Oduol v Gitaru (Civil Appeal E002 of 2020)
[2024] KEHC 690 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E002 OF 2020

RE ABURILI, J

JANUARY 25, 2024

BETWEEN

MOSES ODUOL ..... APPELLANT

AND

RACHAEL MWERU GITARU ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable L. Akoth in the Chief Magistrate's Court at Kisumu delivered on the 28th August 2020 in Kisumu CMMC 105 of 2019)

JUDGMENT

Introduction

1. Vide a plaint dated 28th February 2019, the respondent sued the appellant claiming for general and special damages for injuries sustained following a road traffic accident that occurred on the 4.3.2016 when the appellant's motor vehicle registration number KCF 863A in which the respondent was a lawful passenger.

2. It was the respondent's case that the accident was a result of the negligent manner in which the appellant's driver, agent or servant drove the appellant's motor vehicle registration number KCF 863A was driven, thereby causing it to lose control.

3. In response, the appellant vide a statement of defence dated 12th April 2019 denied the allegations made by the respondent putting him to strict proof and further averred that the injuries sustained by the respondent were as a result of his own negligence.

4. As the parties had already agreed by consent on liability to be apportioned in the ratios of 85:15 in favour of the respondent against the appellant, the trial court determined the quantum of damages awarding the respondent general damages of Kshs. 800,000 and special damages of Kshs. 442,843.

5. Aggrieved by the said judgment and decree, the appellant preferred the instant appeal brought by way of memorandum dated 7th June 2022 and filed on the 14th June 2022 raising the following grounds of appeal:

    1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high, erroneous, oppressive and punitive and amounts to miscarriage of justice.

    2. The learned trial magistrate totally ignored and/or paid lip service to the appellant's submissions and authorities therein cited.

    3. The learned trial magistrate erred in law and fact in failing to appreciate the principles governing the awards of damages, namely that like cases attract similar awards, and ignoring completely the appellant's submissions therein.

    4. The learned trial magistrate completely misdirected herself by holding that high inflation rates (which rates were not specified) would catapult awards of Kshs. 300,000 and Kshs. 400,000 made in June 2019 and January 2020 respectively to Kshs. 800,000 in August 2020 and thus reached an award of damages that is inordinately high, erroneous and amounts to miscarriage of justice.

    5. The learned magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages.

6. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

7. Counsel for the appellant submitted that the evidence adduced showed that the respondent's injuries were soft tissue injuries on the head, chest, arm and ankle joints but that the respondent failed to prove that his ribs were fractured as a result of the accident which evidence was ignored by the trial court.

8. It was submitted that the injuries to the ribs were not supported by the initial treatment notes or X-Ray and cannot be taken into account even when included in a subsequent doctor's report as was held in the cases of *Daniel Odhiambo Ngesa v Daniel Otieno Owino & Another* [2020] eKLR, *BB (a minor suing through his next friend and father GON) v Ragae Kamau Kanja* [2019] eKLR, *James Mburu Njoki v Richard Kipkorir Langat* [2020] eKLR, *Malonza Ivutha v Polysack Company Ltd* [2019] eKLR and *Kariuki Kimuli v David Munyoki* [2020] eKLR.

9. The appellant's counsel submitted that the award of Kshs. 800,000 rendered by the trial court was inordinately high and made without regard to the principle that similar injuries attract similar awards and thus a misdirection warranting this courts intervention as was held in the cases of *Ram Gopal Gupta v Nairobi Ta Packers Limited & 2 others* [2017] eKLR, *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR.

10. It was submitted that an award of Kshs. 300,000 would be sufficient in general damages.

The Respondent's Submissions

11. On behalf of the respondent, it was submitted that it was neither a rule of law that a party can only rely on treatment notes restricted to a certain period of time following an accident, nor that a party cannot obtain further treatment, additional diagnosis and rely on treatment notes thereof following a road traffic accident. Reliance was placed on the case of *Beth Njeri Koigi v Martin Muraya Rwamba & Another* [2019] eKLR where the court stated that the plaintiff had proved his case on a balance of

probabilities that he sustained the pleaded injuries where the primary attendance card did not show the injuries he had sustained.

12. It was submitted that despite the fact that the appellant contended that PEX7, the sick sheet form from Nairobi West Hospital was further proof that the Respondent did not sustain rib fractures because it stated that she was treated for multiple injuries secondary to RTA- Road Traffic Accident, the respondent invited the court to take judicial notice that sick sheets/certificates are intended to formally disclose or communicate recuperation period needed and that this was adequate evidence of the correlation between the accident on 4.3.2016 and the respondents fracture injuries.

13. Counsel for the respondent further submitted that no law precludes a person from seeking further or any additional treatment and that it is common course of events for illness or injury to take time to diagnose through several tests and examinations, the import being that there was no evidence that the respondent's injuries were sustained elsewhere than on the material date.

