Kiando v Mungai (Civil Appeal 52 of 2023)
[2024] KEHC 10412 (KLR) (20 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 52 OF 2023

FN MUCHEMI, J

AUGUST 20, 2024

BETWEEN

JOSEPH NGIGI KIANDO ALIAS JOSEPH NGINGE KIANDO ALIAS MR KIANDI JOSEPH NGIGI ..... APPELLANT

AND

MATHIAS BIBU MUNGAI ALIAS MATIAS BIBU ALIAS MATTIUS BIBU ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. B. M. Ekhubi (PM) delivered on 9th June 2022 in Thika CMCC No. 302 of 2010)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 302 of 2010 a claim that arose from a road traffic accident whereby the court below found the appellant fully liable and awarded several heads of damages as general damages for pain and suffering at Kshs. 600,000/-; diminished earning capacity Kshs. 150,000/-; future medical expenses Kshs.100,000/- and special damages of Kshs.39,050/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact by finding the appellant to blame for the accident whereas the respondent was an excess pillion passenger contrary to the *Traffic Act*.

    b. The learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions on liability and quantum thereby arriving at an unjustified decision on quantum.

c. The learned trial magistrate erred in law and in fact in failing to uphold the doctrine of precedent and as a result arrived in unjustified decision.

3. Parties disposed of the appeal by way of written submissions.

Appellant's Submissions

4. The appellant submits that the respondent was travelling as an excess pillion passenger along Thika Garissa road when he was involved in a road traffic accident with motor vehicle registration number KCH 643U. The appellant further submits that the respondent called a police officer as a witness who informed the court that the respondent was an excess pillion passenger according to the records. The respondent admitted to that fact on cross examination. Thus, the appellant argues that the respondent's admission together with the police officer's testimony was sufficient to find the respondent was statutorily negligent and thus apportion liability.

5. The appellant relies on the case of Milka Akinyi Ouma vs Kenya Power Lighting Co. Ltd & Another (2020) eKLR and states that he did not testify but that did not take away the respondent's legal burden to prove his case on a balance of probability.

6. Relying on the case of Daniel Toroitich arap Moi vs Mwangi Stephen Muriithi & Another (2014) eKLR, the appellant submits that the trial court failed to underscore that the burden of proof does not shift.

7. The appellant relies on the cases of Rosemary Karry Muriithi vs Benson Njeru Muthitu (2020) eKLR and Paul Lawi Lokale vs Auto Industries Limited & Another (2020) eKLR and submits that the respondent contributed to the liability by voluntarily getting on a motor cycle where he found there was a passenger already. That notwithstanding, the respondent did not testify that he complied with the provisions of the *Traffic Act* by wearing a helmet and a reflector jacket as the accident occurred at 5 am and it was dark thus the reflective jacket could have served as a warning to other motorists of the respondent's presence on the road.

8. Relying on the case of Khambi & Another vs Mahithi & Another (1968) EA 70, the appellant argues that the court ought to apportion liability at 50% to the respondent as the trial court failed to consider the circumstances under which the accident occurred, the respondent voluntarily boarding a motor cycle where there was another passenger on board and the respondent failed to wear reflective attire.

The Respondent's Submissions

9. The respondent submits that he proved that motor vehicle registration number KCH 643M belonged to the appellant by producing into evidence a copy of records from the registrar of motor vehicles and a duplicate certificate of insurance which showed that the appellant was the insured owner of the said motor vehicle.

10. The respondent further submits that an accident occurred between himself as a pillion passenger aboard motor cycle registration number KMCG 118T and motor vehicle registration number KCH 643M on 8/6/2019 along Thika Garissa road, a fact denied by the appellant but not controverted in evidence by him. The respondent further submits that he testified that the accident occurred when the driver of the suit motor vehicle rammed onto the rear of the motor cycle. He blamed the driver for the accident for driving at a high speed, failing to keep appropriate distance, failing to keep a proper look out and failing to do anything to avoid the accident. The respondent submits that he called a police officer who testified as PW2 and stated that the accident occurred when the suit motor vehicle hit the motor cycle from behind. In cross examination PW2 stated that the scene was visited and the position

of the motor vehicle had not been altered. The respondent submits that the appellant did not call any evidence in support of his case.

11. Relying on the cases of Lomolo (1962) Limited vs Anam Kwangulei [2019] eKLR and Cube Movers Ltd & Another vs Victor Ayiecha Okero & Another (Suing as the legal representative of the Estate of Vincent Maiko Okero (Deceased) [2015] eKLR, the respondent submits that the appellant did not plead any contributory negligence against him and therefore there is no basis upon which the court can make a finding of contributory negligence against him. Further, the appellant only pleaded contributory negligence against the rider and/owner of the motor cycle. Thus, the respondent argues that the issue of excess passengers is not a reason to interfere with the finding of the learned magistrate.

12. The respondent submits that the learned magistrate correctly appreciated the material facts on the cause of the accident which was the suit motor vehicle ramming into the rear of the motor cycle. Relying on the case of Eustus Njoroge Mwaura vs Anmwaralli & Brothers Ltd & Another [2019] eKLR, the respondent submits that the fact that the motor cycle had excess passengers was not the cause of the accident but the uncontroverted evidence of the appellant's driver ramming into the rear of the motor cycle. Further, the appellant did not prove that the fact that the respondent was an excess passenger caused the accident and therefore there was no basis for the learned magistrate to apportion liability against the respondent.

13. The respondent relies on the case of Joash Nyabicha vs Kenya Tea Development Authority & 2 Others [2013] eKLR; Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 Others [2014] eKLR; Barongo Sevelius Yophen vs Jared Ndemo [2020] eKLR and Tom Obita Ndago & Another vs Alfonse Omondi Otieno [2015] eKLR and submits a criminal infraction does not in itself imply that the person is negligent and it must be clear that the infraction is the cause or contributes to the accident.

14. The respondent argues that the cases of Paul Lawi Lokale vs Auto Industries Limited & Another [2020] eKLR and Rosemary Murithi vs Benson Njeru Muthitu & 3 Others [2020] eKLR as cited by the appellant are inapplicable as they do not reflect the correct position of the law. The respondent submits that correct position is as held by the Court of Appeal in Joash Nyabicha vs Kenya Tea Development Authority & 2 Others (supra) and in any event the cases cited by the appellant are persuasive and not binding on this court.

15. The respondent relies on the case of John Wainaina Kagwe vs Hussein Dairy Limited [2013] eKLR and submits that the appellant did not lead any evidence to controvert his testimony thus the appellant is wholly to blame for the accident. Further, the respondent argues that as a passenger he cannot be blamed for the accident as he had no control of the motor vehicle and the motor cycle. To support his contentions, the respondent relies on the case of Paskalia Abuko Shibero vs George Onyango Orodi [2020] eKLR.

16. The respondent further submits that the according to the circumstances of the accident, the driver of the suit motor vehicle failed to keep appropriate distance. According to the provisions of Highway Code, the distance between vehicles on the road is fixed at not less than 70 metres. Furthermore, the respondent relies on the case of Multiple Hauliers (E.A.) Ltd vs Justus Mutua Malundu & 2 Others [2017] eKLR and submits that the motor vehicle behind has a greater duty to avoid collision between the two motor vehicles.

17. The respondent argues that the driver of the suit motor vehicle did nothing to avoid the accident as testified by PW2. PW2 further testified that the rider on his part did not in any way contribute to the accident. To support his contentions, the respondent relies on the cases of Samuel Stephen Were (Suing as the representative of Jared Ochieng Oduogo (Deceased) vs Sukari Industries Limited [2016] eKLR and Multiple Hauliers (E.A) Ltd vs Justus Mutua Malundu & 2 Others (supra).

18. Relying on the case of Kathini Titus vs Almicdad Parcel Services Limited & Another [2014] eKLR, the respondent submits that the appellant ought to have taken out a third party notice as he blamed a third party, the rider for the accident. Having failed to do so, the appellant ought to be blamed entirely for the accident.

19. On quantum, the respondent submits that he sustained injuries as pleaded in the plaint and provided in the medical reports by Dr. Wokabi and Dr. Okere as follows:-

    a. Fracture of the right tibia;

    b. Fracture of the right fibula;

    c. Blunt and cut wound injuries on the scalp;

    d. Multiple blunt soft tissue injuries on the truck;

    e. Bruises on the right leg; and

    f. Permanent disability assessed at 30%.

20. The respondent submits that PW3, Dr. Wokabi confirmed that he sustained the said injuries and testified that at the time of examining the respondent, the respondent was complaining of pain on the right leg and inability to walk fast or far and to stand for long hours. He opined that the respondent would require future medical expenses for the removal of the metal implant. Dr. Okere also confirmed the injuries sustained and opined that the metal implant would require removal in the future. He further opined that the injuries were incapacitating and assessed the degree at 30%.

21. The respondent submits that he proposed a sum of Kshs. 900,000/= and relied on decisions in Godfrey Wamalwa Wamba & Another vs Kyalo Wambua [2018] eKLR where the respondent sustained a compound fracture of the right distal tibia/fibula and soft tissue injuries to the scalp, chest and lower lip. The High Court affirmed an award of Kshs. 700,000/- as general damages for pain, suffering and loss of amenities. The respondent further relied on the case of Biojoule Kenya Limited vs John Njoroge Kiumu [2020] eKLR where the respondent sustained a comminuted fracture of the right tibia and fibula and the court affirmed an award of Kshs. 750,000/-. Conversely, the appellant proposed an award of Kshs. 250,000/- based on the decisions in John Mwangi Kiiru vs Salome Njeri Mwangi [2018] eKLR where the respondent sustained two fractures of the metatarsal bones, a massive swollen foot, soft tissue injuries and pain and swelling. The High Court affirmed an award of Kshs. 450,000/- as general damages. Further in Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor [2020] eKLR, the respondent sustained a fracture of the right tibia/fibula bones, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury and sift tissue injury on the left leg. The High Court reduced an award of Kshs. 600,000/- to Kshs. 400,000/- as general damages.

22. The respondent argues that the learned magistrate in his judgment considered all the decisions cited and awarded Kshs. 600,000/- basing his award on the decision in Wakim Sodas Limited vs Sammy Aritos [2017] eKLR where the respondent suffered a fracture on the 4th left rib and a compound fracture of the left tibia/fibula lower third. The High Court upheld an award of Kshs. 400,000/-. The trial magistrate in making the award took into account the principles of inflation, passage of time and value of money. Thus the respondent argues that the appellant's contention that the award is inordinately high has no basis as the authorities cited by him do not support his proposal of Kshs. 250,000/-.

23. The respondent submits that the appellant in his submissions in the court below stated that the respondent was not entitled to an award of general damages of loss of future or diminished earning

capacity as the respondent was not impaired in any way by the disability. Contrary to the appellant's claims, the respondent states that he led evidence to demonstrate that the disability had impaired his ability to work and neither was his evidence controverted or challenged. Relying on the cases of S J vs Francesco Di Nello & Another [2015] eKLR; Mariga vs Musila [1984] eKLR; Butler vs Butler [1984] KLR 225; Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR; Regina Mwikali Wilson vs Stephen M. Gichuhi & Another [2015] eKLR, the respondent submits that the accident placed him at a relative disadvantage in terms of the work he used to do before the accident and therefore entitled to damages for diminished earning capacity.

24. The respondent submits that the learned magistrate considered the foregoing legal principles and cited decisions, the evidence adduced, pointing out relevant factors such as the degree of disability and the inability of the respondent to work, the fact that this award falls under general damages and took into consideration the award made for pain and suffering and proceeded to make a global award of Kshs. 150,000/-. The respondent argues that the appellant did not demonstrate how the trial court erred in arriving at the award and therefore he has not laid a basis for this court to interfere with the award by the trial court.

25. The respondent submits that the appellant in his submissions before the magistrate urged the court not to award future medical expenses as the doctor did not give a precise figure for the cost and that any future medical expenses could be paid by NHIF. Contrary to the appellant's contentions, Dr. Wokabi expressly stated the precise sum for the removal of the implant at a cost of Kshs. 100,000/- whereas Dr. Okere in his report dated 25/11/2019 assessed the cost at Kshs. 200,000/-. Thus the trial court relied on the opinion of Dr. Wokabi which he was entitled to in view of Section 48(1) of the *Evidence Act* and the Court of Appeal decision in Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko [2006] eKLR.

26. The respondent further submits that no evidence was adduced by the appellant to show that NHIF medical cover can cater for the surgery of removal of implants. Further, the evidence by Dr. Wokabi supports the contention that NHIF does not cover the said surgery .

Issues for determination

27. The issues for determination are:-

    a. Whether the respondent is liable to contributory negligence.

    b. Whether the award on general damages was inordinately high.

    c. Whether the respondent was entitled to an award of diminished earning capacity.

    d. Whether damages for future medical expenses was properly awarded.

