Naran & another v Monde (Civil Appeal E048 of 2021)
[2023] KEHC 3581 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E048 OF 2021

FROO OLEL, J

MARCH 29, 2023

BETWEEN

PRADEEP VASANT NARAN ..... 1ST APPELLANT

KANTI PREMJI ..... 2ND APPELLANT

AND

JOHN MWANGI MONDE ..... RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON Y. BARASA MUKHULA (S.R.M.) DELIVERED ON 5TH AUGUST 2021 IN NAIVASHA CMCC NO 798 OF 2019)

JUDGMENT

1. The Appellants were the Defendants in the primary suit, where they were sued for damages arising out of a road traffic accident which occurred on 19/02/2018.It was alleges that on the said date, the plaintiff was lawfully driving motor vehicle registration number KCM 818H along Maai- Mahiu at Msikiti area. The appellants, their driver , agent, servant and/or employee drove motor vehicle registration number KAR 870Y-ZC 0667 SC (hereinafter referred to as "the trailer") in a reckless and negligent manner that he permitted the said trailer to leave its lane, lose control and violently hit into the Respondent's motor vehicle thereby causing the Respondent to suffer serious injury.

2. The plaintiff (respondent herein) sued for General damages for pain and suffering and loss of future earnings, special damages of Kshs 256,324/-, Provision for future medical expenses, costs of the suit and interest.

3. The Defendant's filed their statement of defence dated 10.2.2020 denying the contents of the Plaint and alleged that if the said accident occurred then it was substantially occasioned and/or wholly caused by the negligence of the Plaintiff.

4. The parties did record a consent on liability on 30/07/2021 and judgment was entered in favour of the respondent (plaintiff) against the appellants(Defendants) in the ratio pf 90%:10% and the same was adopted on 4/08/2021.The hearing proceeded where the plaintiff called two (2) witnesses. The appellants did not call any witness and only had their medical report admitted into evidence. The learned magistrate after considering the evidence adduced and submissions filed did deliver judgment on 5th August 2021 and found as follows; Liability as apportioned by consent of parties in the ratio of 90:10 in favour of the Plaintiff, general damages at Kshs. 2,000,000/=, future medical expense at Kshs 250,000, special damages at Kshs 249,934/= plus costs and interest of the suit.

The Appeal

5. Aggrieved by this judgment, the Appellant filed their memorandum of appeal dated 27th August 2021 seeking to review and set aside the award on the grounds that;

    a. The learned magistrate erred in law and fact in failing to properly evaluate the evidence adduced on the issue of quantum thereby rendered judgment that is unsound in principle and not reflective of the evidence adduced.

    b. The learned Trial magistrate erred in law and in principle in making an award of Kshs. 2,000,000/- on account of general damages for pain and suffering contrary to the principles and law governing the making of such an award and in the absence if evidence to justify such an inordinately high award under the said head

    c. The learned Trial magistrate erred in law and in making an award of Kshs 250,000 on future medical expenses without appreciating and/or considering medical report by Dr Wambugu P.M who is a consultant surgeon, more particularly with regards to future medical expenses likely to be incurred.

    d. The learned Trial magistrate erred in law and in failing to consider that the injuries sustained by the Respondent was simple fractures which had fully healed and thereby arrived at an award that is inordinately excessive.

    e. The learned Trial magistrate erred in law and in facts in making an award on quantum which was unsupported by authorities.

    f. The learned Trial magistrate erred in law and in principle in failing to appreciate the defendants'/ Appellant's submissions and the recent comparable cases cited therein and thus making a prejudicial award to the Plaintiff/Respondent against the Defendant/ Appellant

Facts of the Case

6. At the trial, the Plaintiff called 2 witnesses. PW1, Sitete Letaya stated that CP Bett was the investigating officer but had been transferred to Kakamega. The station received a report concerning an accident on 19.2.2018 at 23.30 hours that was entered under OB /14/2/18. It was made at 0950 hours. He said the accident took place at Musikiti along Mai Mahiu road and involved motor vehicle registration number KAR 870Y/2C 0667 Scania Prime Mover and motor vehicle registration number KCN 818H Isuzu Lorry. The Scania was from Nairobi- Mai Mahiu and when it reached the location of the accident, the driver lost control and it rammed into several motor vehicles registration numbers KBQ 492H, KCC 359W, KBN 969A, KAY 122X. The prime mover then collided with the lorry KCN 818H Isuzu lorry that was heading towards Nairobi.

