



**Guardian Coach Ltd & another v Kiptoo (Civil Appeal 34 of 2020)
[2022] KEHC 12397 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 12397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 34 OF 2020
GWN MACHARIA, J
MAY 26, 2022**

BETWEEN

GUARDIAN COACH LTD 1ST APPELLANT

RICHARD NYAKUNDI MOSE 2ND APPELLANT

AND

DAVIS LANGAT KIPTOO RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha CMCC No. 424 of 2017 delivered by Hon. K. Bidali (CM) on 14th October, 2020)

JUDGMENT

1. This is an appeal against the trial court's assessment of general damages. It arises from Naivasha CMCC No. 424 of 2017 in which the appellants were sued by the respondent for general and special damages arising from injuries he sustained in a road traffic accident on April 2, 2017 at Sipamba area along Maai Mahiu - Nairobi road. According to the plaint, the respondent was lawfully travelling in motor vehicle registration number KBS 244V as a fare-paying passenger when the 2nd appellant negligently drove, controlled and/or managed it thus causing the accident. The said motor vehicle was owned by the 1st appellant who was held vicariously liable for acts or omissions of the 2nd appellant.
2. The parties in this case entered a consent on liability whereby the same was apportioned in the ratio of 95:5 in favour of the Respondent as against the appellants herein jointly and severally. The trial court was therefore only tasked with assessment of damages which were awarded as follows: Kshs. 2,500,000/- for general damages, Kshs. 1,031,185/- for special damages and Kshs. 3,000,000/- for future medical expenses.
3. Being dissatisfied with the quantum of damages, the appellants filed the present appeal vide a memorandum of appeal dated October 15, 2020 and raised the following 9 grounds of appeal:



- a. The learned trial magistrate erred in law and misdirected himself when he failed to consider the appellant's submissions on both points of law and facts.
 - b. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - c. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented & filed by the appellants;
 - d. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;
 - e. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance was excessive in the circumstances occasioning miscarriage of justice;
 - f. The learned magistrate erred in law and fact in awarding manifestly excessive and undeserved general damages of Kshs: 2,500,000/= to the Respondent in the circumstances.
 - g. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law and erred in awarding Kshs. 1,031,185/- to the Respondent as special damages.
 - h. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law and erred in awarding Kshs. 3,000,000/- to the Respondent as Future Medical Expenses.
 - i. The learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
4. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows in this regard-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
5. PW1, Dr. Wellington Kiamba testified that he examined the respondent herein on May 13, 2017 and re-examined him on March 12, 2018. He stated that the respondent sustained amputation of left upper limb above elbow joint and amputation of left thumb and 1st metacarpal bone, amputation of right index figure, amputation of two distal phalanges, lacerations and abrasions of arms and face. It was further his testimony that he prepared a report on May 13, 2019 but a final report was done later. Further, he testified that the Respondent had been fitted with a cosmetic prosthetic but was not comfortable. PW1 further testified that the Respondent suffered 90% permanent disability which was evaluated using the forensic medicine guidelines and workman compensation hence the percentage recorded by Dr. Kalande was incorrect. Additionally, he stated that the Respondent now requires a prosthesis for proper functioning and noted that doctors at PCEA Orthopedic Hospital



quoted Kshs. 3 million for a myoelectric arm. He produced the following documents: the medical reports as exhibits 1(a) and 1(b); a final medical report as exhibit 2; receipt of Kshs. 50,000/= which he charged for court attendance as exhibit 3; and the forensic guidelines as exhibit 4.

