



Olusa & 2 others v Mombasa Maize Millers (Kisumu) Limited & 2 others (Civil Appeal 150 & 143 of 2019 (Consolidated)) [2023] KEHC 19788 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 150 & 143 OF 2019 (CONSOLIDATED)**

RE ABURILI, J

JUNE 30, 2023

BETWEEN

ROBERT ELIAKIM OLUSA APPELLANT

AND

MOMBASA MAIZE MILLERS (KISUMU) LIMITED 1ST RESPONDENT

STEPHEN KORIR 2ND RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL 143 OF 2019**

BETWEEN

MOMBASA MAIZE MILLERS (KISUMU) LIMITED 1ST APPELLANT

STEPHEN KORIR 2ND APPELLANT

AND

ROBERT ELIAKIM OLUSA RESPONDENT

(An appeal arising out of the judgement and decree of the Honourable R.S. Kipng'eno in the Senior Principal Magistrate's Court at Nyando delivered on the 26th November 2019 in Nyando SRMCC No. 169 of 2019)



JUDGMENT

Introduction

1. The appellant herein Robert Eliakim Olusa filed suit against the respondents for injuries sustained following a road traffic accident that occurred on the 18.3.2018 along the Ahero-Awasi road, claiming general and special damages as well as costs of the suit.
2. The respondents filed their statement of defence denying the averments made in the plaint and put the respondent to strict proof. The parties herein entered consent on liability in the ratio of 85:15 in favour of the respondent against the appellants.
3. At the end of the trial, the trial court awarded the appellant general damages of Kshs. 1,800,000 and special damages of Kshs. 5,550 which when factoring in contribution on liability reduced to Kshs. 1,534, 718. The court rejected the claim for future medical expenses.
4. Aggrieved by the said decision, the Appellant instituted this appeal vide a memorandum of appeal dated 13th December 2019 and filed on the 19th December 2019 raising the following grounds of appeal:
 - a. That the learned magistrate erred in law and fact by failing to award future medical expense of Kshs. 500,000 whereas the same was duly pleaded and proved.
 - b. That the learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant, consequently arriving to a wrong conclusion on the same.
5. The respondents also filed an appeal challenging the award of general damages vide their memorandum of appeal dated 16th December 2019 on 17th December 2019 vide HCCA 143 OF 2019 which I will consider as a cross appeal and for efficiency purposes, I hereby consolidate the two appeals.
6. The respondents herein raised the following grounds of appeal:
 - i. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion of the same.
 - ii. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 - iii. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 - iv. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 - v. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
7. The parties canvassed the appeal by way of written submissions.



The Appellant's Submissions

8. The appellant submitted that he pleaded for future medical expenses in the nature of medical surgery at the cost of Kshs. 500,000 that was further supported by the prognosis of Dr. Wokabi but that the same was not granted. The appellant urged the court to grant the said future medical expense.
9. It was his submission further that there were no disputes on the injuries that she had sustained as set out in the medical report of Dr. Wokabi who formed the opinion that the injuries would lead to a 18% permanent disability.
10. The appellant further submitted that the award on general damages was not inordinately high based on the injuries he sustained. Reliance was placed on the cases of *David Ndonge Wanderi v Raita Ole Tekei* [2019] eKLR and the case of *Rwaken Investments Limited v John Kibicho & Emmanuel Persmei Mkoltiko* [2017] eKLR.

The Respondent's Submissions

11. It was submitted that the general damages of Kshs. 1,800,000 was inordinately high vis-à-vis the injuries sustained by the appellant and as such the trial court was justified in interfering with the award as held in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 and the case of *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457.
12. The respondents submitted that the respondent should be awarded at most Kshs. 400,000 in general damages relying on the case of *Akemo Valley Hospital & Maternity v Napoleon Mecha Ogaki* [2019] eKLR and the court *Mwavita Jonathan v Silvia Onunga* [2017] eKLR where in both instances the court awarded Kshs. 400,000 for injuries similar to those of the appellant herein.
13. On future medical expenses, the respondents submitted that there was no specific plea for future medical expenses as gleaned from paragraphs 10 (c) and 6 of the appellant's amended plaint and that that mere indication of an alleged future medical expense vide a medical report was inconclusive without sufficient proof by a medical expert to justify such an expense. Reliance was placed on the case of *Simion Taveta v Mercy Mutiti Njeru* [2014] eKLR where the court held inter alia that future medical expenses are a special damage that must be pleaded.
14. On costs, the appellants submitted that the appeal should be awarded with costs to them as costs follow the event as was held in the case of *Rosemary Wairimu Munene, Ex Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd.*

Analysis and Determination

15. I have considered the grounds of appeal and submissions by both counsel for the parties in both appeals as consolidated. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions as was held by the Court of Appeal for *East Africa in Peters v Sunday Post Limited* [1958] EA 424 and reiterated by the Court of Appeal in several cases including the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
16. The issues for determination before this court are;
 - i. Whether the award of general damages was inordinately high or excessive as to warrant this court's interference



- ii. Whether the trial court erred by failing to grant future medical expenses.
17. On quantum, the trial court record shows that the appellant suffered fracture of the neck, fracture of the right femur and abrasions on the back of the head. PEX5a, the medical report prepared by Dr. Wokabi noted that the permanent disability would be at 18% once the appellant healed.
18. The circumstances under which an appellate court will disturb 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 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.”
19. The Court in P. J. *Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:
- “... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”
20. In the case of the case of *Silas Muthuri Muraga & another v Margaret Mwengwa Munene* [2015] eKLR where the plaintiff suffered Fracture of the sixth cervical (neck), Cut on the forehead and Laceration on the lower limb, the Court on Appeal found that the award of Kshs 650,000 as general damages was not excessive.
21. In the case of *David Kimathi Kaburu v Dionisius Mburugu Itirai* (2017) eKLR where the court awarded Kshs 630,000/- to a plaintiff that sustained a plated fracture midshaft femur; intertrochanteric fracture; wobbly gait; severe pain on the right hip and entire hip with injuries.
22. In the case of *Godfrey Wamalwa Wamba & another v. Kyalo Wambua* [2018] eKLR, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs. 700, 000.00, which the appellate court upheld.
23. In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1, 600, 000.00 had the same reduced on appeal to Kshs. Kshs. 800, 000.00
24. Considering the aforementioned authorities with comparable injuries, I find that the award of Kshs. 1,800,000 was excessive in the circumstances. I set the award aside and substitute the same with an award of Kshs 900,000.



25. Turning to the claim for future medical expenses as raised by the plaintiff/ claimant, the governing principle was initially explained by the Court of Appeal in *Kenya Bus Services Ltd v Gituma* [2004] EA 91 as follows

“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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person’s legal rights should be pleaded.”

26. However, the same Court of Appeal flexed its muscle and in the later cases and has held as follows on claims for future medical expenses in an appeal against my decision where I declined to award future medical expenses based on the Kenya Bus Limited case above. In *Forwarding Company Limited & Another v Kisilu & Gladwell (third Party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR), the court stated as follows:

“In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.”

27. In *Guardian Coach Ltd & another v Kiptoo* (Civil Appeal 34 of 2020) [2022] KEHC 12397 (KLR) (26 May 2022) (Judgment) it was stated as follows:

“The law on the claim for future medical expenses was settled in the case of *Tracom Limited and another v Hassan Mohamed Adan* [2009] eKLR where the Court of Appeal stated 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. In the case of *Kenya Bus Services Ltd v. 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.” [Emphasis mine]

28. The filed amended plaintiff shows that the claim for future medical expenses was pleaded as per Dr. Wokabi’s medical report on the possibility of future medical expenses being incurred and estimated the cost as being Kshs. 500,000 for total hip replacement and also at paragraph 10 (c).
29. Based on the above decision of the Court of Appeal in *Forwarding Company Limited & Another v Kisilu & Gladwell (third Party)* *supra* which allowed a cross appeal from my own decision declining to award future medical expenses to the plaintiff, and which decision is binding on this court, and in this case, the appellant having pleaded in his amended plaintiff, the claim for future medical expenses as per the doctor’s prescription, there is no reason why the trial court did not award him that claim. I find that the trial magistrate erred in failing to award the claim for future medical expenses which was pleaded and proved. I award the appellant kshs 500,000 for future medical expenses.
30. The upshot of the above is that the two appeals herein, being the appeal and cross appeal are both allowed to the following extents that the trial court’s judgment on the general damages award and refusal to award the claim for future medical expenses are set aside and substituted with the following awards, under general damages and cost of future medical expenses:
31. The upshot of the above is the trial court’s judgement is set aside as follows:
General damages Kshs. 900,000
Future medical expenses Kshs 500,000
Total Kshs 1,400,000
Less 15% contribution (Kshs 210,000) 1,190,000
Add Special damages Kshs. 5,550
Total Kshs. 1,195,550
32. General damages will earn interest from date of judgment until payment in full. Cost of future medical expenses earns interest at court rates from date of filing of amended plaintiff until payment in full Special damages earn interest at court rates from date of filing suit until payment in full.
33. As both parties are successful in their respective appeals, I order that each party bear their own costs of this appeal.
34. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE

