



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nobel Trading Company v Ongaro (Civil Appeal E575 of 2022)
[2024] KEHC 16754 (KLR) (Civ) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E575 OF 2022

NIO ADAGI, J

AUGUST 16, 2024

BETWEEN

NOBEL TRADING COMPANY APPELLANT

AND

ROSELYN KWAMBOKA ONGARO RESPONDENT

*(An Appeal from the Judgment of Hon. A. N. Makau (PM) in
Milimani CMCC. No. 5993 of 2019 delivered on 18/05/2022)*

JUDGMENT

1. The Appellant in the Memorandum of appeal dated 27.7.2019 has raised 4 grounds of appeal which basically challenge the judgment of the trial court on quantum.

I will therefore not delve into the issue of liability which the Appellant seem not to be challenging.

2. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* {1968} EA 123. {1958} E.A. page 424.

In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court.

A first appeal is a valuable right of the parties and unless restricted by law, the whole case



is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

3. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
4. The Respondent's case is that she was involved in a Road Traffic Accident on 07/1/2019 while travelling as a pillion passenger on motor cycle Reg. No. KMEJ 581H along Outering Road when the Appellant's Motor Vehicle Reg. No. KCN 429L knocked down the Respondent occasioning her severe bodily injuries and she has since suffered loss and damage.
5. The Respondent sued the Appellant for damages sustained during the accident. The Respondent's evidence was that she was lawfully and carefully travelling as a pillion passenger on the stated motor cycle when the stated motor vehicle was so negligently and/or carelessly driven, managed and/or controlled that the same was allowed to knock down the Respondent.
6. The Trial Court found the Appellant 100% liable and awarded the Respondent damages as follows:-
 - a. General damages for pain & suffering & loss of amenities..... Kshs.1,500,000/
=
 - b. Future Medical Expenses.....Kshs. 300,000/=
 - c. Special damages.....Kshs. 3,550/=Total.....Kshs.1,803,550/=
7. The Appellant is aggrieved with the Judgment of the Trial Court and has now appealed to this Court basically challenging the awarded damages particularly the General damages for pain & suffering & loss of amenities which it considers to be manifestly excessive as to be erroneous and the award for future medical expenses which should not have been awarded.
8. I have perused the Record of Appeal, considered and weighed the rival submissions on the appeal and also taken into consideration the judicial decisions cited and attached.
9. The Appellant submitted that the trial magistrate's award was excessive and inordinately high considering the Respondent's treatment notes, medical reports and the P3 Form produced as evidence in support of the injuries sustained.
10. The Appellant also submitted that the Respondent should not have been awarded any amount for future medical expenses.
11. The Respondent submitted that the trial magistrate's award of Ksh.1,500,000/- general damages for pain and suffering and loss of amenities was reasonable and appropriate.



12. In relation to future medical expenses, the Respondent submitted that the same was expressly pleaded and specifically proved.
13. The issues for determination are as follows: -
 - i. Whether the award of general damages was manifestly excessive.
 - ii. Whether damages for future Medical Expenses was properly awarded.

whether the award of damages was manifestly excessive,

14. The Appellant submitted that the Trial Court's award of Ksh.1,500,000/- for is inordinately high for the nature of injuries suffered and comparable awards for similar injuries at the time the judgment was entered. The Appellant relies on the case of Simon Taveta v Mercy Mutitu Njeru (2014) eKLR where it was held that though award of general damages is a judicial discretion the same should be guided by the principles of comparable injuries did not take into account the principle that similar injuries attract similar damages.
15. The Respondent pleaded that she sustained serious injuries on the right leg with a fracture of the right femur, fracture of the right distal radius, recurrent pains on the right upper leg, weakness of the right leg and recurrent pains on the right hand. The Respondent was treated at St. Jude Centre in Komorock and later referred to PCEA Kikuyu Hospital. Two medical reports by two doctors were produced in evidence by the Respondent.
16. The first medical report dated 26.2.2019 was prepared by Dr. Sang Edward showing the Respondent to have sustained fracture left femur and distal radius. On 24.1.2019, she was taken to theatre for surgery. The Doctor indicated that the Respondent had since done well and on follow up as an outpatient.
17. The second medical report dated 09.4.2019 was prepared by Dr. Cyprian Okoth Okere showing the Respondent to have sustained fracture the right femur and fracture of the right distal radius. The present complaints included recurrent pains on the right upper right leg, weakness of the leg and recurrent pains and weakness of the right hand. On physical examination, the right arm and forearm has a surgical scar on the distal radius. The implant is in situ. The upper leg and lower leg have a surgical scar on the upper leg laterally. The implant is in situ. This Doctor's opinion was that the Respondent sustained fractures of the right radius and right femur. He classified the injuries as grievous harm. The implant will be removed in future at a cost of about Ksh.300,000/-. The degree of permanent incapacity of the right arm will be 10% and that of the right femur 40%. This doctor's reference was to the P3 Form, the discharge summary from PCEA Kikuyu hospital and medical report from PCEA Kikuyu Hospital.
18. The two medical reports by two different doctors produced by the Respondent and which are exhibits on record give contradicting nature of injuries. Whereas the medical report by Dr. Sang Edward shows the Respondent to have sustained fracture left femur and distal radius, the medical report by Dr. Cyprian Okoth Okere shows the Respondent to have sustained fracture the right femur and fracture of the right distal radius.
19. The first doctor's report further shows that the Respondent was taken to theatre for surgery. The Doctor indicated that the Respondent had since done well and on follow up as an outpatient. The Doctor did not state what the Respondent went for at the theatre or refer to any x-rays reports on the Respondent's fractures either to right femur and the right distal radius
20. The second doctor's report show the Respondent's present complaints included recurrent pains on the right upper right leg, weakness of the leg and recurrent pains and weakness of the right hand. On



physical examination, the right arm and forearm has a surgical scar on the distal radius. The implant is in situ. The upper leg and lower leg have a surgical scar on the upper leg laterally. The implant is in situ. This Doctor's opinion was that the Respondent sustained fractures of the right radius and right femur. He classified the injuries as grievous harm. Again, this report does not show whether the doctor had a chance of looking at any x-ray reports relating to the Respondent's fractures and or confirmation of the implants in situ.

21. I have noted that the Trial Court did not in the judgment say anything on the 1st medical report by Dr. Sang Edward which was prepared about a month following the accident and from the Hospital where the Respondent was admitted and treated compared to the second report which came almost after two and a half months later.
22. In the case of *Ena Investment Limited v Judy Mong'are Kemunto (Civil Appeal E069 of 2021)* [2023] KEHC 25914 (KLR) (30 November 2023), the court held:-

“I have considered the fact that there were two sets of conflicting medical reports. It is noteworthy that the second set of reports by Dr. Kouko and Dr. Kahuthu were prepared over one year after the accident and were intended to confirm the Respondent's injuries. It is to be expected that the claimant would have healed considerably within the span of one year.

Dr. Chamwage, who testified as DW1, confirmed that the initial treatment notes indicated that the Respondent had suffered a fracture of the ribs and dislocation of her ankle joint. He added that there was a possibility of such fracture uniting and healing after 10 months, thereby making it difficult to confirm whether there was a dislocation. Evidently, the second medical report could not confirm or ascertain whether the left ankle had been dislocated as the re-examination was done without the initial x-rays which showed the initial dislocation.

It is my finding that the initial medical reports provided sufficient proof of the Respondent's injuries and formed the basis upon which the trial court could assess general damages”.

23. Now turning to answer the first issue for determination, I am alive to the fact that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984* [1985] eKLR thus:

“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 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”.

24. It is this court's finding that the Trial Court erred in failing to consider or take into account the first medical report by Dr. Sang Edward which could have provided sufficient proof of the Respondent's injuries wherefore it took into account irrelevant factor and left out of account a relevant one in assessing the damages it awarded to the Respondent.
25. I have perused the following cases relied on by the Trial Court.1.Mwaura Muiruri v Suera Flowers Limited & Another (2014) eKLR, 2.James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & Another (2015) eKLR and Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another.



26. I find that even by going by the Respondent's second medical report, the award in these cases were for far more serious injuries than those sustained by the Respondent.
27. Upon considering the authorities cited by the parties in their submissions which were placed before the learned trial magistrate, I find that the authority relied upon by the Respondent constituted injuries of a more severe nature in comparison to those sustained in this instance. The authority cited by the Appellant featured comparable injuries.
28. I have also considered the recent case of Njuguna *v Mwabindo (Civil Appeal 41 of 2021)* [2023] KEHC 24136 (KLR) P(24 October 2023) in which the court upheld a sum of Kshs.1,400,000/= in the case of a plaintiff who had sustained very serious injuries including a Fracture distal radio-ulna, Dislocation of the right wrist joint, Fracture acetabulum, Displaced right hip joint, Fracture right tibia distal third. Fracture left big toe, Dislocation left big toe, Tender swollen right wrist, Tender right hip, Tender left leg. I am therefore satisfied that the learned trial magistrate's award under this head was excessive and inordinately high
29. After taking into consideration the injuries sustained by the Respondent, the awards by courts on similar injuries and the issue of inflation, I find the award of Ksh.700,000/- would be reasonable compensation in general damages in the circumstances.

Whether damages for future Medical Expenses were properly awarded.

30. On the issue as to whether the damages for future Medical Expenses were properly awarded, the Appellant submitted that the same should not have been awarded.
31. The court of appeal in *Tracom Limited & v Hasssan Mohamed Adan* [2009] eKLR held as follows: -“

“...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 v 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 arising 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 be 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 the treatment will be 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 all 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...”

In *Forwarding Company Limited & Another V Kisilu; Gladwell (third Party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR), the court stated as follows “In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the



time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.”

32. Having found that there was no evidence placed before court by way of x-ray reports to confirm that in deed the Respondent had implants in situ that needed to be removed and further that this prayer was not specifically pleaded, it follows that the Trial Court should not have made an award of future medical expenses basically for the removal of the implants. The award therefore of Ksh.300,000/= is set aside.
33. Reliance is made on the holding in *Pride Kings Security v Ekaalet* (Civil Appeal E009 of 2022) [2023] KEHC 20284 (KLR) (17 July 2023) where the court held that:-

“On future medical expenses, I note, from the plaint, that the same were not pleaded. Such expenses are in the nature of special damage, and it its trite that for special damages to be awarded, special damage must not only be specifically pleaded, it must equally be specifically proved. The law on future medical expenses is fairly straightforward and clear, future medical expenses must be pleaded. Where the same are not pleaded, they are not available. *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) is the law on that. See also *Ibrahim Ndung’u Gikonyo vs. Geoffrey Nyamweya Omac* [2021] eKLR (Chepkwony, J)”.

34. The upshot is that:
- a. The General Damages award of the Trial Court is set aside and replaced with an award of Ksh.700,000/=.
 - b. The Kshs.3,550/= in special damages is upheld.
 - c. The Appellant to have half the costs of the appeal.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH AUGUST 2024

NOEL I. ADAGI

JUDGE

