Mungai & another v Ooko (Civil Appeal 766 of 2021)
[2024] KEHC 17075 (KLR) (Civ) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 766 OF 2021

DKN MAGARE, J

MAY 24, 2024

BETWEEN

ELIUD NJUGUNA MUNGAI ..... 1ST APPELLANT

JOSEPH KIHIU MBURU ..... 2ND APPELLANT

AND

MIRIAM AKOTH OOKO ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable P. Muholi. Principal Magistrate delivered on 21/11/2020 in Milimani CMCC Suit No. 8429 of 2019.

2. The Appeal is on the quantum of damages only. It is contended that the award was inordinately high and amounted to erroneous estimate if damages.

Pleadings.

3. In the Plaint dated 28th October 2019, it was pleaded that on 17th June 2019, the Plaintiff was a lawful passenger aboard Motorvehicle Registration No. KBB 821P along James Gichuru Waiyaki Way Junction when the 2nd Defendant drove the 1st Defendant's Motor Vehicle Registration No. KBX 524U so negligently that it knocked down the Plaintiff causing him. severe injuries.

4. The Claimant prayed for Judgement for Kshs. 3,550/= being special damages and also prayed for general damages.

5. The Appellant as Respondents in the Trial Court entered appearance. They filed defence denying the averments in the Plaint.

Evidence.

6. During trial, the Respondent as Plaintiff relied on his witness statement and bundle of documents dated 28th October 2019 and filed in court. The documents were produced as exhibits.

7. The Plaintiff then closed her case without any cross-examination.

8. On the part of the Appellant, they did not call any witnesses.

9. The Trial Court considered the case and rendered its Judgement on 2nd December 2020. The court awarded Kshs. 250,000/- in general damages with costs and interest.

10. Aggrieved, the Appellants who were the Defendant lodged this Appeal.

11. The Appellants filed submissions dated 8th December 2023.

12. It was submitted that the lower court awarded general damages that were inordinately excessive and high. It was submitted that Kshs. 100,000/- would have been adequate compensation for the injuries. They relied on Ngugu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR and Eva Karemi & 5 Others v Koskei Kieng & Another (2020) eKLR to support the submission that Kshs. 100,000/- was adequate compensation and Kshs. 250,000/- as awarded was inordinately high.

13. The Respondent also filed submissions dated 23rd August 2023.

14. It was submitted that the learned magistrate correctly applied the principles applicable for the award of general damages and arrived at a correct decision in the impugned judgement.

15. They relied on Alfarus Muli v Lucy Lavuta & Another (1997) eKRL to submit that the award was proper. They also cited Sameul Muthama v Kenneth Maundu Muindi (2009) eKLR and Leah Wambui Ngugi v Gerge Mbuga Karanja & 2 Others (2016) eKLR to submit that the award of Kshs, 250,000/- in general damages was not inordinately high.

Analysis.

16. I have considered the appeal as well as submissions and authorities filed in court. The issue is whether the lower court erred in the award of general damages.

17. 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.

18. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

a.

> ".. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

20. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

21. Therefore, the Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

22. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

23. I proceed to determine whether the court erred in the award on quantum. The principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary.

24. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR 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 that 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 a wholly erroneous estimate of the damage.

25. 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.'

26. We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

27. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

28. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

29. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

30. With the above guide, if the Award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. 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.

31. The Trial Court is this case awarded Kshs. 250,000/- in General Damages.

32. I wish to state the position in that case of Easy Coach Limited v Emily Nyangasi [2017] eKLR where Court opined that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others [2004] eKLR).

33. Therefore, it is trite law that in assessment of damages in this case, regard should be had to the nature, severity and extent of the injuries suffered by the Respondent which, as is clear from the evidence and medical report were as follows:

    a. Deep cut wound to the upper lip

    b. Deep cut wound to the right leg

    c. Blunt injury to the scalp

    d. Headaches

    e. Pain swelling and blood loss.

34. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

35. Furthermore, in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

36. On the General Damages awarded at Kshs. 250,000/-, I have to consider whether the award was inordinately high.

37. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, the court reduced general damages from Ksh. 230,000/- to Ksh. 180,000/- for the Respondent who suffered the following injuries:

    i. Cut wound with bruises on the temporal region.

    ii. Laceration with inflammation of the frontal part of the head. Right umbilical region tenderness; left iliac region cut wound with bruises.

    iii. Bruises on the posterior aspect of the elbow joint bilaterally.

    iv. Right lower limb (lateral ankle joint) cut wound with bruises and inflammation.

    v. Further, in Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 Others [2019] eKLR where 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/=.

38. Similarly, in Nyambati Nyaswabu Erick Vs Toyota Kenya Limited & 2 others [2019] eKLR the Court set aside an award of Kshs. 55,000/= for a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs and substituted it with one of Kshs. 90,000/=.

39. In Kimori v Mangare (Civil Appeal E004 of 2021) [2022] KEHC 14283 (KLR) (11 February 2022) (Judgment) where the Respondent had sustained some deep cut wounds on the left leg, chest contusion and trauma to the right leg and neck, a sum of Ksh. 130,000/= was awarded as adequate compensation for the injuries sustained.

40. Therefore, based on the cited authorities, I note that the award by the Trial Court of Kshs. 250,000/= was inordinately high. The award of Kshs. 150,000/- would be adequate compensation for the injuries suffered and I so hold and find.

Determination.

41. In the upshot I allow the Appeal and make the following Orders:

    a. Judgement on general damages is set aside and substituted with an award of Kshs. 150,000/-

    b. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Kimondo Gachoka & Company Advocates for the Appellant

Waiganjo Wachira & Co. Advocates for the Respondent.

Court Assistant - Brian