Muhia v Kariuki & another (Civil Appeal E026 of 2022) [2023] KEHC 3391 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E026 OF 2022

FR OLEL, J

MARCH 29, 2023

BETWEEN

MOSES MUTUGUTI MUHIA ..... APPELLANT

AND

MWANGI KARIUKI ..... 1ST RESPONDENT

HIMDAT FADHIL MOHAMMED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon E MBURU (SRM) delivered on 24th September 2020 in Naivasha CMCC 704 of 2015)

JUDGMENT

1. The Appellant herein filed a suit claiming damages for injuries sustained from a road traffic accident which occurred on March 8, 2015. The appellant averred that he was riding his motor cycle registration Number xxxx along Fly over- Njambini road, when the respondent by himself, his servant, agent and/or driver carelessly and recklessly drove motor vehicle registration Number xxxx causing it to lose control and ram into the appellant's motor cycle from behind and as a consequence the appellant sustained serious injury. After the suit was heard the appellant was awarded General damages of Kshs 1,000,000/= and special damages Kshs 7,500/= plus costs and interest.

2. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal on March 9, 2022 raising 2 grounds of appeal namely:-

    a. That the learned trial magistrate erred in law and in fact by failing to consider the plaintiff/Appellant submissions on quantum payable and therefor awarding general damages which were too low comparable to the injuries suffered by the appellant.

b. That the learned magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstance so of the case.

3. The Appellant herein therefor prayed that the award of damages be set aside and substituted with an award commensurate with the injuries sustained.

Background Facts

4. The appellant adopted his witness statement and further testified that on March 8, 2015 at about 6.00pm he was riding his motor cycle heading toward Njambini and was on his left side. A motor vehicle suddenly entered the main road from a petrol station called Texas or shell, and violently collided with him as it joined the main road. As a result of the injury, he lost consciousness and found himself at Kwa Ngothi hospital. He was later transferred to St Mary's Hospital Gilgil where he was admitted for 3 months. Due to the said accident, he suffered serious injuries which included; broken pelvic bone and broken right ankle, his bladder was torn and general blunt injuries all over the body. He further testified that he had to undergo 4 operations and had not fully healed as he still had a loose bladder. He blamed the defendant as he hit him from behind and he fell on the suit motor vehicle bonnet.

5. In cross examination he maintained that the driver of the suit motor vehicle was on the wrong as he entered the main road from the petrol station without a proper look out for other road users. He reaffirmed that the impact was in front of the motor vehicle, which hit the motor cycle from behind and threw him onto its bonnet. He confirmed that he had not fully healed from the accident and had a valid driving licence allowing him to ride and/or driver on the road.

6. PW2 Dr Obed Omuyoma testified that he was a medical practitioner within Nakuru town and had compiled the medical report of the appellant dated August 27, 2105. He suffered fracture of the pelvis and bladder tear with fistula and also fracture of medial mandala or right ankle joint. At the time of examination the appellant could still not walk without the aid of crutches and had suffered physical disability of 40%. The degree of injury was classified as Grievous harm. The appellant was using crutches to walk as he had not fully healed from the fractures, but the bladder injury was permanent and he would use a catheter forever. The fracture would heal but he would not go back to normal.

7. PW3 PC John Korogi testified that he was based at Magumu sub base and had the OB for an accident that occurred on March 9, 2015 one PC Mwendwa visited the scene, which was along Fly over – Njambini road. It was reported that the driver of motor vehicle xxxx Nissan wagon was driving out of Texas petrol station and joined the road without carefully looking out for oncoming traffic. As a result he collided with motor cycle xxxx. The suit motor vehicle was damaged on the driver's door, bonnet and windscreen. The police blamed the driver of motor vehicle xxxx. The person injured as a result of the said accident was the plaintiff. He was issued with a police abstract which was produced into evidence.

8. On February 4, 2020, the plaintiff withdrew the case as against the 2nd defendant in the lower court and the same was allowed. DW1 Francis Mwangi stated that he was a pastor and recalled very well what occurred on March 8, 2015. He was at Njambini and went into shell fuel station to fuel his motor vehicle .This was at about 6.30pm. As he exited from the petrol station, trying to join the main road, he noticed a motor cyclist riding at high speed. The said motor cyclist lost control, came into his lane and hit his motor vehicle on the bonnet. He further stated that he tried to swerve but it was too late, the accident occurred on his lane. He stopped and observed that the car was damaged on the bonnet, driver's headlight and windscreen.

9. The matter was reported to the police who visited the scene. He also discovered that he knew the rider of the motor cycle and even visited him in hospital. In cross examination he confirmed that the suit motor vehicle xxxx was his motor vehicle and stated that it was the appellant who should have given way. He denied having poor judgment and blamed the appellant for the accident. In cross examination he reiterated that the accident happened on his lane and it was the appellant who was to blame for the accident. According to the witness the appellant had recovered and walked well with no deformity.

10. The trial court proceeded to make a determination on liability and quantum. The defendant was found to be 100% liable and the plaintiff awarded Kshs 1,000,000/= as General damages, Kshs 7,500/= as special damages plus costs and interest of the suit. Being dissatisfied by the said award the appellant file this appeal specifically as against the general damages awarded which they opined was too low comparable to the injuries suffered by the appellant and comparable awards.

Appellants Submissions

11. The appellant did submit that the court has wide discretion in awarding damages and that each case must be looked at in its peculiar circumstance, more so with regard to accident cases where injuries suffered differed from person to person. Such discretion was to be exercised judicially with wise circumspect and upon some legal principle's

12. The appellant further stated that the appellant court can interfere with an award if the trial court;

    i. Took into account an irrelevant factor or,

    ii. Left out of account a relevant factor, or short of this

    iii. The amount is so inordinately low or so inordinately high that it must be erroneous estimate of damages.

    iv. Such award must also be consistent with limits awarded for similar/ comparable injuries. See *Kemfro Africa Limited T/A Meru Express services, Gathongo Kanini Vs AM Lubia and Olive Lubia (1987) KLR 30*

13. The appellant submitted that the injuries suffered by the appellant were sever leading to 40% permanent disability as confirmed by Dr Omuyoma. Therefore, the assessment and citation used by the trial court was inaccurate and erroneous as the trial magistrate did not consider the inflationary factors given that similar awards considered were delivered ten or so years ago. The appellant cited *Ruth Lilian Nyawir okoth Vs Philip Ologo Odeny HCC No 1186 of 1996 Nairobi*, & *Gilbert Nicholas Otieno v Oil Crop Development Co Ltd & Ano [2009] eKLR*. In both citations the plaintiffs suffered similar injuries as the appellant herein and were awarded between Kshs 950,000 to Kshs 1,200,000/= more than ten years ago.

14. The appellant also cited with approval the case of *Christine Mwigina Akonyo v Samuel Kairi Chege [2017] eKLR* , where the plaintiff was awarded Kshs 4,000,000/= for similar injuries though slightly more serious. The appellant therefor did submit that this court should reconsider the award and increase the same to at least Kshs 2,000,000/= plus costs of the suit and the appeal.

Respondent's Submissions

15. The respondent opposed this appeal and stated that the quantum awarded was in order. It was not excessive and/or inordinately high so as to represent an error of estimate in the compensation awarded to the respondent.

16. Further the respondent submitted the trial magistrate erroneously held that the respondent was 100% liable yet there wasn't sufficient proof of the same. The police office also testified that the accident was pending under investigations and the respondent was not charged in court. They urged the court to find contributory negligence on the part of the appellant.

17. On the issue of quantum awarded, the respondent submitted that there should be a balance between the injuries suffered and the need to make reasonable compensation to the accident victim. It was the respondent's submission that the award was appropriate as the appellant had exaggerated his condition. The respondents relied on the case of Gilbert Nicholas Otieno Vs Oil Crop Development Co Ltd & Ano [2009] eKLR where the court awarded Kshs 740,000/= , *Savanna International Ltd v Muka(civil Appeal No 31 of 2018)[2022] KEHC 675(KLR*) & *Lillian Wanja v Cyprian Mugendi Igonga & 2 others [2016] eKLR* where the plaintiff was awarded Kshs 500,000/= for soft tissue injury and dislocation of the left Ankle joint

18. The respondent stated that the award cannot be faulted as the court took into consideration the nature of injuries sustained, inflationary factors and similar citation's regarding similar injuries and rightfully arrived at the sum of Kshs 1,000,000/= as general damages for pain and suffering and loss of amenities.

