



**Macharia & another v Ndichu (Civil Appeal 182 of 2014)
[2023] KEHC 1337 (KLR) (Civ) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1337 (KLR)

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

CIVIL

CIVIL APPEAL 182 OF 2014

AA VISRAM, J

FEBRUARY 24, 2023

BETWEEN

LUCY WANJA MACHARIA 1ST APPELLANT

PETER MUIGAI KIHU 2ND APPELLANT

AND

ALEX MWAURA NDICHU RESPONDENT

*(Being an appeal from the judgment dated 14th April, 2014 of Hon. W. Ngumi in
Githunguri Senior Resident Magistrate in Githunguri PMCC No. 100 of 2010)*

JUDGMENT

Introduction

1. This judgment determines that appellants' appeal dated 13th May, 2014 vide its Memorandum of Appeal of even date. The appeal relates to the issue of quantum.
2. The respondent who was the plaintiff before the trial court pleaded that he was injured following a road accident that occurred on 21st April, 2009. According to the respondent, the accident was caused by the appellants' motor vehicle KAP 517P ("the Motor Vehicle"), which was being driven in a negligent manner by the 2nd appellant, thus knocking down the respondent.
3. The respondent claims that he sustained injuries, suffered loss and damages as a result of the accident.
4. After conducting a hearing, the Magistrate in his judgment awarded liability in the ratio 50:50 and awarded the following together with costs of the suit.
 - a. General damages on pain and suffering - Kshs. 2,000,000/-



- b. Further medical treatment - Kshs. 120,000/-
- c. Special damages - Kshs. 159,000/-
Less - Kshs. 10,000/-
Total - Kshs. 2,269,040/-
Less 50% contributory negligence - Kshs. 1,134,520/-

Appeal on Quantum

5. It is that judgment above, being Githunguri PMCC No. 100 of 2010 dated 14th April, 2014 that gives rise to the appeal, where the appellants complain that:
 - a. That the trial magistrate erred in law by awarding Kshs. 2,000,000/- as general damages for pain and suffering which was inordinately high as to amount to an erroneous estimate of the award applicable in the circumstances of the case.
 - b. That the learned trial magistrate erred in law by awarding Kshs. 120,000/- as further medical treatment which amount was not pleaded in the plaint.
 - c. That the learned magistrate erred in law in that she failed to subject the award of special damages to apportionment in the ratio of 50:50 on account of the respondent's contributory negligence.

Appellants' Submissions

6. The appellants submitted that the award of Kshs. 2,000,000/- for general damages was inordinately high. They submitted that the most grievous of the injuries sustained by the respondent was a blunt injury to his left bronchial plexus which led to neuronal death resulting in amputation of his left arm below the elbow.
7. The appellants preferred the medical report of Dr. R. P. Shah ("the Second Report") to that of Dr. D. J. Muiru ("the First Report"). The Second Report concluded that the respondent had suffered 80% permanent disability since he lost half of his upper limb, whereas the First Report concluded that he had suffered 100% permanent incapacity of his left arm.
8. In relation to the fracture of the respondent's left femur, the Second Report concluded that this injury had since healed, and this had also been confirmed by Dr. Muiru during his evidence at trial.
9. The Learned Magistrate ought not to have relied on the First Report in making the award for general damages because the report had been made three years prior to the hearing date. The respondent had made some improvements since his examination by Dr. Muiru. The trial court proceeded on the wrong principles and misapprehended the evidence when it made its award.
10. In support of the above submissions, the appellants cited *Odingo Luora & 4 others v Kenya Bus services Limited* [2015] eKLR where the 3rd appellant in the said case had his left arm amputated below the elbow. The court assessed damages for pain and suffering at Kshs. 600,000/-.
11. In *John Bosco Mutyetumo Mutunga v Kimanzi Musyoka* [2018] eKLR the respondent in that suit had suffered an above the elbow amputation. The trial court awarded him Kshs. 800,000/- as general damages for pain and suffering. This award was upheld by the Court of Appeal.



12. The respondent had not pleaded and proved his claim for future medical expenses, which had been awarded by the Magistrate in the sum of Kshs. 120,000/-. The appellants submitted that the plaint in paragraph seven sought future medical expenses for the removal of plates but the cost of the same had not been stated. The trial court therefore misapprehended the evidence in making the award.
13. The appellants conceded that the third ground in the Memorandum of Appeal had been overtaken by events and was no longer relevant.

Respondent's Submission

14. On the issues of future medical expenses, the respondent submitted that he had sought future relief in the plaint and included a prayer that "the honorable court may award such relief as the court may deem just to award".
15. As regards the award for general damages, the respondent submitted that he had suffered severe injuries which led to the amputation of his arm. He also suffered loss of feeling in his limb around the shoulder area due to damage of several nerves. He stated that he was a builder and relied heavily on his arms to earn a living. The loss of the limb was a traumatic experience and placed him at risk of being rendered destitute. He submitted that he was a burden on his caretakers, and had cost them a lot of money.
16. In support of his submission, the respondent relied on the case of *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR where the plaintiff whose arm was amputated below the elbow (permanent incapacity was assessed at 45% to 60 %) was awarded damages of Kshs. 2,200,000/- for pain and suffering.
17. In *Simba Platinum Limited v Nicholas Auma Wandera* [2021] eKLR the court upheld an award for damages for pain and suffering of Kshs. 2,500,000/- pursuant to the amputation of arm at the shoulder.
18. In *Roba Doti Guyo v Jiang Zhongmei Engineering Company* [2015] eKLR where the plaintiff was awarded damages for pain and suffering in the amount of Kshs. 2,500,000/- pursuant to amputation of his arm.

Analysis and determination

19. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR Civil Appeal No. 147 of 2020 [2004] eKLR where the Court of Appeal held:

"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."
20. Further to the above, in the Court of Appeal decision of *Butt vs. Khan* (1977) 1 KAR the court stated that the test on whether or not to interfere with an award of damages, is as follows:

"An Appellate court will not disturb an award for damages unless it is 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."



21. As this is a first appeal, I have a further duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

22. I will start with the claim for general damages. The First Report indicated that the injuries suffered by the respondent were: blunt chest injury causing hemothorax, blunt injury left brachial plexus causing neuronal death and tear of the sub clavia artery and compound fracture left femur. The doctor concluded that the respondent had a below elbow amputation on the left forearm, which he has 100% loss of use. He additionally had a healed scar on the thigh and knee, and required surgery to remove plates (in his leg), which would cost about Kshs. 120,000/-. His final conclusion was that the injuries and disability is permanent.
23. The second medical report dated 10th July, 2013 by Dr. R. P Shah differed from the first in so far as the doctor concluded that the respondent had suffered a permanent disability of 80% rather than 100%.
24. This court has considered the authorities cited by Learned Counsel in support of the above submissions. I have considered the following additional authorities relating to cases with comparable injuries:
25. In *Abubakar Boda Galano vs T.S.S. Transporters Ltd* in Malindi HCCC. No. 46 of 2009 the court awarded Kshs. 2,700,000/- as general damages where the plaintiff had suffered hand injuries with loss of consciousness and amputation of the left upper limb; deep cuts along the left eye and cheek; and massive blood loss.
26. I have considered the nature of the injuries sustained by the respondent. I do not think that the difference between the conclusions in the First Report and Second Report (between 100% and 80% loss of the arm) are materially different. It is unlikely that this variance will make a difference to his ability to earn a living using that arm. That is the point.
27. In relation to the submission that the fracture (of the respondent’s left femur) had healed (over a period of three years), it is clear from the record that the Magistrate considered this evidence, and reached a conclusion, having taken the same into account. I am satisfied that there is not reason to interfere with his decision.
28. Moreover, the fact that the respondent had healed is not ipso facto, a reason for me to interfere with the award of damages for pain and suffering. Counsel did not cite sufficient legal authority to support this submission.
29. I have considered the relevant awards which vary between Kshs. 2,700,000/- on the high end, and Kshs. 800,000/- on the lower end of similar injuries. I do not think that the award of Kshs. 2,000,000/- was inordinate. I am of the view that assessment of general damages is not an exact science and that a certain



amount of discretion ought to be left to the trial court subject to the correct legal principals articulated above.

30. I will now turn to the ground of appeal relating to erroneous award of future medical expenses by the Trial Magistrate. The law is that damages must be pleaded and proved. In the Court of Appeal case of *Tracom Limited & another v Hasssan Mohamed Adan* [2009] eKLR (P. K. Tunoi, J.W.Onyango Otieno, P. N. Waki JA) the court held that:

“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.”

31. The first question, is was it pleaded? Looking at the plaint, under the heading ‘particulars of special damages’, I can see a claim which reads “future surgery expenses for removal of plates”. I can also see that no specific amount has been entered, but the words “further expenses on physiotherapy to be produced during the hearing” appear at the bottom of the same paragraph. I am persuaded that the claim was pleaded.
32. The next part, was the claim proved? Looking at the proceedings of the hearing in the lower court, I read that during examination of Dr. John Muiru, the respondent’s witness, the Doctor said (in relation to the respondent) “he will need surgery to remove the plates, which will cost Kshs. 120,000/- as at the time...the removal of the plates is mandatory as it can develop infections”. I am persuaded that the claim was also proved. I do not think the Magistrate erred in this regard.
33. Based on the reasons above, I do not find sufficient reason to interfere with the decision of the lower court.
34. I find that the appeal is without merit and is dismissed with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF FEBRUARY 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Appellant

..... for the Respondent

