Mugwika v Damaris (Civil Appeal E011 of 2022)
[2023] KEHC 22932 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22932 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E011 OF 2022

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

FABIAN MAINGI MUGWIKA ..... APPELLANT

AND

PRISCAH DAMARIS ..... RESPONDENT

(Appeal arising from the decision of Hon. A. K. Ithuku in Chief Magistrate's Court at Kerugoya Civil Suit No.67 of 2020 delivered on 01st February 2022)

JUDGMENT

1. The appellant has filed memorandum of appeal dated 25th February 2022 challenging the decision of the trial court in Chief Magistrate's Court Kerugoya Civil Suit No. 67 of 2020 seeking orders that the appeal be allowed, the orders following the trial court judgment be set aside, costs of the trial court and the appeal be paid to the appellant and any such order as the court deems fit. The appeal was premised on the grounds that:

    a. The learned magistrate erred in law and fact in failing to apportion liability contrary to the evidence on record showing the respondent contributed to the occurrence of the accident;

    b. The learned magistrate erred in law and fact in finding 100% liability against the appellant;

    c. The sum of Kshs. 3,000,000/= general damages for pain and suffering and loss of amenities is excessive in all the circumstances and ought to be reduced;

    d. The sum of Kshs. 3,000,000/= is not consistent with the level of damages awarded to other plaintiffs in similar circumstances;

    e. The sum of Kshs. 1,000,000/= for future medical expenses was neither pleaded nor proved and ought to be set aside;

f. The sum of Kshs. 225,671/= as medical expenses was neither pleaded nor proved and ought to be set aside; and

g. The learned magistrate erred in law and fact when he failed to consider the appellants submissions and dismissed the same without giving any reason at all.

2. The trial court suit was instituted by a plaint wherein the plaintiff stated the particulars that on 29th January 2020 she was a pedestrian within Kerugoya Township when the defendant's driver or agent negligently drove and/or controlled motor vehicle registration number KAW 573N that it lost control, veered off the road and hit the plaintiff. That the plaintiff sustained the following injuries:

i. Open and comminuted right proximal tibia fracture;

ii. Open and comminuted left distal radio-ulnar fracture;

iii. Soft tissue injuries to the chest and abdomen;

iv. Multiple bruises on the face;

v. Severe degloving injuries to the left arm (8cm long); and

vi. Deep laceration on the right thigh (7cm long, 4cm deep).

3. In the plaint, the plaintiff prayed for special damages as enumerated, general damages for pain and suffering, loss of earnings and loss of amenities and costs of the suit. In her witness statement, the plaintiff stated that she is not able to engage in gainful employment because of the injuries she sustained during the accident. She also produced a police abstract, medical records and receipts in support of her case.

4. At the hearing of the plaintiff's case, PW1 was PC Isaiah Mutwiri of Kianyaga police station who testified that he visited the scene of the accident where a motorist had hit a pedestrian with motor vehicle registration number KAW573N. That the driver of the motor vehicle claimed that her brakes had failed thereby causing the accident. That according to him, the driver of the motor vehicle was to blame for the accident. On cross-examination, he stated that nobody had been charged with a traffic offence as investigations were still underway.

5. PW2 who is the respondent herein stated that on the material day, she was walking besides the road when a vehicle approached and hit her from behind and she fell down and broke both legs. That she was taken to Kerugoya General Hospital and later referred to Kijabe Hospital. That she blames the defendant's driver for the accident. On cross-examination, she confirmed that she is a teacher and because of the injuries, she cannot stand for long as expected of her work. That some of the medical expenses were paid by insurers and NHIF.

6. In his statement of defense, the defendant denied the averments made by the plaintiff and blamed the plaintiff for negligence that led to the accident. During the hearing of the defense case, DW1 was the driver of the motor vehicle registration number KAW 573N who stated that on the material day she saw 2 ladies and several cars ahead of her. That she hooted and her vehicle accelerated on its own and went to the wrong side of the road. That she did not see the plaintiff who claimed that she was the victim. On cross-examination, she stated that the vehicle belonged to her husband who is the defendant. That she was driving on the wrong side of the road because the vehicle accelerated. That the plaintiff did not jump in front of the vehicle. That she was not aware of the mechanical defects of the vehicle and when it started accelerating, she tried to stop it by hitting an obstacle and that is when she saw the plaintiff had been injured.

7. DW2 was PC Isaiah Mutwiri of Kerugoya Police Station who confirmed occurrence of the accident. He stated that the motor vehicle involved was taken for inspection and was found not to have had any pre-accident defects. He produced the inspection report as an exhibit. On cross-examination, he stated that the defendant reported the accident and told them that the brake pedal had failed to work and she swerved to the right, hit another car and the plaintiff, in the process of attempting to stop the car. That he blamed the defendant's driver for the accident.

