Ochola v Ademba (Civil Appeal E038 of 2022)
[2024] KEHC 3672 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E038 OF 2022

RE ABURILI, J

MARCH 28, 2024

BETWEEN

WILLIS ONYANGO OCHOLA ..... APPELLANT

AND

EUNICE ADHIAMBO ADEMBA ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable S.O. Temu in the Principle Magistrate Court at Nyando delivered on the 12th May 2022 in Nyando SPMCC No. 158 of 2019)

JUDGMENT

1. The appellant herein Willis Onyango Ochola was sued by the respondent Eunice Adhiambo Ademba for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 31.12.2018 along the Ahero road at Ahero junction when motor vehicle registration No. KCL 574H in which the respondent was a passenger veered off the road. The appellant filed his defence and denied all the averments in the plaint.

2. The trial magistrate found the appellant to be 100% for the material accident and awarded the respondent general damages of Kshs. 300,000 for pain, suffering and loss of amenities together with costs of the suit and interest.

3. Aggrieved by the said judgment and decree, the appellant filed this appeal vide memorandum of appeal dated 18th May 2022 raising the following grounds of appeal:

    a. That the learned trial magistrate erred in law and in fact in failing to consider the submissions by the appellant on both issues of quantum.

    b. That the learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages thereby arriving at an erroneous decision.

c. That the learned trial magistrate erred in law and in fact by failing to take into account the evidence on record hence arriving at a wrong decision.

d. That the trial magistrate erred in law and fact by awarding the respondent Kshs. 300,000 in general damages which was excessive considering that the injuries sustained by the plaintiff is soft tissue injuries.

e. That the learned trial magistrate erred in assessing general damages at Kshs. 300,000 and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.

4. The appeal was canvassed by way of written submissions. Only the appellant filed submissions.

The Appellant's Submissions

5. The appellant submitted that the respondent only sustained soft tissue injuries and that an award of Kshs. 100,000 would be sufficient in the circumstances. Reliance was placed on the case of Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR where the respondent sustained injuries in the nature of concussion (brief loss of consciousness); blunt injuries to the chest and both hands and an award of Kshs. 300,000 was found to be manifestly excessive and was substituted with an award of Kshs. 100,000

6. The case of *Daniel Odhiambo Ngesa v Daniel Otieno Owino & Another* [2020] eKLR where an award of Kshs. 90,000 was made for injuries of blunt chest injury, sprain on the neck, dislocation of the right shoulder joint, blunt abdominal injury, friction lacerations on the left lower limb and dislocation at the ankle joint.

7. The appellant also relied on the case of *George Mugo & Another v AKM 9Minor suing through next friend and mother of AMK)* [2018] eKLR where the respondent was awarded Kshs. 90,000 as general damages for injuries in the nature of; blunt injury to the left shoulder, blunt chest injury interior, bruises of the left wrist region and blunt injury left arm.

8. The appellant finally submitted that an award of Kshs. 80,000 would be sufficient and adequate compensation.

Analysis and Determination

9. As the first appellate Court, my role is to revisit the evidence on record, re-evaluate it and reach my own conclusion in the matter. (See the case of Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in the age old case of *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).

10. I have carefully perused the pleadings and evidence adduced before the trial court on the injuries sustained by the respondent and the judgment appealed against on quantum of damages as well as the grounds of appeal and the appellant's written submissions. The appellant has not raised any grievance against the liability and therefore, the only issue for determination is whether the trial court erred in awarding the respondent general damages of Kshs. 300,000.

11. The principles upon which an appellate court will interfere with the findings of the trial court on general damages were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:

> " 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 damages."

12. From the trial court record, the respondent pleaded and testified that following the undisputed material accident, she sustained the following injuries:

    i. Degloving injury on the right shoulder joint.

    ii. Blunt injury to the lower back leading to soft tissue injuries.

    iii. Blunt injury to the anterior chest wall leading to soft tissue injuries.

    iv. Soft tissue injuries of both hands.

    v. Soft tissue injuries of both knee joints.

13. The aforementioned injuries were corroborated by the testimonies of PW2 Dr. Obed Omunyoma contained in the medical report produced as PEX4c as well as the P3 form produced by PW4 as PEX3 and finally, in the testimony of DW1 who examined the respondent and prepared a second medical report.

14. From the evidence presented before the trial court, it was clear that the respondent sustained soft tissue injuries.

15. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must be commensurate with the injuries suffered and reflect the trend of previous, recent and comparable awards. This position finds support in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

16. The trial court awarded the respondent general damages of Kshs. 300,000 while the appellant in his submissions proposed that an award of Kshs. 80,000 would be sufficient.

17. I have considered comparable awards for the same injuries sustained by the respondent, bearing in mind that no two cases can be the same.

18. In *Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others* [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000 for a cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000.

19. In this case, considering the injuries sustained by the respondent which were soft tissue injuries, the time lapse since the award was made and comparable injuries in the above cited case of Ephraim Wagura Muthui, I find that the award of Kshs. 300,000 is excessive. On the other hand, taking into account inflationary trends, the award of Kshs. 80,000 proposed by Counsel for the appellant is on the much lower side and would in my view amount to an erroneous estimate of the damage.

20. The award in the case of Ephraim Wagura (supra) was made five years ago and as this court must take passage of time and inflation into account., I find that an award of Kshs. 200,000 would suffice. In the premises, I find this appeal on quantum of damages merited. I set aside the award of Kshs 300,000 and substitute the same with an award of Kshs 200,000 general damages.

21. The award for special damages was not contested and I shall therefore not disturb it. The general damages shall earn interest from the date of judgment until payment in full while the award of special damages shall earn interest from date of filing suit until payment in full.

22. As the appeal is only partially successful and the respondent did not file any opposing submissions, I order that each party bear their own costs of the appeal.

23. The lower Court file to be returned forthwith with a copy of this Judgment.

24. This file is accordingly closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2024

R.E.ABURILI

JUDGE