14. On quantum of damages, the respondent submitted that in view of the fact that there was evidence supporting the rib fracture injuries, that even if this court was to find that the trial court did not consider the Appellant's authorities, this cannot be adequate enough to overrule the court's finding based on evidence as was held by the Court of Appeal in *Alfarus Muli v Lucy M Lavuta & another* Civil Appeal No. 47 of 1997.

15. It was submitted that the Appellant had not demonstrated that there was any irrelevant fact considered by the trial court and neither had he demonstrated that the award was inordinately high to warrant interference by this Honorable Court.

16. The respondent's Counsel further submitted that it was not true that the aspect of inflation catapulted the award from Kshs 300,000 to Kshs 800,000 as the trial court made no such finding but rather that the trial court rightly pointed out that it factored inflationary tendencies in awarding general damages which was a relevant factor for which the trial magistrate was justified.

17. In considering the element of inflation, the respondent relied on the Court of Appeal case in *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR where it remarked, "We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives."

18. On costs, the respondent submitted that it was only fair and just that the appeal be dismissed for failing to meet the well-established threshold in favour of the Respondent.

Analysis and Determination

19. This being the first appellate court, the court has a duty to re-evaluate and re-analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

20. In my view, the issues for determination before this court are whether the trial court erred in awarding the quantum of damages that was excessively high to warrant interference by this court.

21. The respondent pleaded that he was injured following the accident on the 4.3.2016. In his plaint, the respondent listed the following injuries:

    i. Cut wound on the head with bruises

    ii. Injury on the back with resultant lumbar spondylosis

iii. Injury on the chest

iv. Fractures on the 5th, 6th, 7th and 8th ribs.

v. Cut wound on the left arm with tenderness.

vi. Cut wound on the left ankle joint.

vii. Injury on the pelvic equity with tenderness.

22. The respondent testified in support of his case and produced all the requisite treatment notes, P3 forms and treatment notes in support of her claim.

23. Following the accident, the respondent was seen at Jootrh on the same day as is evidenced in PEX8 wherein it is noted that the respondent suffered soft tissue injuries and complained of chest pain and pain at the left hip. The respondent seems to have sought further treatment at Nairobi West Hospital as is evidenced from the various treatment reports adduced as PEX1,2,3,4,5 & 6 on various dates from the 10.3.2016, 11.3.2016, 22.3.2016, and 25.3.2016 and it is only on the 11.3.2016 when a chest x-ray was carried out on her that the report provides that she was found to have fractures on the 5th to 8th ribs on the left side.

24. The respondent's injuries were similarly captured in the P3 form dated 9.2.2019 filled 2 years after the accident and as was produced in evidence as PEX9.

25. It is noted that there was no second medical report obtained by the appellant. The question is whether the award given by the trial magistrate was excessively high and further whether the trial magistrate made the award without regard to the principle that similar injuries attract similar awards and this amounted misdirection to warrant interference by this court.

26. On her part, the respondent submitted that the Appellant had not demonstrated that there was any irrelevant fact considered by the trial court neither had he demonstrated that the award was inordinately high to warrant interference by this Honorable Court and that it was not true that the aspect of inflation catapulted the award from Kshs 300,000 to Kshs 800,000 as the trial court made no such finding but rather that the trial court rightly pointed out that it factored inflationary tendencies.

27. In *West Keya Sugar Company Limited v David Luka Shirandula* [2017] eKLR the plaintiff suffered fractures of 2 ribs on the right side, blunt injury to the right thigh, blunt injury to the right ankle, bruises to both elbows and blunt Injury to the right knee and was awarded Kshs 180,000/- for general damages.

28. In *Bolpak Trading Co Ltd & another v Gilbert Onyango Odie* [2022] eKLR the respondent suffered fractures of the 7th and 8th ribs as well as other soft tissue injuries and the appeal court set aside the trial court's award of Kshs. 400,000 as general damages and replaced it with one of Kshs. 250,000.

29. Comparing the awards made in the above s cases where similar injuries were sustained by claimants and which awards were made in 2017 and 2022 in the period proximate to when the respondent's award was made, I find and hold that the trial court's award on general damages was manifestly excessive and as such I hereby set it aside and substitute it with one of Kshs. 350,000.

30. The upshot is that the instant appeal is meritorious. The award of general damages of Kshs 800,000 made by the trial court is hereby set aside and substituted with an award of Kshs 350,000 less contribution of 15%. As special damages were never challenged as they were pleaded and proved. I shall not interfere. A fresh decree shall be drawn to that effect by the trial court. The appellant shall have

costs of this appeal assessed at Kshs 20,000 to be recovered from the amount payable to the respondent by the appellant.

31. This file is closed. I so order.

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

R.E. ABURILI

JUDGE