8. At the trial court, the parties filed their submissions. The plaintiff submitted that upon follow-up treatment, the doctors at Kijabe and Bishop Kioko Hospitals confirmed that she was using a wheel-chair at the time and that she had 40% disability resulting from the injuries sustained during the accident. She claimed Kshs. 3,500,000/= being general damages and relied on the cases of Gabriel Mwashuma Vs. Mohammed Sajjad & Another (2015) eKLR where for similar injuries the court awarded Kshs. 3,000,000/=, Zipporah Nangila Vs. Eldoret Express Limited (2016) eKLR where the plaintiff was awarded Kshs. 2,400,000/= and Alex Wachira Njagua Vs. Gathuthi Tea Factory & Another (2010) eKLR where the court awarded Kshs. 3,000,000/=. She also claimed Kshs. 1,000,000/= being special damages for future medical expenses and Kshs. 673,051/= being special damages for medical expenses incurred after the accident. On the argument of recovery of moneys paid by insurers, she relied on the case of Leli Chaka Ndoro Vs. Maree Ahmed & S.M. Lardhib (2017) eKLR where the court held that personal accident claims are not affected by the doctrine of subrogation.

9. The defendant cited sections 107 and 109 of the *Evidence Act* and the case of Treadsetters Tyres Ltd Vs. John Wekesa Wepukhulu (2010) eKLR in submitting that the burden was on the plaintiff to prove that the accident was caused by the defendant. On this, he relied on the case of Jamal Ramadhan Yusuf & Another Vs. Ruth Achieng Onditi & Another (2010) eKLR. He stated that the plaintiff was walking by the roadside and when she noticed a car behind her, she panicked and fell into a ditch. That the case made by the plaintiff was not sufficient to even raise probabilities that the court should use to determine the case. He cited indolence on the part of the plaintiff and stated that she cannot benefit from equity when she failed to clearly give details of the accident.

10. The defendant also urged the court to consider a liability ratio of 50:50 as was held in the case of Peter Okello Omedi Vs. Clement Ochieng (2005) eKLR. They submitted that general damages of Kshs. 2,000,000/= would suffice as was found in the cases of James Gathirwa Ngungi v. Multiple Hauliers (EA) Ltd (2015) eKLR, Mwaura Muiruri Vs. Suera Flowers Limited & Another (2014) eKLR, Francis Ndungu Wambui & 2 Others Vs. VK (minor suing through next friend and mother MCWK) (2019) eKLR and Ram Gopal Gupta Vs. Nairobi Tea Packers Ltd & 2 others (2017) eKLR and Joyce Moraa Oyaro Vs. Hussein Dairy Ltd (2016) eKLR. He also contested the special damages stating that they were not substantiated.

11. In the instant appeal, the parties were directed to proceed by way of written submissions and both parties complied.

12. In the appellant's submissions, he relied on the cases of Salmin Mbarak Awadhi Vs. Emma Nthoki Mutwota (2017) eKLR, Mary Ayo Wanyama & others Vs. Nairobi City Council Civil Appeal No. 252 of 1998 and Patrick Mutie Kamau & another Vs. Judy Wambui Ndurumo (1997) eKLR to make his case that the court should have apportioned liability between the parties at a ratio of 50:50 considering that both parties should have exercised due care. He also submitted that the trial court erred in applying an inflation adjustment of Kshs. 1,000,000/= and the damages awarded are also inordinately high and should be reviewed downwards comparatively with other court's decisions in similar cases. He relied on the cases of George William Awuor Vs. Beryl Awuor Achieng (2020) eKLR and Mbaka Nguru & another Vs. James George Rakwar (1998) eKLR where the courts, when faced

with similar circumstances, arrived at much lower awards. The appellant also challenged the award of Kshs. 225,671/= being special damages stating that the same was not proved.

13. The respondent in her submissions reminded the court that it had the responsibility of drawing its own conclusions on appeal based on the trial court's record, as were the sentiments in the case of Selle & another Vs. Associated Motor Boat Co. Ltd and Others (1968) EA 123. She relied on the case of Butt Vs. Khan (1978) eKLR where the court held that the decision of the trial court must not be interfered with unless with sufficient reason. She underscored the severity of the injuries sustained and the burden of medical expenses incurred spanning into the future owing to the disability caused. In supporting the claim for future medical expenses, she relied on the case of Forwarding Company Limited & another Vs Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 and asked the appellate court to uphold the decision of the trial court.

14. I have considered the trial court's record, the pleadings and submissions by the parties at trial and the submissions in this appeal. In my view, the issues for determination are as follows:

    a. Whether the trial court made correct findings on liability;

    b. Whether the general damages awarded by the trial court are commensurate to the injuries suffered by the respondent; and

    c. Whether the award on special damages was justified

    d. Whether the respondent was entitled to the claim for future medical expenses.

15. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of Okeno vs. Republic (1972) EA 32 wherein the court held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

16. On the issue of liability, the trial court found the appellant 100% liable for the accident. The learned magistrate based his decision on the testimonies by the witnesses who recounted the events. DW1 who was the driver of the motor vehicle at the time of the accident, stated that the car brakes failed thereby causing her to swerve and enter into the wrong side of the road and that she tried to stop the car by hitting an obstacle when she discovered that the plaintiff had been injured. She stated that she did not know of the mechanical faults of the vehicle before the accident. PW2 on the other hand states that she was walking beside the road, not on the road, when the accident happened. That she saw the car coming from behind her at high speed while being driven on the wrong side of the road but by the time she saw the car, it had already veered off the road. I fail to see any other probability that the respondent would have done anything different to avert the accident. In the case of Rentco East Africa Limited Vs Dominic Mutua Ngonzi (2021) eKLR the court stated as follows:

> " Palace Investment Ltd –Vs- Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Judges of Appeal held that:

"Denning J, in Miller –vs- Minister of Pensions (1947) 2 All ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.""