6. In cross examination, he stated that he physically examined the Respondent about one month after the injury. He stated that the Respondent's injuries were underestimated by the Defendant's doctor. Further, he reiterated that the manual prosthetics that the Respondent was first given failed to work. Lastly, he noted that the prosthetic arm costs between USD 20,000 – USD 100,000.
7. PW2, Davis Langat Kiptoo, the Respondent herein testified that his left hand was amputated and he also lost three fingers on the right hand. He stated that he was treated at Nakuru and Nairobi and produced discharge summaries from the said hospitals as exhibits 5 and 6. He reported the incident at Maai Mahiu and was issued with a P3 Form produced as exhibit 7. He also produced a quotation from PCEA Orthopedic Hospital for the electric arm as exhibit 8 and a Police Abstract as exhibit 9. Further, he produced various receipts as exhibit 10. It was his further testimony that he used to be a camera man at KNA where he used to earn Kshs. 97,000/- per month but he can no longer work and depends on his wife.
8. In cross examination, he stated that he went to PCEA two months after the accident. He was given a manual prosthetics but it failed to work hence he needs an electric one. Further, he stated that he paid Nairobi Hospital through the National Hospital Insurance Fund. Lastly, he stated that he was a camera man but he did not produce any pay slip.
9. The Appellants herein did not call any witness and neither did they produce any documents in evidence.
10. The appeal was canvassed by way of written submissions which shall be referred to in the court's analysis herein below.

Submissions

On the award of general damages

11. The appellants submitted that similar injuries should attract similar awards. In demonstrating that the award to the Respondent was too high, they relied on the following decisions: *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR in which Kshs. 700,000/= was awarded to a Plaintiff who suffered a fractured right mid shaft femur, fracture of the left mid shaft femur, degloving wound on the right fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead; *Jane Wangui Murage v Dakianga Distributors Limited* [2012] eKLR where Kshs. 400,000/= was awarded for bruises on the face, cerebral concussion, bruised left arm, crushed injury to the left leg and trauma above knee amputation; and *Silvanus Ondiek Ochola v Delta Haulage Services & another* [2009] eKLR where Kshs. 800,000/= was awarded for amputation of the right limb above the knee, deep cut wound on the medial aspect of the left knee, severe injury to the left eye and blunt injuries to the chest.
12. On the other hand, the respondent submitted that the trial court duly considered the submissions that were filed by both parties before exercising its discretion in awarding damages. He submitted that the trial magistrate took into consideration all the material facts including the severity of his injuries. It was further noted that in any event, the Appellants did not call any witness to controvert the Respondent's injuries nor did they produce any medical report challenging the same. Reliance was



placed on *Patrick Kinoti Miguna v Peter Mburunga G. Muthamia* [2014] eKLR. According to the Respondent therefore, the award by the trial magistrate was within the ambits of the law.

On future medical expenses

13. The appellants submitted that the same must be pleaded and proved just like special damages as was held in *Simon Taveta v Mercy Mutitu Njeri* Civil Appeal No. 26 of 2013. They contended that nothing was tendered in evidence to prove the inordinately excessive award of Kshs. 3,000,000 under this head. In their view therefore, the trial magistrate erred in determining that the future medical expenses that had been pleaded had been proved by the doctors who attended to the plaintiff. They urged the court to be guided by *Abdi Werdi Abdulabi v James Royo Mungatia & another* [2019] eKLR, where an award of Kshs. 8,700,400 for future medical expenses was reduced to Kshs. 1,000,000 in view of the fact that nothing has been filed by the Plaintiff therein to support the claim save for a medical report from the doctor.
14. On the other hand, the respondent submitted that he pleaded for future medical expenses for the myoelectric arm at a cost of Kshs. 3,000,000/= since he needs the same to enable him perform some of his duties given that the manual arm he had been fitted with failed. He insisted that the same was proved accordingly and noted that Dr. Kiamba in quoting the said amount referred to a quotation from PCEA Orthopedic Hospital.

On special damages

15. The appellants submitted that a re-evaluation of the award of special damages is necessary in this matter as the same was not specifically proved. They argued that among the documents produced by the Respondent were bills from Nairobi Hospital which cannot satisfy the proof of special damages which must be based on actual receipts only and not pro-forma invoices. Reliance was placed on *Total Kenya Ltd v Janevams Limited* (2015) eKLR and *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2016] eKLR.
16. On the other hand, it was submitted that the respondent pleaded for medical expenses of Kshs. 1,022,510/= and produced the relevant receipts and invoices to prove the same. Further, the respondent submitted that the appellant did not object to production of the said documents and thus cannot purport to challenge them now. He relied on the case of *Zipporah Nangila v Eldoret Express Limited & 2 others* (2016) eKLR.