7. The point of collision was on KCN 818H lane and the prime mover climbed on a cliff and it rolled off the road. The lorry was being driven by John Mwangi Monde (the respondent herein). He was injured and was rushed to Kijabe Mission Hospital. CP Bett concluded that the Prime mover was at fault because it was descending escarpment and was being driven at very high speed and it encroached on the opposite lane. He said there was no way the respondent would have avoided the said accident. He produced the police abstract as Exhibit 1.

8. Further he also stated that he was not the investigating officer and motor vehicle KBQ 492 H was the last to be hit of the motor vehicles that were hit. He could not tell whether charges and been preferred against the driver of the Scania until investigations are completed. He said as per abstract, driver was charged with careless driving and the name of the owner and driver were indicated on the police Abstract.

9. PW2 was John Mwangi, He adopted his statement and further stated that he was injured on the chest, it had internal bleeding. He was also injured on the hip joint right side, right ankle twisted, the left leg broke near the toes. He was admitted for a month at Kijabe Mission Hospital. He produced his ID card, bundle of treatment noted, bundle of receipts, motor vehicle search, demand letter, P3 for and a medical report by Dr. A.O. Wandugu. He stated that the right leg has not healed, it is swollen and produces pus. He also feels pain in the chest when it is cold and if he sits down for long he feels pain. He blamed the lorry because he overtook and hit him on his side. He said he was moving at slow speed. The doctor told him it will take Kshs 250,000 to remove the metal from his leg. At the time of the accident, he was employed as a driver and was paid Ksh 30,000/= as monthly salary. The said payment was in cash and therefore did not have evidence of payment as he was working for a private person. He had not resumed work.

10. In cross examination, the witness stated that he could not have swerved to the left because there was a trench and the right side had oncoming vehicles. He was not aware of a traffic case. NHIF paid Kshs 300,000 and he paid Kshs.212,000. He said the other doctor said it would take Kshs 90,000 to remove the metal and he might use NHIF. The doctor told him to stay home for 2 years but he did not have proof of that. He was told he had a permanent weakness and that his leg hasn't healed well. He was not treated at Kenyatta National Hospital.

11. The Defendants did not call any witness but had their medical report produced by consent of the parties. .

Appellants Submissions

12. The Appellant's filed submissions on 16.11.2022 and submitted on two issues, quantum awarded and future medical expenses. On quantum, the appellants submitted that the particulars of injuries in the plaint are similar to those in the medical report by Dr. A.O. Wandugu while the report of Dr. Wambugu noted that the injuries sustained were left haemothorax, fracture of the pelvis involving the left superior pubic ramus with dislocation of right sacro-iliac joint, compound fracture right ankle joint involving the distal fibula and fracture left firt metatarsal.

13. Dr Wambugu noted that the respondent walked with a right sided limp gait unaided. The right lower limb had healed but had surgical and laceration wound scars on the shin and lateral maeleolus. The metal implants were palpable and there were pus discharging sinuses. Also the ankle joint was still moderately swollen and full dorsi-felxion movements were restricted. The stress tests on the pelvis were negative, while the chest tube insertion site scar on the left triangle safety had healed.

14. The appellants submitted that based on the injuries and the fact that the fractures sustained by the Respondent had united, a sum of Kshs 500,000 would be sufficient as general damages. Reliance was place on the case of Kigaragaru vs Aya , civil appeal no 85 of 1983, Peter Gakere Ndiangui vs Sarah Wangari Maina, Civil Appeal ni E46 of 2020, Muthamiah Isaac vs Leah Wangui Kanyingi, Civil Appeal 653 of 2011, Patrick Kamuya & Another vs Asaph Gatundu Wanjiku [2016] eklr and Wycliffe Omurwa Masanta vs Easy Coach Limited & Another [2019] eklr.

15. As regards future medical expenses, it was submitted that the trial court failed to consider the Appellants submissions with regard to the superior qualifications of Dr. Wambugu who is a consultant surgeon and failed to accord the 2nd medical report the appropriate evidential weight. The Appellant relied on the case of Devki Steel Mills vs Geoffrey [2022] eklr.

16. The appellant final submissions was that the responded did not produce its medical report as evidence and referred to it in their submissions. This was un-procedural and that the court ought to have ignored the said evidence. The appellant's prayed that the appeal be allowed and the quantum as awarded be reduced.

Respondents Submissions

17. The Respondent filed submissions on 19.12.2022 and submitted that the Trial court duly considered all the evidence adduced before reaching its decision. The injuries suffered by the respondent were life threating as highlighted by the medical report by Dr, A.O Wandungu . The good doctor confirmed that the respondent suffered the following injuries ;

    a. Fracture, superior rami of the pelvis and hip dislocation,

    b. Spinal injuries with dislocation SI.

    c. Fracture compound of the right ankle.

    d. Trauma to the chest as evidenced by bleeding inside the chest cavity(hemathorax)

    e. Fracture of the left foot-mid

    f. Blood loss.

