Machogu v Chepkwony (Civil Appeal E039 of 2021)
[2023] KEHC 4147 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E039 OF 2021

RL KORIR, J

APRIL 28, 2023

BETWEEN

JAMES BOSIRE MACHOGU ..... APPELLANT

AND

JOHN KIPKIRUI CHEPKWONY ..... RESPONDENT

(Being an Appeal from the Judgment of Honourable Evans Muleka (PM) dated 9th November 2021 in the Principal Magistrate's Court at Sotik, Civil Case Number 97 of 2019)

JUDGMENT

1. The Plaintiff (now Respondent) sued the Defendant (now Appellant) for General and Special Damages arising out of an accident that occurred on March 25, 2019 between Motor Vehicle Registration Number KCE 916C owned and driven by the Appellant and Motor Cycle Registration Number KMCQ 273Q which the Respondent was riding.

2. In its Judgment delivered on November 9, 2021, the trial court apportioned liability at 70:30 in favour of the Plaintiff (now Respondent). The Plaintiff was also awarded General and Special Damages of Kshs 1,242,250/= plus costs and interest of the suit.

3. Being dissatisfied with the Judgment of the trial court, the Defendant/Appellant appealed to this court against the trial court's findings on quantum of damages through the Memorandum of Appeal dated 17th November 2021. He raised the following grounds:-

    I. That the learned trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award of Kshs 1,500,000 that was overly in excess in the circumstances of the case.

    II. That the learned trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.

III. That the learned trial Magistrate's exercise of discretion in assessment of quantum was injudicious.

4. The Appellant prayed that this court set aside the trial court's Judgment and replace it with its own assessment.

The Plaintiff's/respondent's Case

5. It was the Plaintiff/Respondent's case that he was involved in a road accident on March 25, 2019 between Motor Cycle Registration Number KMCQ 273Q and Motor Vehicle Registration Number KCE 916C which was driven by the Appellant's driver or agent.

6. It was the Respondent's case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the Plaint.

7. That as a result of the accident, he suffered the following injuries: -

   a. Right temporal bone fracture.

   b. Right zygomatic bone fracture.

   c. Lacerations on then scalp (right temporal-parietal area)

   d. Compound right tibia fracture.

   e. Blunt trauma to the right shoulder.

   f. Bruises on the right leg.

8. The Respondent prayed for Special and General Damages against the Appellant.

The Respondent's Written Submissions.

9. The Respondent submitted that this court should not interfere with the trial court award as it was fair. That it was not inordinately high or low as to represent an erroneous estimate. He relied on the *Kemfro Africa Limited t/a Meru Express Services (1976) & Another vs Lubia and Another (1987)* KLR 30, *Catholic Diocese of Kisumu vs Sophia Achieng Tete (2004)* 2 KLR 55 and Butt Vs Khan (1982-88) 1KAR to support this submission.

10. It was the Respondent's submission that his injuries were confirmed by his own doctor and the Appellant's doctor. That the injuries had rendered him physically incapable of competing in the labour market as they had made him permanently disabled. It was his further submission that both doctors had confirmed that he needed to undergo further surgery to correct the fractures and remove the metal implants.

11. The Respondent submitted that the general method of assessing damages was that comparable injuries should be compensated by comparable awards. He relied on *James Gathirwa Ngungi vs Multiple Hauliers (EA) Limited & Another (2015)* eKLR to support this submission.

12. It was the Respondent's final submission that the trial court did not err in awarding the amounts and that the same ought not to be disturbed by this court.

The Defendant's/appellant's Case

13. In his statement of defence, the Defendant (now Appellant) denied the occurrence of the accident on 25th March 2019 involving Motor Cycle Registration Number KMCQ 273Q and Motor Vehicle

Registration Number KCE 916C. The Appellant further denied being the insured, beneficial or registered owner of the aforementioned Motor Vehicle.

14. It was the Appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the Respondent and the rider and/or owner of the aforementioned Motor Cycle. The particulars of negligence of the Respondent and the rider were contained in paragraph 10 of the Defence. The Appellant however abandoned the contest on liability and appealed only on quantum.

The Appellant's Written Submissions

15. The Appellant submitted that Dr. Morebu Peter Momanyi's Medical Report dated 20th May 2019 confirmed the injuries in the Plaint. That the Appellant's doctor, Dr. Kahuthu produced Dr. Kikao's x-ray report which showed that the Respondent's skull had no fracture as it was in a good and fair condition.

16. It was the Appellant's submission that an award of Kshs 700,000/= would be a sufficient and adequate compensation to the injuries sustained by the Respondent. He relied on *Jitan Nagra vs Abidnego Nyandusi Oigo (2018)* eKLR, *Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor (2020)* eKLR to buttress this submission.

17. 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 allowances in this respect"

18. In its appellate role, this court also has a duty to review the evidence adduced before it and satisfy itself that the decision reached was well founded. In the case of *Selle & Another vs Associated Motor Boat Co. Ltd and Others* (1968) EA 123, the Court of Appeal pronounced itself as follows: -

> " .....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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. . . . "

19. I have considered the Record of Appeal dated 7th October 2022, the Appellant's Written Submissions dated 15th October 2022, the Respondent's Written Submissions dated 26th July 2022 and I find that the only issue for determination whether the award of quantum of damages was appropriate, fair and just.

20. It is trite law that the burden of proof in civil cases is that of on a balance of probability. (See Court of Appeal case of *Kanyungu Njogu vs Daniel Kimani Maingi (2000)* eKLR)

21. It was common ground that the Respondent suffered injuries as a result of the accident between Motor Vehicle Registration Number KCE 916C and Motor Cycle Registration Number KMCQ 273Q which occurred on 25th March,2019. I shall therefore proceed to assess the damages. As already stated It is also apparent from the grounds of Appeal that the Appellant was satisfied with the apportionment of liability by the trial court.

22. The Respondent produced a Discharge Summary from St. Clare's Kaplong Mission Hospital dated 15th April 2019 and a Medical Report by Dr. Morebu Peter Momanyi that were marked as P. Exh 4 and 1(a) respectively. It was the conclusion of Dr. Morebu Peter Momanyi that after examining the Respondent, he had suffered grievous harm i.e., a head injury with skull fractures, compound right tibia fractures with severe body injuries and that his recovery was expected to take a long time.

23. In his Defence, the Appellant called upon DW2 (Dr. Jenipher Kahuthu) who produced a Medical Report dated 17th September 2020 and marked as D. Exh 1. The doctor testified at the time of the examination, the Respondent was in a fair general condition and walked with a cane. That he had scars on the right leg and that movement on the right knee and joints were normal.

24. DW2's findings in her Medical Report were that the Respondent had fractures of the distal tibia and fibula shafts and that the skull was normal.

25. It was DW2's testimony that the Respondent came with a skull x-ray and that the same was reported to Dr. Kikao who did the imaging. That Dr. Kikao did not confirm the fracture on the head as reported by Dr. Momanyi. She further testified that the Respondent had metal implants.

26. In regard to General Damages, the Respondent stated in paragraph 5 of the Plaint that he suffered the following injuries: -

    a. Right temporal bone fracture

    b. Right zygomatic bone fracture

    c. Lacerations on then scalp (right temporal-parietal area)

    d. Compound right tibia fracture.

    e. Blunt trauma to the right shoulder.

    f. Bruises on the right leg.

27. In the case of *Spin Knit Limited v Benard Kiplangat Cheruiyot (2022)* eKLR, Matheka J. quoted the case of Mbaka Nguru and Another vs James George Rakwar NRB CA Civil Appeal No. 133 of 1998 (1998) eKLR where it was held that: -

> "The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

28. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia (1985)* KLR 730 where it was held that: -

> "It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and

reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

29. I am guided by the principles extensively set out the Court of Appeal in the Mbaka case (Supra) above. I understand them to mean that the court should reach an award that reflects the nature and gravity of the injuries, that, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, and; that no two cases are exactly similar and the discretion of the court in awarding damages is to be exercised on a case to case basis.

30. The Respondent in this case suffered bone fractures on his right side and soft tissue injuries to the scalp, right shoulder and the right leg. I have found the following cases quite helpful in terms of comparison:-

I. Fred Mohinga Kipkigiya vs David Agreey Zimbiru (2011) eKLR where the High Court reduced an award of Kshs. 800,000/= to an award of Kshs. 650,000/=. The plaintiff in that matter had sustained a fracture of the right femur and fracture of the distal femur in addition to soft tissue injuries.

II. Akamba Public Road Services vs Abdikadir Adan Galgalo (2016) eKLR where the award of Kshs.800, 000/= was substituted with an award of Kshs.500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.

III. Pauline Gesare Onami vs Samuel Changamure & another (2017) eKLR where the plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the court upheld the trial court's award of Kshs. 600,000/=.

IV. Sammy Mugo Kinyanjui & another vs Kairo Thuo (2017) eKLR where the Respondent had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. The court lowered the award of general damages from Kshs. 1,000,000/= to Kshs 600,000/=.

31. In the case of *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others (1986)* KLR 457, the Court of Appeal held 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... The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

32. Guided by the case law cited above and the injuries suffered by the Respondent, I find that the Kshs 1,500,000/= awarded as General damages by the trial court was excessive. It was not comparable to decided cases that had almost similar injuries. Taking inflation into consideration substitute the award of Kshs 1,500,000/= with the award of Kshs 800,000/=. In reducing the awards, I am guided by the principle espoused in the case of Kigaragari vs. Aya (1982 - 1988) I KAR 768, thus: -

> " Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

33. The Respondent prayed for future medical expenses to remove the metal implants. The two Medical Reports indicated that he would need Kshs 200,000/= and Kshs 80,000/= respectively for the surgery. In the case of Tracom Limited & another vs Hassan Mohamed Adan (2009) eKLR, the Court of Appeal 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 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..." (Underlining mine)

See also Court of Appeal case of Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993.

34. In the case of *Mbaka Nguru & Anor. vs James George Rakwar (1998)* eKLR, the Court of Appeal stated that: -

> " A mere reference to future medical expenses in a medical report produced at the trial was not sufficient to justify an award."

35. Further in the case of *Caltex Oil (Kenya) Limited v Rono Limited (2016)* eKLR, the Court of Appeal held that: -

> " .....If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

36. In this case the Respondent pleaded at paragraph 5 of the plaint that he would require future treatment and an operation to remove the metal implant which he estimated at Kshs. 200,000/=. The Respondent produced a medical Report by Dr. Peter Momanyi P. Exh.1(a) which stated the cost to be Kshs. 200,000/=. A second Medical Report prepared by Dr. Jenipher Kahuthu DW3 produced by the Defendant Exhibit 1 estimated the cost of the removal of the implants at Kshs. 80,000.

37. I therefore find that the Respondent pleaded and proved his claim of future medical expenses. I find an award of Kshs. 100,000/= to be reasonable and I so award. This award being a general damage is added to the Kshs. 800,000/= to make the general damages Kshs. 900,000/=.

38. With regards to the other pleaded Special damages, the Respondent particularized them as follows: -

Medical Expenses Kshs 71,200/=

Medical Report Kshs 6,500/=

Transport Expenses Kshs 30,000/=

Copy of Records Kshs 550/=

39. The Respondent produced a bundle of receipts marked as P.Exh 6 which indicated that he had paid Kshs 6,500/= for the Medical Report, Kshs 30,000/= for transport, Kshs 550/= for the Motor Vehicle Search and Kshs 71,200/= for medical expenses. I am satisfied that the Respondent pleaded and proved his claim for special damages and the same is awarded at Kshs 108,250/=.

40. The General Damages of Kshs 900,000 (inclusive of Kshs. 100,000 future medical expense) less 30% contribution by the Respondent comes to Kshs 630,000/=.

41. The summation of the General and Special Damages awarded is Kshs 738,250/=.

Conclusion

42. The Memorandum of Appeal 17th November 2021 succeeds as the Damages awarded to the Respondent are reduced from Kshs 1,242,250/= to Kshs 738,250/=.

43. Each party to bear their own costs on this Appeal and the Respondent shall costs of the suit as awarded by the trial court.

Orders Accordingly

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL, 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of N/A for the Appellant, Ms. Kebaya holding brief for Ms. Gogi for the Respondent and Siele (Court Assistant)