Analysis and determination

On the award of general damages;

17. In the present case, the injuries pleaded by the respondent were confirmed in a medical report produced by Dr. Kiamba which shows that the respondent suffered several injuries which led to amputation of the left upper limb above the elbow and loss of 3 digits of the right-hand thumb, index and middle fingers. The report also shows that he sustained soft tissue injuries on the face and neck. Dr. Kiamba testified that he examined the respondent about a month after the accident and assessed permanent disability at 90%. He also classified the injury as grievous harm.
18. The trial court considered the authorities tendered by both parties and properly noted that the injuries suffered by the Respondent were comparable to those sustained by the plaintiffs in the authorities cited by the respondent. He then took into account inflation given the passage of time before making the award of Kshs. 2,500,000/-. The appellants have not demonstrated that the learned magistrate took into account irrelevant matters or failed to consider any relevant factors in making the award. Further,



it is evident that in the authorities relied on by the appellants, the victims did not suffer any permanent disability. I therefore find no reason to interfere with the award of Kshs 2,500,000/-.

As regards future medical expenses;

19. 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 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.” [Emphasis mine]

20. In the present case, the respondent in his amended plaint dated 24th August, 2019 pleaded for future medical expenses for a myoelectric arm at a cost of Kshs. 3,000,000/-. During trial, he testified that he went to PCEA Orthopedic Hospital two months after the accident and was given a manual prosthetic which failed to work. The Respondent produced a Quotation of 3,000,000/- for a myoelectric arm from the said facility. His evidence was corroborated by Dr. Kiamba (PW1) who confirmed that the Respondent suffered 90% permanent disability and thus requires a prosthesis for proper functioning.
21. During cross examination, PW1 stated that a prosthetic arm costs between USD 20,000 – USD 100,000. The figures suggested were not contested by the Appellant’s during trial. In the circumstances and guided by the above authority, this Court finds that Respondent pleaded and proved the claim for future medical expenses to the required standard. There is therefore no basis for interfering with the award made by the trial magistrate.

On special damages:

22. From the trial court’s judgment, it is clear that the learned trial magistrate found that special damages had been proved accordingly since the documents were produced by consent. Indeed, there is no dispute that the respondent’s bundle of documents was produced by consent of both parties. However, this does not divest the court of the duty of ensuring that the special damages pleaded are specifically proved as required by law.



23. From the record, the respondent produced various receipts, bills and invoices from various hospitals, health providers and chemist in proof of the cost of medical expenses pleaded. Notably however, it is a well settled principle of law that an invoice is not proof of payment. Special damages can only be proved by producing actual receipts or invoices endorsed with the word "Paid" (See: [*Total \(Kenya\) Limited Formally Caltex Oil \(Kenya\) Limited v Janevams Limited*](#) [2015] eKLR.)
24. To prove the sum of Kshs. 1,022,510/- pleaded as special damages for medical expenses, the Respondent herein produced a Final In-patient Bill from the Nairobi Hospital. Nowhere on that Bill is it indicated that the Respondent paid the said amount. Indeed, it was his evidence that the said amount was covered by the National Hospital Insurance Fund (NHIF).
25. Be that as it may, I note that the respondent produced the following actual receipts: a receipt of Kshs. 7,000/- from Dr. Kiamba; receipts from Marindi Social Support Services totaling Kshs. 50,000/-; receipt from Dr. D. G. Kinyua for Kshs. 2,000/-; a receipt of Kshs. 12,900/- from the Nairobi Hospital; a receipt from Kavirondo Chemist for Kshs. 2,710/-; and a receipt of Kshs. 50,000/= from Dr. Kiamba for court attendance. This means that the Respondent only proved special damages of Kshs. 124,610/-. In the premises, I find that the trial magistrate erred by awarding the Respondent the sum of Kshs. 1,031,185/- for special damages.

Conclusion

26. Accordingly, the appeal partially succeeds. The same is dismissed as regards assessment of general damages and cost for future medical expenses are concerned. Accordingly, the awards for general damages and future medical expenses are upheld. It is however allowed to the extent that the award of special damages is reduced from Kshs. 1,031,185/- to Kshs. 124,610/-. There shall be no order as to costs. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 26TH DAY OF MAY, 2022.

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G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr.Njuguna h/b for Mr.Thairu for the Appellant.
2. Ms Kiberenge for the Respondent.