18. It was submitted that the Respondent testified that the injuries left him unproductive as he still had chest pains causing him breathing difficulties, there was still pain in his lumbo-sacral spine and pelvis disabling him from performing strenuous tasks. He cannot climb stairs, stand for long, walk fast, walk long distances, run and climb due to the pain. Thus cannot work as a driver as he would previously.

19. On the medical reports, it was submitted that the Appellant could not dictate which hospital the Respondent would be treated and he had a right to choose a facility of choice. The Respondent had also said he had never been treated at Kenyatta National Hospital. In addition, the evidence of the Respondent was not controverted as the medical report produced the Appellant was a replica of theirs. The Respondent relied on the case of Gitobu Imanyara & 2 others vs Attorney General [2016] e KLR.

20. The respondent further submitted that in the lower court, the Appellants submitted that Kshs 800,000 would be sufficient and in the appeal wanted the court to award Kshs 500,000. The authorities relied upon had not captured all the injuries sustained by the Respondent and were old and thus could not be used in comparison. This court was urged to dismiss the Appeal. The Appellant also relied on the case of Zachary Kariithi vs Jashon Otieno Ochola [2016] e KLR.

Analysis and Determination

21. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. Liability, special damages, Costs and interest are not contested. The issues for determination are the quantum award and the future medical expenses award.

22. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions as stated in the case of Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principals 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 on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270

23. In Coghlan V Cumberland (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen."

24. As regards quantum, for this court to interfere with the award, it is guided by the holding of the Court of Appeal in the case of Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

25. Similarly, in Woodruff Vs Dupoint(1964) EA 404 it was held by the East Africa court of Appeal that:-

> " The question as to quantum of damages is one of the facts for the trial court judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them.....The quantum of damages being a question of fact for the trial judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff but whether the damages awarded are "such as may fairly and reasonably be considered as arising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

26. The plaintiff particularized injuries in the plaint as;

i. Fracture, superior rami of the pelvis with hip dislocation

ii. Spinal injuries with dislocation of S1

iii. Fracture compound of the (r) ankle joint

iv. Trauma to the chest as evidenced by bleeding inside the chest cavity (hemathorax)

v. Fracture of the (l) foot- mid

vi. Blood loss

27. According to the report by Dr, A.O Wandugu dated 11.09.2019 the injuries sustained were a replica of those in the Plaint. His prognosis was as follows;

i. The injuries have resulted in a chronic disabling pains in the affected areas, a source of chronic ill health which might need medication on and off

ii. The injuries have resulted in permanent scars which are rather cosmetic in the affected areas

iii. The injuries have resulted in permanent vulnerability to recurrent respiratory tract infections

iv. The injuries have resulted in permanent impairment of the bending movement which is going to be progressive due to the invertible early onset of osteoarthritis in the lumbo-sacral spine

v. The injuries by their effects in the affected foot and affected ankle joint have resulted in permanent weakness of both legs which is going to be progressive due to the inevitable early onset of post –traumantic arthritis in the ankle joint and bones of the affected foot.

28. From the discharge summary that was produced, the Respondent was admitted in 20.2.2018 and discharged on 8.03.2018. This confirms that the Respondent was admitted for approximately three weeks. The treatment notes from Kijabe hospital were also produced into evidence as Exhibit 4(a) –(i)

29. The parties also made reference to the medical Report by Dr. Wambugu dated 20th July 2020, which medical report was produced on behalf of the appellants. The said report confirmed the respondent's

injuries and the doctor's prognosis was that the respondent sustained blunt trauma injuries, multiple skeletal and soft tissue injuries due to the said accident. He had metal implants on both lower limbs and the one on the right leg would ideally be removed to enhance control of the bone infection. The procedure would cost approximately Ksh 90,000/= at Kenyatta National Hospital.

30. In their submissions, the appellant alleges that the Trial court erred in failing to consider the medical report of Dr Wambugu, who according to them has superior qualifications and was a consultant surgeon and thereby failed to accord the appropriate evidentiary weight on the second medical report.

31. While it is true that the judgment dated 5th August 2021 does not specifically refer to the content of the medical report by Dr wambugu, the same cannot be said to have been prejudicial to the appellant considering the totality of the evidence adduced. The respondent did produce into evidence the treatment notes from AIC Kijabe Hospital and P3 form as exhibit 4(a) to (i) and Exhibit 6. The same are found on the supplementary record of Appeal (pages 12 to 22). From the said records it is clear that the appellant suffered the injuries pleaded and confirmed by his doctor and it is on this basis that the court proceeded to determine what the adequate quantum was.

32. Further this court notes that the appellant did not call and witness to testify on its behalf and closed its case after admission of the Medical evidence. As it stands, the evidence of the Respondent remained uncontroverted,see North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited Vs. City Council Of Nairobi (2019) eKLR thus:-

> " 18. In Edward Muriga Through Stanley Muriga Vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.
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> 19. In the case of Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another Vs. Raju GovindJI, HCCC No.548 of 1998 appreciated that:-
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> > 'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

33. Similarly, in the case Edward Mariga through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another [1979] eKLR s the Court of Appeal aid:-

> " The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother."

34. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the Respondent. It is clear he suffered serious injuries including ; Fracture,

superior rami of the pelvis and hip dislocation, spinal injuries with dislocation SI, Fracture compound of the right ankle, Trauma to the chest as evidence by bleeding inside the chest cavity (hemathrax), Fracture of the left mid foot –mid, soft tissue injuries and blood loss.

35. Dr A.O. Wandugu gave a comprehensive prognosis as captured in paragraph 27 above and further stated that the cost of future medical treatment to remove the surgical devices (metal on the respondents legs) with supportive medical attention would cost the respondent approximately Ksh 250,000/= . On the other hand Dr P.M. Wambugu did give a general opinion that the injuries sustained by the respondent were caused by blunt trauma occasioned by the accident. The metal implants on both lower limbs would ideally be removed especially on the right leg. This would enhance control of the bone infection and the cost would be approximately Ksh.90,000/= at Kenyatta Hospital. The Appellant indeed proved that was injured and therefore entitled to adequate compensation.

Was the Court Right to Award Ksh.250,000/= as Future Medical Treatment

36. Both medical doctor's acknowledge that the respondent must undergo further medical surgery to remove the metal implants on both legs. The appellants Doctor in particular stresses that the operation on the right leg must be undertaken to "enhance control of the bone infection" and it would cost approximately Ksh.90,000/= at Kenyatta hospital. This court takes judicial notice of the fact that such operations cannot be carried out simultaneously. It has to be done one leg at a time. Thus even if the same were to cost Ksh.90,000/=, this would only cater for such operation on one leg. The respondent would still need to attend surgery for the other leg after a long recovery process. Thus to operate on both legs would cost Ksh. 180,000/=.

37. Further the appellant's doctor did not take into consideration the attendant post recovery costs. His report is specific to cost of the operation while the respondent doctor states that "Estimate cost of removal with supportive medical attention is a minimum of Ksh.250,000/=" I therefore do not find any error made by the trial magistrate in awarding the said sum of Ksh.250,000/= as future medical expense. The said decision was made with proper discretion and there is no basis to upset the same.

Quantum

38. As aptly stated in the court of Appeal decision of Gitobu Imanyara Vs Attorney General (2016) eKLR where it was held that;

> "...it is firmly established by 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 a question of the amount of damages it will generally be necessary that this court be convinced that the judge acted upon some wrong principle of law, or that the amount awarded was extremely high or 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 damages to which the plaintiff is entitled. This principle was 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 was 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 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"

39. Further in the case of Charles Oriwo Odeyo Vs Apollo Justus Andabwa & Ano (2017) eKLR the court stated that;

> " The court in making an award for damages must always consider prevailing inflation."

40. The question which then arise if for the award of damages of Kshs. 2,000,000/= was adequate or was it excessive. The appellant in their submissions filed at the trial court submitted that the respondent should be awarded Ksh.800,000/= and relied on several citations as can be gleaned from their written submissions (see pages 70 to 77 of the record of appeal) In this appeal the appellants have sought to have the quantum reduced to Ksh.500,000/= This obviously cannot be a correct assessment of the injuries sustained.

41. The said citations relied on mainly referred to injuries which were much less severe as compared to those sustained by the respondent. Some cations referred to injuries in industrial accident where the injuries were different to what the respondent suffered or less severe injuries suffered over ten (10) years ago.

42. The respondent relied on the citation of Zachary Kariithi Vs Jashon Otieno ochola (2016) eKLR, where the plaintiff was awarded Ksh 1,500,000/=

43. Upon consideration of the case law cited by the parties and similar awards for the injuries sustained, I find no error on the record nor any evidence that the Trial Magistrate acted on wrong principle of law, misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. I therefore find no reason to interfere with the award of general damages.

Disposition

44. Consequently, the Appeal fails and is dismissed with costs which are hereby assessed at Ksh.180,000/= all inclusive.

45. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 29TH DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

Mr. Mwihia for Respondent.