17. Therefore, on a balance of probabilities it is also my view, and in agreement with the trial court, that the appellant herein is 100% responsible for the accident.

18. On the issue of damages, the trial court was guided by the case of John Kipkemboi & Another Vs. Morris Kedolo (2019) eKLR where the court stated:

"The assessment of damages in personal injury case by court is guided by the following principles: -

1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
2. The award should be commensurable with the injuries sustained;
3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts;
4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account; and
5. The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR."

1. The trial magistrate applied these principles in reaching his determination in which he awarded Kshs. 3,000,000/= as general damages. The appellant submits in this appeal that the sum of Kshs. 2,000,000/= would suffice. The trial court was guided by the cases cited by the plaintiff, being precedents set by previous courts in the cases of Gabriel Mwashuma Vs. Mohammed Sajjad & Another (2015) eKLR, Zipporah Nangila Vs. Eldoret Express Limited (2016) eKLR and Alex Wachira Njagua Vs. Gathuthi Tea Factory & Another (2010) eKLR where for similar injuries, the courts awarded between Kshs. 2,400,000/= to Kshs. 3,000,000/=. On his part the defendant cited the cases of James Gathirwa Ngungi Vs. Multiple Hauliers (EA) Ltd (2015) eKLR, Mwaura Muiruri Vs. Suera Flowers Limited & Another (2014) eKLR, Francis Ndungu Wambui & 2 Others Vs. VK (minor suing through next friend and mother MCWK) (2019) eKLR and Ram Gopal Gupta Vs. Nairobi Tea Packers Ltd & 2 others (2017) eKLR and Joyce Moraa Oyaro Vs. Hussein Dairy Ltd (2016) eKLR in which the courts awarded between Kshs. 800,000/= to Ksh. 1,750,000/= for similar injuries.

2. In this appeal, I shall base my arguments under this head on previous decisions where the court was faced with similar circumstances. In the case of Daniel Otieno Owino & Anor -Vs- Elizabeth Atieno Owuor [2020] eKLR the trial court awarded Kshs. 600,000/= for similar injuries but the same was reduced on appeal to Kshs. 450,000/=. In another case of Aloise

Mwangi Kahari -Vs- Martin Muitya & Anor [2020] eKLR the court enhanced an award of Kshs. 320,000/ = to Kshs. 500,000/= for Compound fracture of the right tibia and fibula, Severe soft tissue injuries on the face and soft tissue injury on the left shoulder joint. In the case of Haco Industries (K) Limited Vs Tabitha Njoki Njeru [2021] eKLR the court relied on these 2 authorities to reduce the trial court's award of Kshs. 1,500,000/= to Kshs. 1,000,000/=.

3. It is therefore my view that the general damages for pain and suffering as awarded by the trial court is inordinately high and ought to be reduced to Ksh. 2,000,000/=. In awarding this, the court considered the element of economic inflation as guided by the case of Charles Oriwo Odeyo Vs. Appollo Justus Andabwa & Another [2017] eKLR, where it was held that the court in making an award for general damages must always consider the prevailing inflation.

4. Further, I also note that there is no amount of money that can compensate the respondent herein for the pain and incapacity she suffered physically, emotionally and in all other spheres of her life. This was echoed in the case of H. West & Son Ltd -Vs-Shepherd (1964) AC. 326 in which Lord Morris of Borth-y-Gest stated as follows;

> " ... 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. ln 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."

23. On special damages, I do not find reason to interfere with the award of Kshs. 225,671/= as the same is well explained by the magistrate. I have perused the trial court record and find adequate proof of the medical expenses. Additionally, on the issue of future medical expenses, the defendant at trial did not contest the medical report proposing Kshs. 1,000,000/= for future medical expenses for the plaintiff. The trial magistrate proceeded to award the same as prayed. I also find no reason to interfere with the same and I find guidance on this in the case of Tracom Limited & Vs Hasssan Mohamed Adan [2009] eKLR where the Court of Appeal held as follows: -

> " ...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..."

24. In conclusion, I have considered all the pleadings and submissions of the trial court, the submissions of the parties to this appeal, relevant caselaw and do find that the appeal partially succeeds and I hereby make the following orders:

    a. Liability is held at 100% by the appellant;

    b. Special damages (medical expenses) Kshs. 225,671/=;

    c. Damages for future medical expenses at Kshs. 1,000,000/=;

    d. General damages for pain and suffering of Kshs. 3,000,000/= as awarded by the trial court is hereby set aside and substituted with Kshs. 2,000,000/=;

    e. Costs of this appeal and the trial court to be borne by the appellant: and

    f. Interest at court rates on special damages from the date of filing of the plaint and on general damages from the date of judgment of the trial court.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent