Climax Coaches Limited v Kavaya (Civil Appeal E129 of 2023)
[2024] KEHC 6182 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E129 OF 2023

RE ABURILI, J

MAY 30, 2024

BETWEEN

CLIMAX COACHES LIMITED ..... APPELLANT

AND

PETRONILAR KAVAYA ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable L. Kiniale in the Chief Magistrate's Court at Nyando delivered on the 20th July 2023 in Nyando CMCC No. 28 of 2020)

JUDGMENT

Introduction

1. The appellant herein Climax Coaches Limited was sued by the respondent vide a plaint dated 29th January 2020 for general damages arising from an accident that occurred on the 1st August 2019 when she was aboard a motor vehicle registration number KCJ 946V owned by the appellant that she alleged was negligently driven resulting in the aforementioned accident.

2. The appellant entered appearance and filed a statement of defence dated 3rd April 2020 where he denied any negligence on his part or his driver. The appellant attributed negligence on the respondent and put her to strict proof.

3. The trial court found the appellant 100% liable for causing the accident and after considering the authorities relied on by the parties herein found that the respondent had sustained soft tissue injuries with a fracture of the right clavicle and awarded the respondent general damages of Kshs. 500,000.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 19th April 2023 raising the following grounds of appeal:

a. That the learned trial magistrate erred in law and in the assessment of quantum by awarding Kshs. 500,000 for general damages an award which was excessive and an erroneous estimate of the damages awardable compared to the injuries sustained by the respondent.

b. That the honourable court erred in law and fact in confirming that the respondent sustained fracture of the clavicle yet there was no proof of the same.

c. That the learned magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in her assessment of damages.

d. That the learned trial magistrate erred in law and in fact erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and the evidence on the record by the appellant's witness i.e. Doctors.

e. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

f. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum and injuries sustained that the respondent sustained.

5. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

6. The appellant submitted that it disputes the fracture of the clavicle alleged to have been sustained by the respondent and that the documents availed confirmed that the respondent sustained soft tissue injuries as was evident from the initial treatment notes from Ahero County Hospital and confirmed by PW2.

7. It was submitted that PW4 who saw the respondent 3 months after the accident testified that he was presented with an x-ray that showed that the respondent had sustained a fracture but that the aforementioned x-ray was never presented in court and thus it was clear that the respondent did not sustain dislocation or fracture of the shoulder joint.

8. The appellant urged the court to disturb the award of general damages of Kshs. 500,000 as the same was too high as to be an erroneous estimate in light of the soft injuries sustained by the respondent. It was submitted that an award of Kshs. 80,000 would be appropriate in the circumstances. Reliance was placed on the following cases:

i. *George Mugo & Another v AKM (minor suing through next friend and mother of ANK)* [2018] eKLR where the court awarded Kshs. 90,000 for soft tissue injuries.

ii. *George Kinyanjui T/A Climax Coaches & Another v Hussein Mahad Kuyala* [2016] eKLR where the High Court on appeal reduced an award of Kshs. 650,000 to Kshs. 109,890 upon finding that the loss of teeth was unrelated to the accident in question as the respondent had sustained soft tissue injuries.

iii. *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR where the court reduced general damages for soft tissue injuries from Kshs. 300,000 to Kshs. 100,000.

iv. *PF (suing as next friend and father of SK minor) v Victor O Kamadi & Another* [2018] eKLR where upon appeal the appellate court substituted an award of Kshs. 50,000 with that of Kshs. 100,000 for soft tissue injuries.

v. *Godwin Ireri v Franklin Gitinga* [2018] eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee and an award of Kshs. 300,000 was reduced to Kshs. 90,000 on appeal.

vi. *Lamu Bus Services & Anor v Caren Adhiambo Okello* [2018] eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh and an award of Kshs. 200,000 was reduced to Kshs. 130,000 on appeal.

9. The appellant submitted that the instant appeal was merited and prayed that it be allowed with costs.

The Respondent's Submissions

10. The respondent submitted that the supplementary record of appeal dated 14/03/2024 filed and served without leave of court be struck out of court records.

11. It was submitted that the trial magistrate was satisfied that the respondent proved her injuries, which injuries were serious in nature as compared to those quoted by the appellant which were soft tissue injuries. The respondent supported the trial court's award and relied on case of *Lawrence Wairimu Wanyoike & Another v Jospeh Letting* [2021] eKLR where the court affirmed an award of Kshs. 800,000 for deep cut wound on the forehead, fracture left clavicle, blunt injury to the chest and blunt injury to the shoulder.

12. It was the respondent's submission that the amount of general damages of Kshs. 500,000 awarded by the trial court be set aside and the same be substituted with an award of Kshs. 800,000.

Evaluation of the Evidence

13. As the first appellate Court, its role is to re-evaluate the evidence on record, reassess it and reach its 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 Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348).

14. The issue for determination is whether the trial court erred in its award of the general damages.

15. The principles upon which an appellate court will interfere with the findings of the trial court 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."

16. Revisiting the trial court record, the respondent pleaded and testified that she sustained the following injuries;

    i. Head Injury

    ii. Injuries to the chest with fracture right clavicle

    iii. Injuries to the abdomen

    iv. Injury to the right shoulder with dislocation

    v. Injury to the wrist joint

    vi. Injuries to the right/left legs with bruises

17. It was her testimony in cross-examination that an x-ray was taken at Vihiga Hospital and that it showed that she had dislocated her right shoulder. However, it was her admission that she did not have documents to confirm the same and that she had not produced the x-ray report in court.

18. PW2 the clinical officer who filed the P3 form on behalf of the respondent testified that he examined the respondent 7 days after the accident occurred. It was his testimony that in addition to bruises to the head and neck, the respondent had tenderness on the neck and abdomen and that she had a dislocation on the right shoulder and right wrist.

19. In cross-examination, PW2 testified that the injuries sustained by the respondent were soft tissue injuries. He testified that the patient had been referred to Jaramogi Oginga Odinga Teaching and Referral Hospital for an x-ray and that a dislocation could be confirmed by the x-ray report. It was his testimony that he did not have the x-ray report in court.

20. PW3 a Clinical Officer at Vihiga County Hospital testified that he saw the respondent 4 days after the accident and that she was examined and it was confirmed that she had suffered soft tissue injuries and fracture of right clavicle. He produced the respondent's outpatient card from the hospital. In cross-examination, PW3 testified that he was not sure whether the date on the document was the date of the accident and that one could not stay with a fracture for 3 days though it would depend on the severity of the fracture. He admitted that the document was adduced in court was not signed and that the said fracture was not indicated on the notes and further that one could not tell the clinical officer who prepared the documents.

21. PW4, Professor Okombo testified that he examined the respondent on the 20.1.2020 more than 5 months after the accident. It was his testimony that the respondent had sustained injuries to the head, chest, abdomen, right leg and right shoulder and that she had dislocation injuries to the right hip joint. He testified that the respondent had a fracture of the right clavicle bone and that he concluded that the respondent's injuries were soft and severe in nature.

22. In cross-examination, PW4 testified that he relied on treatment notes produced by the respondent in preparing his report. It was his testimony that there was no indication of a fracture to the clavicle in the said notes nor was there an indication of dislocation. He further testified that one cannot go home without a fracture being attended to. He testified that he had seen x-ray films though the same were not in court.

23. In re-examination, PW4 testified that the document from Vihiga showed that an x-ray was done and it revealed a fracture to the right clavicle.

24. The appellant called DW1, Dr. Jenipher Kahuthu who testified that she re-examined the respondent on the 11.1.2022 and sent her for repeat x-ray which did not reveal any fractures. It was her testimony that from the treatment notes, there was no evidence of management of fracture and dislocation. She further testified that the respondent did not have x-ray reports for the same and that the 2nd x-ray could have shown a healed fracture. It was her testimony that she made a finding that the injuries sustained by the respondent were soft tissue injuries.The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the *Evidence Act*. It was upon the respondent to prove the injuries sustained.

Determination

25. I have perused the exhibits adduced by the respondent in support of her case for the injuries pleaded. I note that in the P3 form produced, there is no mention of a fracture to the clavicle as alleged by the respondent. The said injury is also not reflected in the treatment notes from Ahero County Hospital, contrary to the testimony of PW2 and further, there is no referral to JOOTRH for an X-ray as alleged by PW2.

26. The only document produced by the respondent in support of her claim that she sustained a fracture to the right clavicle is the treatment note from Vihiga County Hospital. Regarding this document, I note that the same is not signed by the maker and further it was not produced in court by the maker. Further, it was the testimony of PW3 who works at Vihiga County Hospital that one could not tell who was the maker of the said document. The document therefore remained unauthenticated. In addition, the P3 never showed any fracture or treatment for any such serious injuries. In my view, the evidence by the plaintiff/ respondent's witnesses on the injuries sustained were exaggerated and did not reflect the correct injuries. I believe the evidence by DW1 Dr Kahuthu that there was no evidence of fracture or dislocation suffered by the respondent and indeed, if there were such injuries which are very serious affecting her bones, why did she not produce the Xray films for bverification by the court, noting that DW1 is also a doctor and she subjected the respondent to a second medical examination and xrays which did not reveal any healed fracture? The onus of proof lies on the plaintiff to prove all the injuries sustained. The injuries pleaded must be proved on a balance of probabilities. The respondent having claimed that she sustained a fracture and a dislocation, the burden of proof lay on her to prove those injuries. Having pleaded such serious injuries and failed to produce the xrays to show the injuries, the only inference I make is that had the respondent produced the xrays taken, if at all they were taken of her alleged dislocated or fractured clavicle or shoulder, the xrays would have shown no fracture or dislocation at all.

27. It is for the aforementioned reasons that I hold the view that the treatment notes from Vihiga County Hospital are rather suspicious. I opine that no evidentiary value can be assigned to the said document which is not authenticated. As it was the only document that mentioned the respondent's alleged fracture and with PW3 confirming that there was no such injury detected, I hold the view that the said fracture was not proved on a balance of probabilities.

28. Accordingly, it is my view that the respondent only proved that she sustained soft tissue injuries to the head, chest, abdomen, right and left legs and wrist.

29. 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 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."

General Damages

30. The appellant impugned the trial court's award of Kshs. 500,00 as general damages on the grounds that the same was inordinately high and was not based on comparable awards and suggested that this court award the respondent Kshs. 80,000.

31. On her part, the respondent urged this court to revise the trial court's award of general damages upwards from Kshs. 500,000 to Kshs. 800,000. However, there was no cross appeal filed by the respondent and therefore this court cannot revise the award of damages upwards as submitted by the respondent.

32. The Court of Appeal in Simon Taveta v Mercy Mutitu Njeru [2014] eKLR observed that –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

33. I have considered the authorities relied on by both parties in this appeal as well and before the trial court.

34. 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 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.

35. Taking into account the passage of time and inflation, I find that an award of Kshs. 150,000 would suffice.

36. Applying the above principles to this case, I find that the award of damages awarded by the trial magistrate was on the higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries and that there was no evidence of bone injury which influenced the high award.

37. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Kshs. 500,000 general damages and substituting it with an award of Kshs. 150,000.

38. As the damages have been reduced substantially, I order that each party shall bear heir own costs of this appeal.

39. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE