IAAA (A Minor Suing Through Next Friend & Father AAA) v Sebi (Civil Appeal E204 of 2023) [2024] KEHC 16917 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 16917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E204 OF 2023

F WANGARI, J

JUNE 28, 2024

BETWEEN

IAAA (A MINOR SUING THROUGH NEXT FRIEND & FATHER AAA) ..... APPELLANT

AND

ABDI MOHAMED SEBI ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Orders of Hon. G. Sogomo, Principal Magistrate delivered on 14/7/2023 Mombasa Chief Magistrate Court Civil Suit No. 1113 of 2019.

2. The Memorandum of Appeal had one main ground, that the award of general damages was inordinately low bearing in mind the injuries sustained by the Plaintiff.

Analysis

3. 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.

4. 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..."

5. 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..."

Quantum.

6. In an appeal against assessment of damages, the Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service 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.

7. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

8. 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.

9. Furthermore, in Parvin Singh Dhalay v 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:-
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> "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."

10. There is no dispute that the Plaintiff who was 2 years old at the time of the accident sustained severe injuries after the Defendant's vehicle hit and ran over her face.

11. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. 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"

12. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. 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 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.

13. I now analyze similar fact cases on quantum. I have considered the injuries suffered by the Plaintiff in the respective suits vis a vis the pleadings and authorities cited. The Plaintiff suffered the following injuries;

    a. multiple skull fractures and on the facial bones

    b. displacement of the jaw

    c. leaking cerebrospinal fluid from the right ear

    d. loss of vision of the right eye

14. As a result of the above injuries, the Plaintiff was found to be 52% partial disability. The trial court awarded Kshs. 2,000,000 as general damages and Kshs. 1,124,671 as special damages. The special damages remain undisturbed as no appeal was lodged on the award.

15. The Appellant in the submissions proposed an award of Kshs. 5,000,000 as general damages and future medical expenses of Kshs. 6,000,000 and loss of future earnings for Kshs. 1,500,000. Reliance was made on the case of AMK (Suing as the mother and next friend of JMK – Minor) v KPLC eKLR Suit No. 28 of 2019.

16. The Respondent in his submissions proposed an award of Kshs. 2,000,000 as general damages as awarded by the trial court, and this court ought not to disturb the award on general damages. Reliance was made on the case of Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR.

17. The duty of this court is to assess the damages payable for the injuries sustained by the Plaintiff. I rely on the case of Amazon Energy Limited v Magdaline Nthenya Mathias & another [2019] eKLR, on appeal, Kshs. 2,500,000 was awarded where the Plaintiff suffered fractures of the thigh, skull fracture, fracture of the shoulder and total loss of vision of the right eye.

18. Considering that the above award was made in year 2019, and in consideration of the passage of time and inflation rate, I find that an award of Kshs. 3,500,000 is sufficient and adequate.

19. On future medical expenses and loss of earnings, these are special damages which should not only be pleaded but proved. This was held in the case of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

20. The Plaintiff pleaded future medical expenses. I however note that on this award, the same was not subject to the appeal as per the Memorandum of Appeal dated 7/8/2023. It was raised on submissions. That notwithstanding, the Plaintiff has failed to prove that the amount claimed as future medical expenses.

21. On costs, each party shall bear its own costs.

Determination.

22. In the upshot, I make the following orders: -

    a. The appeal on quantum is hereby allowed by setting aside the award of the lower court and substituted with an award of Kshs. 3,500,000 as General Damages for pain and suffering.

    b. The appeal on Future Medical Expenses and loss of Future Earnings is hereby dismissed.

    c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JUNE, 2024.

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F. WANGARI

JUDGE

In the presence of:

Awino Advocate for Fais Advocate for the Appellant

Omwenga Advocate for the Respondent

Barile, Court Assistant