Wambugu v Onchomba (Civil Appeal 418 of 2019)
[2024] KEHC 12252 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 418 OF 2019

MA OTIENO, J

SEPTEMBER 26, 2024

BETWEEN

RAEL WAMBUI WAMBUGU ..... APPELLANT

AND

RONALD NYAKUNDI ONCHOMBA ..... RESPONDENT

(Being an appeal from the Judgment delivered on 13th March 2019 by Hon. M.W. Murage, RM in Nairobi CMCC No. 7728 of 2015)

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court in the Nairobi CMCC No. 7728 of 2015 delivered on 13th March 2019 in which the Respondent had sued the Appellant seeking damages for injuries suffered in a road traffic accident which occurred on 18th May 2015 along Mombasa Road at Olesereni bypass.

2. The Respondent's claim at the lower court was that while lawfully riding his motor cycle registration number KMCZ 445Q, he was hit by the motor vehicle registration No. KCB 115F, then being driven by the Appellant. The Respondent blamed the Appellant for causing the accident.

3. The Appellant entered appearance and filed her defence dated 4th March 2016 denying liability, instead blaming the Respondent for the accident.

4. On 13th March 2019, the trial court rendered its judgment in the dispute in favour of Respondent in the following terms; -

    a. Liability at 100% against the Appellant

    b. General damages at Kshs. 800,000/-

c. Special damages of Kshs. 369,625/-

d. Costs and interest of the suit

The Appeal

5. Aggrieved with the decision of the trial court particularly on quantum, both general and special damages, the Appellant vide her memorandum of appeal dated 17th July 2019 appealed to this Court against the trial court's decision raising the following four grounds of appeal; -

   i. That the learned trial Magistrate erred in law and in fact in making an award on General Damages which was inordinately high considering the Respondent's injuries.

   ii. That the learned trial Magistrate erred in law and in fact in making an award on Special Damages in excess of the amount proven.

   iii. That the Learned trial magistrate erred in law and in fact in failing to appreciate the discrepancies in the injuries suffered by the Plaintiff as presented by two competent medical doctors.

   iv. That the learned trial Magistrate erred in law in failing to consider and/or appreciate the Appellant's Submissions as well the authorities thereto.

6. In a nutshell, it was the Appellant's position in this appeal that the sum of Kshs. 800,000/- awarded by the trial court as compensation in general damages for pain, suffering and loss of amenities was inordinately high in the circumstances of the case and did not take into account the Respondent's injuries.

7. Additionally, the Appellant challenged the award of Kshs. 369,625/- in special damages on the basis the award was excessive of the amount proven in evidence submitted by the Respondent at trial.

Submissions By the Parties

8. On 13th February 2024, directions were given that the appeal be canvassed by way of written submission. Both parties complied with both the Appellant and the Respondent filing their respective submissions on 12th March 2024.

9. The first issue taken up by the Appellant in his submissions was that the trial court erred in law and in fact by awarding Kshs. 800,000/- in general damages. According to the Appellant, the award was inordinately high and excessive in the sense that it failed to take into account injuries suffered by the Respondent.

10. The Appellant submitted that considering the injuries suffered by the Respondent as a result of the accident, an award of Kshs. 250,000/- ought to have been sufficient. She supported her position by citing the decision in Kisii HCCA No. 105 OF 2019, *Reamic Investment Limited v Joaz Amenya Samuel* (2021) eKLR of Kshs. 350,000 was made by Ougo J for injuries which included open femur fracture, contusion on the anterior chest and soft tissue injuries.

11. The second and final limb of the Appellant's submissions was on special damages. It was the Appellant's submissions that the amount of Kshs. 369,625/- awarded by the trial court was excessive of that which had been proven at trial. According to the Appellant, the cost of future medical expenses of Kshs. 141,000/- which was part of the special damages claimed ought not have been awarded since the Respondent had confirmed on cross-examination that the implant had been removed but failed to produce in evidence, receipts in relation thereto.

12. Additionally, the Appellant submitted that the Respondent did not produce a receipt for Kshs. 400/- being the total cost of obtaining both the Police Abstract and P3.

13. On his part, the Respondent supported the trial court's judgment and urged this court to uphold the same. On general damages, the Respondent submitted that the award of Kshs. 800,000/- by the trial court was in line with the injuries suffered. He cited the case of *Kihara & Another v Mutuku* (Civil Appeal No. 27 of 2018) [2022] eKLR where an award of Kshs. 700,000/- was made for fracture of the right femur, blunt injuries to the chest, thigh and bruises to the forehead.

14. Regarding special damages, the Respondent submitted that the cost of future medical expenses related to the removal of the implant was supported by the medical report of Dr. Okoth Okere dated 29th January 2015 which expressly gave the figure at Kshs. 150,000 as well as that of Dr. P.M. Wambugu dated 27th February 2017 which confirmed that the Respondent had sustained a fracture of the right femur with a 4% level of incapacity.

Analysis and Determination

15. I have considered this appeal in the light of evidence on record and the respective parties' submissions in this appeal, including the authorities cited. I note that the appeal is primarily on the quantum of damages awarded by the trial court.

16. When dealing with an appeal on quantum, this court is alive to the principle that assessment of damages is within the discretion of the trial court and that as an appellate court, I should only interfere in instances where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Mbogov Shah* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).