The Law

28. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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. 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 into account of particular circumstances or probabilities materially to estimate the evidence."

29. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

30. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the respondent is liable to contributory negligence.

31. The appellant urges the court to substitute the magistrate's court findings of 100% liability with equal liability between the respondent and himself. The appellant asserts that the trial court erred in finding him solely liable and due to the fact that the respondent was an excess pillion passenger and his failing to wear protective and reflective gear, ought to have apportioned equal liability.

32. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

33. According to the respondent, on 8th June 2019, he was travelling as a pillion passenger aboard motor cycle registration number KMCG 118T along Thika Garissa road when motor vehicle registration number KCH 643M, which was being driven at a high speed and was overlapping knocked them down. The respondent called a police officer who testified as PW1 and stated that an accident occurred on 8th June 2019 at 5.30am along Thika Garissa road involving motor cycle registration number KMCJ 118G and motor vehicle registration number KCH 643M and that motor vehicle registration number KCH 643M was blamed for the accident. The witness further testified that the motor cycle was carrying two pillion passengers with the respondent being one of them. Additionally, PW1 testified that the driver of the motor vehicle registration number KCH 643M hit the motor cycle from behind. The appellant did not call any witnesses including the driver who was driving the said motor vehicle.

34. From the record, it is clear that the appellant is not disputing the manner in which the accident occurred but he argues that liability ought to be apportioned equally between his driver and the respondent for he claims that the respondent contributed to the accident by being an excess pillion

passenger. For the appellant to succeed on contributory negligence, he ought to prove the following factors as was provided for in the persuasive decision in Alfred Chivatsi Chai & Another vs Mercy Zawadi Nyambu [2019] eKLR:-

a. The probability that the harm would not have occurred if that other person took care to mitigate the loss and damage.

b. The likelihood of the harm as a result of breach of the duty of care by the tortfeasor.

c. The nature of the social activity or legal duty, is risk creating activity in which the person owed the duty of care was engaged in.

35. In determining contributory negligence, Lord Denning in Jones vs Livox Quarries Limited 1952 2 QB 608 where he stated that:-

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of other being careless.

36. Further in the case of Benner vs Chemical Construction Ltd [1971] 3 ALL ER 822 where the Court of Appeal said in a judgment by David C.J –

> In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence.

37. From the record, the appellant pleaded contributory negligence on the owner or rider of the motor cycle registration number KMCG 118T but did not attribute any fault on the respondent. That notwithstanding, the circumstances of the accident do not show that the accident was caused by the fact that the respondent was an extra pillion passenger onboard the suit motor cycle. Furthermore, the appellant failed to adduce evidence to show the link between the causation of the accident and the respondent as an extra pillion passenger. The appellant has failed to show negligence on part of the rider which led to the occurrence of the accident. This could have happened by the appellant calling his driver to testify and be cross examined on the occurrence of the accident but the appellant opted not to call any evidence. As such, the evidence of the respondent was uncontroverted. The said evidence described the circumstances of the accident to the effect that the appellant's driver hit the motor cycle from the rear as he was driving at a high speed as well as overtaking. Thus, it is my considered view that no evidence has been presented by the appellant to show that the learned trial magistrate misdirected himself in law or fact in holding that the appellant was wholly liable for the accident in negligence and was in breach of the duty of care.

Whether the award of general damages was inordinately high.

38. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate 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 won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages

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 factor 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."

39. Similarly, in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

40. According to the plaint, the respondent suffered the following injuries:-

    a. Fracture of the right tibia.

    b. Fracture of the right fibula.

    c. Blunt and cut wound injuries on the scalp.

    d. Multiple blunt soft tissue injuries on the trunk

    e. Bruises on the right leg.

41. The magistrate awarded a sum of Kshs. 600,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

42. The record of appeal is clear that the injuries sustained by the respondent were confirmed by Dr. Cyprianus Okoth Okere in his medical report dated 25th November 2019. The doctor classified the injuries as grievous harm and assessed permanent incapacity at 30%. Dr. W. M. Wokabi in his report dated 20th March 2020 also confirmed the respondent's injuries. The doctor indicated that the respondent suffered pain from the injuries sustained. The fractures of the right tibia and fibula were serious in that surgery to fix the metal implant had to be conducted. The doctor examined the respondent later and noted that the fractures had united well and that the right leg was healing well.

43. Looking at the decisions relied on by the appellant, it is noted that the injuries are less severe than those sustained by the respondent. Notably, the respondent in his submissions at the trial court proposed that the court award a sum of Kshs. 250,000/- relying on decisions where the awards given were Kshs. 450,000/ in 2019 - and Kshs. 400,000/- on 29th May 2020. I have further looked at the decisions cited by the respondent which are fairly comparable in the circumstances.

44. The learned trial magistrate in arriving at the award of Kshs. 600,000/- relied on the case of Wakim Sodas Limited vs Sammy Aritos [2017] eKLR where the respondent sustained a fracture of the 4th rib and a compound fracture of the left tibia/fibula. The court in that case awarded Kshs. 400,000/- which was upheld on appeal. The learned trial magistrate further considered the inflationary trends and the passage of time together with the time value of money principle.

45. Taking into consideration the severity of the respondent's injuries, and the inflationary trends, it is my considered view that Kshs. 600,000/- was reasonable compensation as general damages for pain, suffering and loss of amenities. In my considered view, the general damages were comparable to the injuries sustained.

Whether the respondent was entitled to an award of diminished earning capacity.

46. The Court of Appeal in Butler vs Butler [1984[KLR 225 had this to say:-

> A plaintiff's loss of earning capacity occurs where, as a result of his 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...It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of general damages.

47. Similarly the Court of Appeal in S. J. vs Francessco Di Nello & Another [2015] eKLR held that:-

> Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.
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> This was the position enunciated in Fairley vs John Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg 14 wherein Lord Denning M.R. said in part as follows:-
>
> > It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.
>
> That learned Counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it were a claim under loss of income or future earnings.

48. Relying on the above cases, it is clear that loss of earning capacity is awarded as part of general damages and need not be specifically pleaded nor proved as though it were a claim under loss of income or future earnings. All that is required is that it be proved through evidence that such capacity was lost due to the impact of the injuries on the plaintiff.

49. The factors to be taken into account in considering such damages vary from case to case and include the age and qualifications of the claimant or the means of earning a living, the remaining length of working life, his disabilities and previous service if any. Butler vs Butler [1984] KLR 225.

50. Guided by the above principles, the respondent was 21 years of age when the accident occurred. The injuries left him with a permanent disability at the ratio of 30%. The respondent testified that he works as a DJ(disc jockey) which required him to stand for long periods of time and carry heavy equipment. As a result of the accident, the respondent testified that he could not stand for more than three hours

or carry heavy equipment which affected his deejaying work. From the foregoing it is evident that the respondent's injuries affected his income earning ability. It is therefore my considered view that the award of Kshs. 150,000/- was sufficient compensation under the head of loss of earning capacity.

Whether damages for future medical expenses was properly awarded.

51. The Court of Appeal in the case of Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR stated:-

> We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs Gituma (2004) 1 EA 91, this Court stated:-
>
> > And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as raising naturally from infringement of a person's legal right should be pleaded.
>
> We understand that to mean that once the plaintiff pleads that there would need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where treatment is undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

52. The appellant in his submissions in the court below argued that the doctor did not give the exact figure as to how much it would cost to remove the metal implant but assessed it at between Kshs. 100,000 – 200,000/-. The appellant further argues that the respondent being a member of NHIF, the costs would be undertaken directly by NHIF.

53. From the medical report by Dr. Cyprianus Okoth Okere dated 25th November 2019, the respondent would require to have the metal implant removed at a cost of Kshs. 200,000/-. Dr. W. M. Wokabi in his medical report dated 26th March 2020 indicated that the removal of the metal implant would cost Kshs. 100,000/-. The doctor further testified that he was not aware that one could use NHIF to cover the costs of the removal of the metal implant.

54. The respondent pleaded for future medical expenses in his plaint and proved the same through the medical report and testimony of Dr. Wokabi. The appellant did not produce any evidence to controvert that of the respondent. The appellant did not produce any evidence to show that the cost of the surgery to remove the metal implants could be catered for by NHIF. Dr. Wokabi further testified that he was not aware that such expense, could be covered by NHIF.

55. As regards future medical expenses, I reach a conclusion the award was justified and made in consideration of the applicable principles. The award, in my view, should not be disturbed and it is hereby, upheld.

Conclusion

56. Consequently, I find that the appeal lack merit and is hereby dismissed with costs.

57. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE