



Ainu Shamsi Hauliers Limited & another v NIK (A Minor Suing Through her Parents) IKH & MHM (Civil Appeal E001 of 2021) [2022] KEHC 11778 (KLR) (11 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E001 OF 2021
A ALI-ARONI, J
AUGUST 11, 2022**

BETWEEN

AINU SHAMSI HAULIERS LIMITED 1ST APPELLANT

MAOW HUSSEIN GABOW 2ND APPELLANT

AND

NIK (A MINOR SUING THROUGH HER PARENTS) IKH & MHM RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgement of Chief Magistrate Hon. Cosmas Maundu delivered on the 4th of February, 2021, in Chief Magistrates Case No. 5 of 2017.
2. The brief facts of this case are that the Respondent Naima Ismail Kulu a child who was 8 years at the time of the accident, the 7th of January, 2016 sued the appellants through her parents IKH (father) and MHM (mother). The 1st appellant Ainu Shamsi Hauliers Limited, is the registered owner of lorry registration Number KBQ 862V and Maow Hussein Gabow who was driving the said vehicle along Garissa Madogo Highway is the 2nd appellant.
3. The respondent who was a pupil at [Particulars Withheld] Academy alighted from her school bus that had stopped to allow her and other children alight near their home when she entered the road and was hit by the 1st appellant's lorry that was said to have been driven fast in the circumstances.
4. As a result of the accident the respondent suffered the following injuries;
 - a) A complete fracture of the left thigh.
 - b) Soft tissue injury to the thigh.



5. As a result of the injuries sustained the respondent's left leg was amputated up to the knee leaving her with above knee stump. Skin grafting was also done to her right leg.
6. At the time of going to court, she walked using crutches with a hope of getting an artificial limp.
7. Her prayers to court included;
 - a) General damages for pain and suffering and interest.
 - b) Special damages of Kshs. 43,600 and interest.
 - c) Future special damages of Kshs. 3,436,000 and interest.
 - d) Costs of the suit.
8. Upon hearing the case for both sides the court found in favour of the Respondent in the following terms;
 - a) General damages Kshs. 2,500,000/=
 - b) Future medical expenses Kshs. 3,954,800/=
 - c) Special damages Kshs. 43,900/=
 - Total Kshs. 6,498,709/=
 - d) Interest at court rate and costs.
9. Aggrieved by the judgement of the trial court on the award of damages the Appellants moved this court by way of an appeal on the following grounds;
 - a) The learned "judge" erred in law and in fact in failing to appreciate the submissions of the Appellants.
 - b) The learned "judge" erred in law and in fact in awarding the Plaintiff Kshs. 2,500,000/= as general damages.
 - c) The learned "judge" erred in law and in fact in awarding the Plaintiff Kshs. 3,954,809.79 for future medical costs.
 - d) The learned "judge" erred in law and in fact by not allowing the Plaintiff to undergo a second medical examination.
10. The appellants based on the above grounds sought for;
 - a) The appeal be allowed and the trial court's judgement be set aside.
 - b) Appellant be awarded costs of the appeal.
11. From the above grounds it will appear that the appellant's do not take issue with the trial court's judging on liability and special damages.

Analysis and determination

12. The court having considered the record and submissions filed by the parties including additional medical opinion as relates to the cost of prosthesis that would inform cost of future medical expenses, forms the view that issues for determination are;



- a) Whether the trial magistrate erred in law and in fact in awarding the plaintiff Kshs. 2,500,000/= general damages.
 - b) Whether the learned magistrate erred in law and in fact in awarding the plaintiff Kshs. 3,954,809.79 as future medical care.
 - c) Costs.
13. From the record the appellants' counsel proposed an award of Kshs. 1,800,000/= for general damages whereas the respondent's counsel sought for Kshs. 4,000,000/=.

As for future medical cost counsel for the appellant's relying on Doctor Wokabi's report proposed Kshs. 1,000,000 whereas the respondent's counsel relying on the report by Doctor Sitati proposed Kshs. 3,954,809.75 which included cost of fitting the prosthesis and inflation of 5% on the cost of the same.

14. The principle upon which an appellate court may interfere with damages awarded are well settled. The court can interfere if the award is too low or too high as to cause an injustice.

In *Butt v Khan* [1981] KLR 349 the Court of Appeal stated;

“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.”