19. The upshot of their submissions was that this appeal had no merit and should be dismissed with costs

Determination

20. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

21. As held in *Selle & Another v Associated Motor Boat Co ltd & others [1968] EA 123* where it was stated that;

> ' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif v Ali Mohammed Sholan[1955], 22 EACA 270.

22. In *Coghlan v Cumberland [1898] 1 Ch, 704* , the court of appeal of England stated as follows;

> ' Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on

the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.'

23. Also in *Peters v Sunday post limited*, the court of Appeal East Africa stated that ;

> ' It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'

24. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

25. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No 284 of 2001[2004]eKLR 55* set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> ' It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate'.

26. Similarly, in *Woodruff v Dupoint[1964] EA 404* it was held by the East Africa court of Appeal that:-

> ' The question as to quantum of damages is one of the facts for the trial court judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them.The quantum of damages being a question of fact for the trial judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff but whether the damages awarded are 'such as may fairly and reasonably be considered as arising according to the usual course of things, from the breach of the contract itself.' The plaintiff is not entitled to be compensated to such an extent as to place him in

a better position than that in which he would have found himself had the contract been performed by the defendant.'

27. It was also held by the court of appeal in *Mohammed Mohammed Jabane v Highstone Butty Tongoi Olenja Civil Appela No 2 of 1986[1986] KLR 661;VOL 1KAR 1982;(1986-1989) EA* 183that;

> ' Unless it is shown that the learned judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrable acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts'

28. Finally in the decision of *West(H) and Sons Limited v Shepherd [1964] AC 326* at 345 it was appreciated that ;-

> ' The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously'.

29. The Appellant submitted that taking into account similar award for similar injuries the award of general damages should be increased to at least Kshs 2,000,000/= The Respondents on the other hand in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld.

30. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the appellant. It is clear he suffered severe bodily injuries and the accident raptured his bladder leaving him with a permanent disability of 40%. The appellant is unfortunately condemned to using a catheter all his life. Further he had multiple fracture of the pelvic bone and right ankle which will heal but as per the doctors evidence he will not go back to normal. Therefore the appellant ought to have been adequately compensated.

31. The question which then arises is if the award of damages of Kshs 1,000,000/= was adequate or was it inordinately low to justify intervention by this court. I do concur with the appellant that given the serious nature of the injuries sustained the award was inordinately low compared to similar injury awards and therefor justifying intervention by this court. In arriving at this finding, I have considered the respondents injuries, the medical report, comparable citations by both the parties as submitted in the trial court and those filed in this appeal as well as other citations as outlined above.

32. I do find that the award of Kshs 750,000/= to Kshs 1,000,000/= as proposed by the respondent, were awarded to similar injuries almost ten years ago. Comparative citations including of Christine Mwigina Akonyo v Samuel Kairi Chege [2017]eKLR, *Fanuel Karunja Wanaswa v Butali sugar Millers Ltd [2018] eKLR* for similar injuries the courts awarded sums ranging from Kshs 1,500,000/= to Kshs 4,000,000/= for similar injuries as sustained by the appellant. I therefor find merit in this appeal and substitute the award of General damages from the Kshs 1,000,000/= awarded to Kshs 1,800,000/=.

33. The Respondents had also submitted that there should be contributory negligence by the appellant. Unfortunately they did not file a cross appeal and therefore there is no basis of determining the said issue.

Disposition

34. The upshot is that this appeal is merited award of General damages as assessed in Naivasha CMCC NO 704 OF 2015 is set-aside and the same is substituted with an award of Kshs 1,800,000/=.

35. The costs of this appeal is awarded to the appellant and is assessed as Kshs 120, 000/= all-inclusive.

36. It is so ordered.

Dated, signed and delivered in open court at Machakos this 29th day of March, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;