37. The fractures suffered by the Respondent were multiple, and the court was called upon to assess damages based on the general hallmark of the injuries, all of which may not have appeared in related judicial decisions. For instance, the authorities cited by the Appellant did not present all facets of the injuries suffered by the Respondent and the suggested Ksh. 800,000/= was not commensurate.

38. On the other hand, the injuries involved compound fractures of the ulna and radius fracture of the femur, posterior hip dislocation, and fracture of the rim of the acetabulum. The award by the lower court of Ksh. 3,000,000/- was thus inordinately on the higher side. The injuries were less severe than in the case of Joshua Ouma Ouko v Raymond Olendo [2021] eKLR. The medical report did not indicate the degree of permanent disability. In the circumstances, I set aside the award of Ksh. 3,000,000/=. In lieu thereof, I enter judgment for a sum of Ksh 1,500,000/=, subject to contribution.

Costs

39. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

40. In the circumstances, the Appellant was the tortfeasor. He appealed on both quantum and partially succeeded. The order that commends itself is that each party shall bear its own costs.

Determination

41. The upshot of the foregoing is that I make the following orders: -

    a. The award of general damages is set aside. In lieu thereof, the court awards a sum of Ksh 1,500,000/= as general damages subject to liability. Interest shall be from the date of judgment in the lower.

    b. Special damages are not affected.

    c. Each party to bear its own costs.

    d. 30 days stay of execution.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

No appearance for the Appellant

Ms. Ndemo for the Respondent

Court Assistant – Michael