15. The record shows that the trial court in arriving at the sum of Kshs. 2,500,000/= was guided by an authority cited by the Appellants' which case the trial Court believed fitted squarely the instant case. This is the case of *Crown Bus Services Ltd & 2 others v BM (a Minor suing through his next friend) SMA* [2020] eKLR. The minor was 5 years at the time of the accident and whose right leg was amputated above the knee with incapacity assessed at 70%. The Appellate court reduced damages from Kshs. 3,000,000/= to Kshs. 2,500,000/= in November, 2020.
16. The view of this court is that there has been no demonstration that the trial court used an erroneous principle in arriving at the figure awarded for General Damages. Indeed, the injuries sustained in the referenced case were very close to the case at hand so was the age of the victim coupled with the fact that the authority is recent as observed by the trial court fitted squarely with the case at hand. This court finds no basis therefore to interfere with this limp of award.
17. Next for consideration is the award for future medical expenses.

There are 4 sets of medical opinions on the file. Two by one doctor representing the appellants and the other 2 by a doctor representing the Respondent. In as much as both doctors agree with the injuries suffered, the future estimates are at variance to a large extent.

Doctor Wokabi representing the Appellants he proposes cost of Kshs. 1,000,000/= in total. He estimates cost of the prosthesis at Kshs. 50,000/= and states that he has consulted 3 providers. He states that Temporary prosthesis up to the time the Respondents reaches 18 years need to be changed after 2 years, and after 18years the same is to be changed after every 10 years. According to him the prosthesis can be purchased locally at ADPK workshop or Jaipur Leg Foundation. He seems to suggest that his colleague Mr. Sitati is proposing high end prosthesis.



18. On his part Dr. Sitati a consultant orthopedic (trauma surgeon) placed the cost of prosthesis previously at between Kshs.200-250,000/=. His recent report gives a price of Kshs. 180,000/=. According to him the Plaintiff will require 12 prosthesis up to the life expectation age (by WHO for Kenya at 64 years) He opines that the Plaintiff will require a prosthesis with a provision for a movable joint which is usually metallic which needs regular lubrication. He states that the structure is what is more expensive. He is categorical that no above knee-prosthesis would go for Kshs. 50,000/=. he also draws a distinction between an above knee prosthesis and a below knee prosthesis otherwise known as a jaipur foot.
19. Doctor Sistati however fails to expound on why the prosthesis cannot be locally obtained yet there are several outlets as proposed by his colleague that do make or import such at affordable prices and close to almost half of the price he proposes and nearer the sum suggested by Dr. Wokabi.
20. Secondly this court forms the view that the trial court ought not to have factored in the issue of inflation considering that a lump sum was being paid and the fact that the Respondent may meet other exigencies of life not to live to the age of 64 used in arrived at the sum awarded.
21. In arriving at its determination this court looks at the Court of Appeal Case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR where the case of *Mbogo & another v State* [1968] EA was cited with approval where the court held;

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”
22. Further the court considered the holding in *Chege Kinuthia & others V Maria Vesters & another* (1988) eKLR the Court of Appeal and in particular Nyarangi JA had this to say on the subject of inflation.

“In *Cookson v Knowles*, [1979] AC 556 at page 577 it was stated that the courts in assessing damages in personal injury cases should leave out of account inflation. The measure of a proper award is a sum of money which if wisely invested would yield an income that goes some way to compensate the plaintiff. The Judge erred because there was no evidence before him that this case is so exceptional as to make it necessary for the provision for future inflation.”

See also the case of *Lim v Camden Health Authority* (1980) A.C 174}}
23. Further this court is of the view that any future medial cost must be reasonable and affordable within the means of an average man in Kenya. And the fact that prosthesis reasonably priced can be obtained locally at more affordable rates.
24. The accident occurred in 2016 when the Plaintiff was 8 and as indicated she may not due to other exigencies of life live to 64 and the court taking this into account will base its calculation on the age of 58 with the need to change the prosthesis after every 4 year as proposed by Doctor Sitati after the respondents attains the age of 18 and will not consider inflation based.
25. The court is prepared to enhance the sum of Kshs. 50,000/= to a sum of Kshs. 80,000/= for a decent locally made/or purchased prosthesis as follows;



-For the next 8 years changing twice after 2 years before age of 18

Kshs 80,000 X 4 = 320,000

-For the next 40 years with change after 4 years

Kshs 80,000 x 10 = 800,000

-Cost of fitting @ Kshs. 5,000/= Kshs 5,000 x 14 = 70,000

Total Kshs 1,190,000

26. The appeal succeeds to the extent of the future medical costs and the award is therefore as follows;

(a) General damages Kshs. 2,500,000/=

(b) Specials Kshs. 43,000/=

(c) Future medical costs Kshs. 1,190,000/=

Total Kshs. 3,733,000/=

(d) Costs and interest.

DELIVERED AND SIGNED AT GARISSA THIS 11TH DAY OF AUGUST 2022.

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ALI-ARONI

JUDGE

