Otieno v Dodhia Packing Limited (Civil Appeal E844 of 2021)
[2024] KEHC 6703 (KLR) (Appeals) (21 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL E844 OF 2021

DKN MAGARE, J

MAY 21, 2024

BETWEEN

DICKSON OTIENO OTIENO ..... APPELLANT

AND

DODHIA PACKING LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of Hon. E.M. Kagoni - PM given on 17/11/2021 in Nairobi CMCC 1819 of 2016. The Appellant was the plaintiff.

2. The Appellant claimed for damages arising from work factory injury on a feeder machine. He allegedly attempted to remove particles of a carton struck in a feeder machine. His left hand was sucked by the machine and crushed. This being a work injury accident on 15/2/2015. The matter had been held in abeyance pursuit to the imbroglio obtaining in the WIBA dispute. The Chief Justice gave directions for hearing of the work injury cases especially the ones filed while there were decisions allowing for their filing, hence giving rise to legitimate expectations.

3. The court below made a decision that a sum of Ksh. 1,080,730 was paid in 2016. He therefore dismissed the suit in limine. The court relied on the case of *Apharama Ltd -vs- Peter Kariuki Chebron* (2017) eKLR. The court found that the Respondent was not denying liability and found the money paid as adequate compensation.

4. The Appellant filed an appeal and set out the following grounds of Appeal: -

    a. That the learned Magistrate erred in law and fact by awarding general damages for pain and suffering that as so manifestly inadequate as to be erroneous.

b. That the Learned magistrate erred in law and fact by not making an award for reduced earning capacity.

c. That the learned Magistrate erred in law and fact in not properly considering the medical reports on record and hence arrived at a wrong assessment of damages that are so manifestly inadequate as to be erroneous.

d. That the learned magistrate erred in law and fact in ignoring the plaintiff's written submission filed on 28th June, 2018 in writing his judgment.

e. That the learned Magistrate erred in law and fact by finding that a sum of Ksh. 1,080,750/= was sufficient compensation for injuries surfed by the plaintiff.

f. That in all circumstances of the case, the findings of the learned magistrate are totally unsupportive in law.

g. That in all circumstances of the case, the learned magistrate failed to do justice before the Appellant.

5. The Appeal is principally on quantum. 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.

6. 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."

7. 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; -

> " .. 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."

8. 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.

9. 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..."

10. In *Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D. S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

11. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

12. The foregoing was settled in the cases of *Butter vs Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

13. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

14. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd vs Meru Express Servcie Vs. 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.

15. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs 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..."

16. Therefore, for me 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.

17. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

18. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

19. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may havfidelite decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

20. 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 vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs 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..."

21. 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.

Pleadings

22. The Appellant pleaded that he suffered the following injuries:-

    a. Severe crash injury on the left hand

    b. Amputation of the left hand on the proximal end leaving a stump.

    c. Multiple fractures and dislocation of the phalanges and metacarpals.

    d. Pain

23. The injuries basically relate to one crash on the left hand which resulted in the amputation of the left hand leaving a stump.

Evidence

24. There was a settlement made for Ksh. 1,006,156 under DOSH for 60% disablement together with a sum of 74,574 for loss of earnings for 111 days. The Appellant was thus awarded Ksh. 1,080,130. This amount was paid. There was assessment by Dr. Kimaj J and Dr. Githiari J on 10/9/2015.

25. It was indicated that the appellant was admitted at Avenue hospital from 15/2/2015 and 20/2/2025. Avenue Hospital through Dr. George K. Musembi assessed liability at 48% permanent incapacity.

26. The report from the Protection House surgical clinic stated that 75% of the left hand was amputated leaving a stump consisting of the ball of a hand. It was covered with normal skin graft. The report was signed by Mr. W.N. Wokabi a consultant surgeon. The defence denied liability in its defence dated 1/7/2016.

27. The appellant filed an amended plaint dated on 16/2/2017 in it he claimed loss of future earnings. An amended defence was filed on 28/3/2017 several particulars of negligence were then attributed to the Appellant. The appellant is said to have filed submission on 26/6/2018. The court noted that none had been filed. The Respondent filed submissions on 11/4/2018. The report by Mr. Wokabi was admitted by consent of the Parties.

28. The appellant stated that he was removing a stuck paper a faculty machine pulled his hand. It had been switched off. It was at same. It is only till 10 am that it was removed. He testified he was paid Ksh. 1,0880,750 as workman compensation.

29. On 4/6/2018 the defendant testified. He stated that the Appellant was paid full salary and compensation under WIBA. The court is to defer to the court below on facts. However, in this case, this court has more latitude and the court making the decision did not hear witnesses. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

Submissions

30. The Appellant filed submissions dated 13/12/2023. The Appellant did not submit how the lower court erred in its finding on liability. It was submitted that the learned magistrate found the Respondent fully liable for the accident.

31. It was submitted that the Honourable magistrate awarded damages for pain and suffering that were insufficient. They relied on *Kemfro Africa Ltd vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27. where the court awarded damages of Ksh. 2,000,000/- in similar injuries as in this case.

32. They also cited *Roba Doti Guyo v Jiang Zhongemei Engineering Company* (2015) eKLR and *Umoja Rubber Products Likited v Robson Rimba Lewa* (2015) eKLR and submitted that the award of Ksh. 1,080.000 was inadequate.

33. They relied on *Gitobu Imanyara & 2 Others v AG* (2016) eKLR to submit that that this court had the duty to consider and reevaluate the evidence and the law as applied by the lower court.

34. On loss of future earnings, it was submitted that the award ought to have been awarded at Ksh. 3,098,880 as submitted by the Appellant.

35. They relied on the cases of *Cathering Gatwiri v Peter Mwenda Kaarai* (2018) eKLR to submit that the learned magistrate did not consider the impact of the injuries on the future working of the Appellant.

36. They also cited *inter alia* *Beatrice Anyango Okoth v Rift Valley Railways Kenya Limited* (2018) eKLR where it was submitted that Ksh. 2,500,000/- was awarded for similar injuries. They therefore prayed for this court to set aside the Judgment of the lower court. I was urged to allow the appeal.

37. The respondent urged me to dismiss the Appeal herein.

Analysis

38. There are only 2 issues in this matter

    a. General damages

    b. Loss of future earnings.

39. The court did not decide on the aspect of loss of earnings. This is for a good reason. The Appellant amended his plaintiff and prayed for loss of future earnings. This is in itself a special damages. It must be strictly proved. It was not shown that the Appellant was terminated.

40. The 111 days he did not work he was paid Ksh. 74,575/=. He did not testify that he lost his job. There were no material placed before the court to Act. I have an uncanny feeling that the Appellant was seeking loss of earning capacity. However, he did not do so. This he could easily have been obtained by multiplying the percentage of disability with the number of years possibly 10 years which he may not work multiply by 12.

41. In this case salary was pleaded at 13,450 which will have worked to 968,400, that is 13,450 x 12x 10 x 60%. However, the Appellant did not seek loss of earning capacity. He sought loss of earnings. This must be strictly proven. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. JA. - held:
>
> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and

may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

42. The Court of Appeal has dealt with the question of loss of earnings and loss of earning capacity. By pleading one and attempting to prove another, the appellant fell into error.

43. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in *Butler vs. Butler* [1984] KLR 225, as follows: -

    a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

    b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

    c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

    d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

    e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

    f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

44. Pleadings are sacrosanct. They determine boundaries to which parties may navigate. It is anathema to god order to ignore pleadings and start tendering evidence on another impleaded issue. Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

45. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

46. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

47. The court erred in not deciding on the question. However, upon deciding the question the our herein finds that there is no evidence of loss of earnings. The Appeal in that respect is dismissed.

48. The second aspect is General and special damages.

49. A sum of Ksh. 2,000/= was leaded and proved. It could only be useful if there was a claim remaining to be paid.

50. On general damages, the Appellant suffered a crushed of the left hand leading to Amputation. The appellant relied on the case of *Simba Platinum -vs- Nicholas Wandera* (2021) eKLR where the court confirmed an award on 2,000,000.

51. The court found that a sum of Ksh. 1,080,950 was sufficient. This was not the duty of the court. The court was to find the amount and from that amount, find whether Ksh. 1,880,750 is more or less than the amount. If it is less than decree for the balance. If it is less then dismiss the suit. It must also be recalled that payment was made in 2016. It does not have the same value as the same amount today.

52. Looking at the awards the courts have oscillated between 1,200,000/= - 1,500,000/= in this case the amputation was 75%. Consequently, an award of Ksh. 1,500,000/= will have been sufficient. The said amount is subject to Ksh. 1,080,750 already paid this leaves a sum of Ksh. 419,250.

53. I therefore set aside the dismissal of the suit and enter judgment for the balance of General damages of Ksh. 419,250.

54. The appellant had proved special damages of Ksh. 2000/=.

55. The appellant shall have costs. Liability remains at 100%

Determination

56. In the circumstances I make the following orders: -

    a. I allow the Appeal on quantum on 100% basis. I substitute thereon with judgment for Ksh. 1,500,000/= less 1,080,750 = 419,2540/=

    b. I allow special damages of Ksh. 2,000/=

    c. I dismiss the claim for loss of future earnings.

    d. The Appellant will have cost of the appeal of Ksh. 85,000/=

    e. The appellant will have costs in the lower court based on the award sum of Ksh. 421,250/=

    f. Stay for 30 days.

    g. This files is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21ST DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Naututu for the Respondent

No appearance for the Appellant

Court Assistant- Brian