



**SS Mehta & Sons Ltd v Mwambega (Civil Appeal 81 of 2021)
[2023] KEHC 3710 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 81 OF 2021**

**SM GITHINJI, J
APRIL 26, 2023**

BETWEEN

SS MEHTA & SONS LTD APPELLANT

AND

**OMARI JUMA MWAMBEGA AKA OMAR JUMA
MWAMBEGA RESPONDENT**

*(Being an appeal from the judgment and decree of the learned Chief
Magistrate Hon. Dr. Julie Oseko in Civil Suit No. E90 of 2020 in the
Chief Magistrate's court at Malindi delivered on the 31st August 2021)*

JUDGMENT

1. This appeal emanates from the judgment and decree of Hon. Dr. Julie Oseko (CM) in CMCC No. E90 of 2020 wherein she awarded the sum of Kshs. 1,800,000 as special damages to the Respondent.
2. Dissatisfied with the judgment, the appellant brought the instant appeal founded on the following grounds;
 1. That the learned Chief magistrate erred in awarding a sum of Kshs. 1,800,000 to the respondent.
 2. That the said award of Kshs. 1,800,000 is in the circumstances of this case so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the plaintiff considering the injuries suffered by him and the opinion of Dr. Ajoni Adede in his medical report dated 14th October 2020.
 3. That the said award of Kshs. 1,800,000 is altogether disproportionate to the injuries sustained by the plaintiff and is not comparable with other award made in respect of similar injuries.



4. The learned Chief magistrate erred in failing to give any or adequate or credible reasons of how she arrived at the figure of Kshs. 1,800,000 general damages which she awarded to the plaintiff on the basis of 100% liability.
 5. That the learned chief magistrate erred in awarding to the plaintiff the sum of Kshs. 150,000 for future medical expenses when there was no evidence led before her in respect of the same.
 6. That the learned magistrate erred in failing;
 - a. To appreciate the significance of the various facts that emerged from Dr. Ajoni Adede's medical report dated October 14, 2020.
 - b. To consider or properly consider all the evidence before her and/or.
 - c. To make any or any proper findings on the aspect of quantum of damages on the evidence before her.
 7. That the learned chief magistrate erred in failing to adequately consider the written filed submissions by counsel for the appellant.
3. The respondent herein Omari Juma Mwambega had sued the appellant S Mehta and Sons Ltd for damages arising out of a road traffic accident that occurred on 22/1/2019 along Malindi- Tsavo road at Masimba area.

Evidence at Trial

4. Pw1 Omar Mwambega the plaintiff adopted his witness statement dated November 6, 2020 as his evidence. He testified that on 22/1/2019 he was involved in an accident at Masimba area and the facts were similar to those in CMCC No. 113 of 2020. It was his testimony that he needed surgery costing Kshs. 150,000 and he is unable to move his neck. Further that he broke C5 and 6 and sustained injuries on chest, leg, right hand and three broken ribs thus cannot work.

Submissions, Analysis and Determination

5. I have perused the pleadings, evidence adduced, judgment, grounds of appeal, submissions and decisions referred to by the parties.
6. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should make an allowance for that. This duty was well stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“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 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. 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

7. The Court of Appeal for *East Africa took the same position in Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

8. On the issue of an appellate court interfering with a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows: -

“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.”

9. The issues arising for determination are therefore;

1. Whether the award of Kshs. 1,800,000 was inordinately high?
2. Whether the award for future medical expenses was merited?

9. As regards quantum, the appellant submitted that the award for damages in the sum of Kshs. 1,800,000 was excessive considering the injuries sustained by the respondent. I have reviewed the authorities by all the parties before the trial court to acquaint myself with what guided the learned trial magistrate in arriving at the award of Kshs. 1,800,000. This court can review the award downward if convinced that the award was inordinately high. My determination is guided by the principles laid down in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 stated as;

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

10. From the medical report dated October 14, 2020, the respondent suffered the following injuries; Disc prolapse (herniation) between neck bones no. C5 and C6, bone marrow contusion fractures of the left 6th, 7th and 8th ribs, blunt object injury to the chest, neck and right upper limb and blunt object injury on the right knee. In addition, the report states that the permanent partial disability suffered is 4 %. In determining the award of damages, the court has to rely on recent comparable awards and this was



appreciated by the Court of Appeal in *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.”

11. In the case of *Southern Engineering Co. Ltd vs. Musungi Mutia* [1985] KLR 730, the court held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, 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...”

12. In *David Muriungi Daniel & another v Martine Githongo Ndereva alias Martin Githingo Ndereva*, the Court of Appeal declined to set aside an award of general damages of Ksh. 1,400,000/= as had been awarded by the trial court where the plaintiff had suffered multiple injuries including subluxation of the cervical spine at C3 to C5. Following this logic, I find no reasonable ground that entitles me to interfere with the judgment of the trial court on the issue of quantum.

Future Medical Expenses

13. The law on future medical expenses is well settled. The Court of Appeal in the case of *Tracom Limited & Another -vs-Hassan Mohamed Adan* [2009] eKLR 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:

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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 arising naturally from infringement of a person’s legal right should be pleaded.”

14. 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...”

15. The plaintiff pleaded for future medical expenses under paragraph 6. In support of his claim the plaintiff produced as evidence the medical report dated October 14, 2020 where Dr. Ajoni Adede opined that a definitive surgical intervention for the disc prolapse called discectomy costs Kshs.



150,000. The defendant did not produce a medical report to counter the same nor object to production of the plaintiff's medical report. In the premises, I do not find a reason to upset the trial court's finding.

16. In the end, I find that the appeal lacks merit and the same is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Miss Nyambuto holding brief for Mr Kilonzo for the Respondent.

Ms Mwanguo for the Appellant (absent).

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S.M. GITHINJI

JUDGE

26/4/2023

