Patrick v Ajak (Civil Appeal E07 of 2020) [2022] KEHC 612 (KLR) (31 March 2022) (Judgment)

Neutral citation: [2022] KEHC 612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E07 OF 2020

OA SEWE, J

MARCH 31, 2022

BETWEEN

AMNADY KIOKO PATRICK ..... APPELLANT

AND

AJAK JOK AJAK ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Naomi Wairimu, Principal Magistrate, dated on 26th November 2019 in Eldoret CMCC No. 280 of 2018)

JUDGMENT

1. The respondent was the plaintiff in Eldoret Chief Magistrate's Civil Case No. 280 of 2018: Ajak Jok Ajak v Amnady Kioko Patrick. He sued the appellant vide a Plaint dated 5th March 2018 for compensation in respect of injuries sustained by him on 15th December 2017. The respondent alleged that on the 15th December 2017, he was travelling as a lawful pillion passenger on Motor Cycle Registration No. KMDQ 279S along Eldoret-Kapsoya Road near Moi Girls High School when the defendant so negligently drove Motor Vehicle Registration No. KCG 147T Toyota Saloon, that he caused it to veer of the road and violently collide with the Motor Cycle Registration No. KMDQ 279S; thereby occasioning him serious injuries, loss and damage.

2. The particulars of negligence were supplied by the respondent at paragraph 4 of the Plaint. He likewise set out the particulars of injuries suffered as well as particulars of special damage at paragraph 5 the Plaint. In addition, the respondent sought to rely on the res ipsa loquitor maxim in seeking compensation for his pain, suffering and loss. He accordingly prayed for the following reliefs:

    (a) General damages for pain, suffering and loss of amenities arising therefrom and special damages as per paragraph 5 of the Plaint;

    (b) Costs of the suit and interest on the decretal sum at court rates from the time of the filing the suit till payment in full;

(c) Any other or further relief that the Court may deem fit and just to grant.

3. The appellant resisted the claim vide his Statement of Defence dated 4th April 2018 and filed on his behalf by M/s Mbugua, Atudo & Macharia Advocates. He denied ever being the registered owner of Motor Vehicle Registration Number KCG 147T, Toyota Saloon; or even that an accident occurred on the 15th December 2017 along Eldoret-Kapsoya Road as alleged. The appellant further denied that the respondent was a pillion passenger on Motor Cycle Registration No. KMDQ 279S or that an accident occurred in the manner alleged by the respondent in the Plaint. Accordingly, the allegations of negligence, injuries and special damages were specifically denied.

4. In the alternative, and without prejudice to his assertions as aforementioned, the appellant averred that if an accident occurred as alleged, then the same was attributable to the negligence of the motor cyclist who was then riding Motor Cycle Registration No. KMDQ 279S. The appellant set out the particulars of negligence of the motorcyclist at paragraph 6 of his Defence.

5. A perusal of the record of the lower court shows that liability was settled by consent on 6th August 2019 at 80%:20% in favour of the respondent. The learned trial magistrate then left to determine the issue of quantum on the basis of the evidence presented by the respondent and his 3 witnesses, as well as the written submissions filed by counsel for the parties and the authorities cited before. In her judgment dated 26th November 2019 the learned magistrate concluded thus:

> " the plaintiff in his submissions cites various authorities and asks the court to award Kshs. 600,000/= as general damages and Kshs. 11,704/- as special damages and also our word [sic] Kshs. 50,000/- being estimated dental medical expenses. The defendant on the other hand submits that an award of Kshs. 150,000/- would suffice and also cites various authorities in support. Having considered the authorities cited by the parties and the injuries sustained by the plaintiff herein I would award to the plaintiff general damages in the amount of Kshs. 500,000/- since the injuries sustained by the plaintiff are minor compared to those sustained by the plaintiffs in the authorities cited by the plaintiff and more severe than the injuries sustained by the plaintiff in the authorities cited by the defendant.
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> Having considered the evidence adduced by the plaintiff, I am inclined to award to the plaintiff special damages in the amount of Kshs. 11,704/- special damages which were both pleaded and proved and for future medical expenses am inclined to allow the claim by the plaintiff of Kshs. 50,000 considering the recommendation in the medical report. Since costs follow the cause, the plaintiff shall have costs of the suit to be assessed at the registry.

6. Being aggrieved by that decision, the appellant filed this appeal vide the Memorandum of Appeal dated 12th October 2020 contending that:

(a) The learned magistrate misapprehended the medical evidence in material respects and thus arrived at a wrong assessment of damages;

(b) The learned magistrate showed extreme prejudice by totally ignoring the appellant's submissions on issues of law and fact and thereby made an excessively high award of damages;

(c) The learned magistrate erred in law by awarding future medical costs of Kshs. 50,000 when the same were neither pleaded nor proved;

(d) The learned magistrate misapprehended the legal principles and guidelines set for the award of damages and thereby made a disproportionately high award of damage.

7. In the premises, the appellant prayed that his appeal be allowed with costs; that the award of Kshs. 500,000 in general damages made by the trial court be set aside and be substituted with an award of Kshs. 175,000 or such other lower award that the Court may deem reasonable. The appellant likewise prayed that the award of Kshs. 50,000 for future medical costs be set aside.

8. The appeal was urged by way of written submissions, pursuant to the directions given herein on 27th April 2021. In the appellant's written submissions filed herein on 20th May 2021, Mr. Eboso addressed two broad issues, namely:

   (a) The principles to be observed in determining whether damages assessed by the trial court are reasonable;

   (b) On the merits of the appeal.

9. On his part, Mr. Kibii, learned counsel for the respondent proposed the following issues for determination in this appeal:

   (a) Whether the learned magistrate misapprehended the medical evidence and thus arrived at a wrong assessment of damages;

   (b) Whether the learned magistrate misapprehended the legal principles and guidelines set for the award of damages and thereby made a disproportionately high award of damages;

   (c) Whether the learned magistrate erred in law by awarding future medical costs of Kshs. 50,000/= when the same were neither pleaded nor proved;

   (d) Whether the appellant's appeal dated 12th October 2020 is incompetent and an abuse of the court process and should be dismissed by this Court.

10. This being a first appeal, it is the duty of the Court to consider and re-evaluate the evidence adduced before the lower court with a view of making its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 it was held that:

> " ...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..."

11. And, as was observed by Sir Kenneth O'Connor in *Peters vs. Sunday Post Limited* [1958] EA 424:

> " 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..."

12. As the appeal is basically on quantum, I must reiterate, at the outset, that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground

that it would have arrived at a different outcome. In *H. West & Son Ltd vs. Shephard* [1964] AC 326, for instance, it was held that:

> " ...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."

13. Similarly, in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

14. Thus, the approach taken by Hon. Wambilyanga, J. in HCCC No. 752 of 1993: *Mutinda Matheka vs. Gulam Yusuf*, which I find useful, was thus:

> " The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

15. Additionally, in *Stanley Maore vs. Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:

> " ...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

16. With the foregoing in mind, I have looked at the evidence of the respondent as to the exact nature of his injuries. He adopted his witness statement dated 5th March 2018. The respondent also called Dr. Sokobe (PW2) who produced his Medical Report dated 22nd December 2017 as the Plaintiff's Exhibit 4(a) in which he listed the plaintiff's injuries as hereunder:

    (a) Blunt injury to the upper 1st incisor tooth with mild breakage at the tip

    (b) Cut wound on the inner aspect of the upper lip

(c) Blunt injury to the neck

(d) Blunt injury to the left shoulder

(e) Blunt injury to the left chest

(f) Blunt injury to the left hip

(g) Bruises on both knees; and

(h) Occasional chest and left hip joint pain

17. Thus, Dr. Sokobe confirmed that he examined the respondent and ascertained that he had sustained the injuries set out hereinabove. He also noted that the respondent had healing bruises on both knees; that his upper left incisor tooth had a small crack and that there was a healed scar on the inner aspect of the upper lip. PW2's prognosis was that the respondent was recovering well; but needed further dental treatment at an estimated cost of Kshs. 50,000/=.

18. For the above injuries, the respondent sought for an award of general damages of Kshs. 600,000.00/= and relied on the following cases both in the lower court and in the appeal:

(a) *Martha Agok v Kampala Coach* [2017] eKLR where the appellant sustained injuries on the face; lost one incisor tooth and fractured another, as well as blunt trauma on the lower abdomen, chest and right leg, the court awarded Kshs. 350,000.00 as general damages

(b) *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* [2005] eKLR, wherein the 3rd Plaintiff was awarded general damages of Kshs. 350,000.00 for multiple soft tissue injuries, injury on the left elbow joint and injuries on both ankles.

(c) *Francis Ochieng & another v Alice Kajimba* [2015] eKLR, in which Kshs. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries.

(d) *Isaac Katambani Iminya v Firestone East Africa (1969) Limited* [2015] eKLR where the court awarded appellant Kshs. 350,000.00/= as general damages for multiple soft tissue injuries and;

(e) *Patrick Kinoti Miguna v Peter Mburunga G. Muthamia* [2014] eKLR, in which the appellate court upheld the award of general damages in the sum of Kshs. 300,000.00/= for bruises on the right parietal region, 2 loose lower incisors, dislocation of the right shoulder, cut on the left leg, bruise on the dorsum of right hand and blunt chest injury.

19. Consequently, the respondent's counsel defended the lower court's award of Kshs. 500,000/= as reasonable and in line with the authorities relied on by the parties. On the other hand, counsel for the appellant proposed an award of Kshs. 150,000/= on the basis of the following precedents: -

(a) *Fast Choice Company Ltd & Another v Joseph Wanyiri* [2011] eKLR, in which the appellant sustained injuruies on the forehead, wrists, arm, knee and loose incisor tooth. The High Court in Nakuru set aside the lower court's award of Kshs. 450,000/= and substituted it with an award of Kshs. 150,000/= as general damages for pain, suffering and loss of amenities.

(b) *Baloch Faisal & Another v Elloy Kawira Nthiiri* [2019] eKLR in which the respondent sustained soft tissue injuries to the head, knees, chest, back and injury to upper incisor teeth. The High Court allowed the appeal on quantum and substituted the award of Kshs. 360,000/= with an award of Kshs. 200,000/= as general damages.

20. In his written submissions filed herein on 20th May 2021, counsel for the appellant relied on the following authorities:

    (a) *George Kinyanjui T/A Climax Coaches & Another v Hussein Mahad Kuyale* [2016] eKLR in which an award of Kshs. 650,000/= was, on appeal, reduced to Kshs. 120,000/= in respect of soft tissue injuries, loss of two molars, bruises and severe head injury, among other injuries.

    (b) *Dickson Ndugu Kirembe v Theresia Atieno & 4 Others* [2014] eKLR where the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,5000/= for soft tissue injuries.

    (c) *Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd* [2015] eKLR; in which the Court of Appeal upheld the decision of the High Court to reduce an award from Kshs. 700,000/= to Kshs. 150,000/= for multiple soft tissue injuries to the elbow, pelvic region, lower back and left knee.

21. I have looked at the cases cited by both parties and I find that the cases that were cited by the respondent were more comparable, I see no reason why the trial magistrate indicated that the injuries more severe. I have looked at the injuries of the Respondent and I find that the award of Kshs. 500,000.00 for general damages by the trial court was excessive. Accordingly, the same is hereby set aside and substituted with an award Kshs. 300,000.00.

    (b) Whether the trial court erred when it awarded Kshs. 50,000.00/= for future medical expenses.

22. Counsel for the appellant contended that the trial court erred when it awarded the respondent the sum of Kshs. 50,000.00/= for future medical expenses, yet that amount was neither pleaded nor proved as required under the law. Counsel invited this court to look at the Plaint dated 5th March, 2018, to confirm that the respondent did not pray for the award of future medical expenses. He submitted that the award of damages for future medical expense, being in the nature of a special damage, ought to have been specifically pleaded and proved.

23. The respondent on the other hand, took the posturing that the award of Kshs. 50,000.00 for future medical expenses was premised on the testimony of PW2 (Dr. Sokobe) and his prognosis as set out in the medical report dated 22nd December, 2017, marked as Exhibit 4(a). PW2's evidence was that the respondent needed further dental treatment at an estimated cost of Kshs. 50,000=. Accordingly, counsel urged the Court to find that since the prognosis of PW2's was not challenged, it therefore furnished sufficient proof for the award of Kshs. 50,000/= for future medical expense.

24. The guidance by the Court of Appeal in such matters was reiterated in the case of *Tracom Limited & Another –vs-Hasssan Mohamed Adan* [2009] eKLR thus: -

> " ...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."

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..."

25. Further, in *Michael Hubert Kloss & Another v David Seroney & 5 others* [2009] eKLR, it was held: -

> " ...The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no proof. Such was the award made to David at Shs.45,000; Christine at Shs.25,000, and Florence at Shs. 15,000. Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of the required amounts for future treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in McGregor on Damages, 16 Edition at page 1654 in relation to medical expenses:
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> "Both expenses already incurred at the time of the trial and prospective expenses are recoverable and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident of the time the case comes on for hearing, implies no substantive differences."
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> We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard..."

26. From the foregoing, it is manifest that, although a claim for future medical expense is part of an award for general damages, it is in nature a special damage item; and must therefore be specifically pleaded, albeit by way of estimates, and proved as is required of special damages. I have looked at the Plaint dated 5th March, 2018 and I find that it contains no claim at all for future medical expenses. In the circumstances, it was not open for the learned magistrate to make such an award.

27. It is a cardinal principle that a court of law can only give relief that accords with the prayers sought by the parties. Hence, in *Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR, the Court of Appeal, while discussing this point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems, at page174:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary

> to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

28. It is, therefore, my finding that the trial court erred in principle when it awarded Kshs. 50,000/= as damages for future medical expenses, yet the same was not prayed for by the respondent in his Plaint dated 5th March 2018.

29. In the result, the Appeal dated 12th October, 2020 is partly allowed. The award of future medical expenses is hereby set aside for the reasons indicated above. As the special damages component was not contested, the same is confirmed; such that the total award is now as follows:

    General damages Kshs. 300,000.00

    Special damages Kshs. 11,704.00

    Less 20% liability Kshs. 62,340.80

    Total Kshs. 249, 363.20

30. Consequently, the judgment of the lower court for Kshs. 561,704/= is hereby set aside and substituted with judgment of this Court for the sum of Kshs. 249,363.20 plus costs and interest. It is further ordered that each party shall bear own costs of the appeal, granted that the outcome is a win-win situation.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF MARCH 2022.

OLGA SEWE

JUDGE