17. In the case of *Gitobu Imanyara & 2 Othersv. Attorney General* [2016] eKLR the Court of Appeal held as follows in relation to the circumstances under which an appellate court may disturb an award of damages by the trial court: -

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that: 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

18. I am equally alive to the principle that in awarding general damages, courts ought to give an award that reflects the nature and gravity of the injuries. That comparable injuries should as far as possible, be compensated by comparable awards, always bearing in mind that not two cases are precisely alike.

This is the guidance by the Court of Appeal in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR when it stated that: -

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

19. A perusal of the pleadings and proceedings reveals that the Respondent in his amended Plaint dated 11th August 2016 found at page 33-35 of the record of appeal pleaded that as a result of the accident, he suffered broken right thigh.

20. The medical report of Dr. Okoth Okere dated 29th January 2015 and that of Dr. P.M. Wambugu dated 27th February 2017 were largely in agreement with the initial treatment notes from Kenyatta National Hospital that the Respondent sustained a fracture of the right femur and that he had been treated with an open reduction and internal fixation of the fracture with an implant.

21. It is the duty of the advocates to avail relevant authorities to guide the trial court in arriving at a fair award. The Appellant cited the case of *Reamic Investment Limited v Joaz Amenya Samuel* [2021] eKLR where an award of Kshs 600,000/- by the trial court was on appeal reduced to Kshs. 350,000 for injuries which included open left femur fracture, abrasion on the left knees, face, neck, right upper imp and left upper lip as well as a contusion on the anterior chest.

22. The Respondent on the other hand cited two cases, the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR where a sum of Kshs. 800,000 was awarded for a fracture of the left femur (mid-shaft) and swollen left tender thigh. The other is that of *Kihara & another v Mutuku* (Civil Appeal 27 of 2018) [2022] KEHC 15626 (KLR) where Mwongo J maintained an award of Kshs. 700,000/- for blunt injuries to the chest, blunt injuries left thigh which developed into ecchymosis, bruises on forearms and Fracture of the right femur.

23. I have considered the authorities cited by both the Appellant and the Respondent in support of their respective positions and note that the injuries suffered in the instant case were more comparable to those suffered in the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR cited by the Respondent.

24. In the premises, find no reason in this case to interfere with the trial court's assessment of general damages for pain, suffering. I therefore uphold and maintain the award of Kshs. 800,000 in general damages given by the trial court.

25. Regarding the award of Kshs. 400 being the cost of obtaining the police abstract and P3 in special damages, the Appellant submitted that the court erred in awarding the same since the Respondent did not avail any receipt in respect of the same. The Respondent in his submissions did not controvert this ground of appeal.

26. The law on special damages is that special damages must not only be specifically pleaded, but must also be strictly proven. In Nairobi Civil Appeal No. 283 of 1996 – *David Bagine –v – Martin Bundi* [1997] eKLR, the Court of Appeal had the following to say on the issue; -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

"....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carterv. Hyde Park Hotel Limited [1948] 64 TLR 177 thus: http://www.kenyalaw.org - Page 1/3 DAVID BAGINEv MARTIN BUNDI [1997] eKLR "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

27. While I note that the Respondent in his amended Plaint of 11th August 2016 pleaded a sum of Kshs. 200 as the cost of obtaining the Police Abstract and a further Kshs. 200 as the cost of obtaining the P3 Form, I have been unable to sight any evidence in form of receipts in respect of the same. Consequently, and in line with the settled principle that special damages must be specifically pleaded and strictly proven, I agree with the submissions by the Appellant that the two items, totaling to Kshs. 400, ought to have been excluded by the trial court in awarding special damages.

28. On the claim for cost of future medical expenses of Kshs. 150,000/- awarded by the trial court, it was the Appellant's submissions that the same ought not to have been awarded since Respondent testified at trial that the implant had been removed at a cost of Kshs. 141,000/- but did not produce a receipt in respect thereof. According to the Appellant, the fact that the implant had been removed at the time of trial excluded the claim from being "a future medical expense" to a claim within the ambit of special damages for which strict proof is required by way of production of a receipt. The Appellant therefore urged this court to have this amount deducted from the special damages awarded by the trial court since the Respondent did not provide any proof of payment.

29. In *Tracom Limited & Anotherv Hassan Mohammed Adan* [2009] eKLR, the Court of Appeal stated as follows regarding the claim for future medical expenses: -

> " 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 Ltdv Gituma (2004) 1 EA 91, this Court stated: -
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> > 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

30. I have looked at the pleadings and the evidence tendered by the parties and note that Dr. Cyprianus Okoth Okere in his medical report dated 28th September 2015 stated that the Respondent would

require a sum of Kshs. 150,000 in future for the removal of the implant. This position was not controverted by the second medical report by Dr. Wambugu. There is no evidence on record in support of the Appellant's submissions that the implant had in fact been removed at the time of trial and that the Respondent paid a sum of Kshs. 141,000/- for the same. This ground of appeal therefore fails as well.

31. In view of the foregoing, I find the appeal is partly merited and I hereby substitute the trial court's award of Kshs. 369,625/- in special damages with an award of Kshs. 369,225/=.

32. The rest of the Judgment remains the same.

33. Each party to bear their own costs of this appeal.

34. It so ordered.

SIGNED, DATED & DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Ms Lucheno for the Appellant

N/A for the Respondent.