Mbagu v Haji (Civil Appeal 62 of 2021) [2022] KEHC 17274 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEHC 17274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 62 OF 2021

SM GITHINJI, J

OCTOBER 26, 2022

BETWEEN

SAMUEL GICHUKI MBAGU ..... APPELLANT

AND

FARAJ NAJIBU HAJI ..... RESPONDENT

(Being an appeal against the whole of the judgement of Honourable D. Sitati Resident Magistrate dated and delivered on 16.6.2021 in SRMCC NO. 99 of 2020 Kilifi)

RULING

1. This appeal is brought by the appellant against the judgment delivered by the Resident Magistrate Hon. D. Sitati in SRMCC No. 99 of 2020 whereby he ordered that the Respondent be paid Kshs. 650,000 as general damages for pain and suffering and loss of amenities.

2. Being aggrieved with the order, the appellant preferred an appeal anchored on the following grounds:

    1. That the learned trial Magistrate erred both in law and fact in awarding a sum of Kshs. 650,000/= by way of general damages for pain and suffering to the Respondent for soft tissue injuries which amount was inordinately high and not keeping with the other comparable award made for soft tissue injuries.

    2. That the learned magistrate erred in both law and fact in awarding a sum of Kshs. 156,000/- as future medical costs which amount was neither proved nor deserved in the circumstances.

    3. That the learned magistrate erred in both law and fact in finding that Dr. Udayan Sheth's Medical report was unreliable because the said doctor was not called at a witness yet the medical report's admissibility was not an issue, the same having been produced by consent of the parties.

4. That the learned magistrate erred in disregarding the submissions by the appellant and in failing to find that Dr. Udayan Sheth's medical opinion was more credible than that of Dr. Kiema as he is an orthopedic surgeon.

5. That the learned magistrate erred in failing to find that the injuries pleaded for in the plaint were soft tissue in nature.

6. That the learned magistrate misdirected himself by basing his assessment of damages on alleged loss of speech, brain damage and injury to the nervous system which injuries were not pleaded for in the plaint.

7. That the learned magistrate erred in law and in fact in applying double standards in relying on the treatment notes whose maker was not called as a witness yet disregarded the medical report by Dr. Udayan Sheth on the reason that the maker was not called as a witness.

8. That the learned magistrate erred in failing to consider the Appellants written submissions.

9. That the learned magistrate erred in both and fact in awarding the Respondent future medical costs when the same were not proved.

10. That the learned magistrate erred in both law and fact in awarding the Respondent future medical costs when the same was not pleaded.

11. That the learned magistrate erred in finding that Dr. Udayan Sheth was silent on future medical costs and failed to appreciate Dr. Udayan Sheth's medical opinion that the respondent had healed meant that there was no need for future medical costs.

12. That the learned magistrate erred in both law and in fact in failing to find that Dr. Udayan Sheth's Medical opinion that the Respondent had fully healed was enough rebuttal evidence to Dr. Kiema's opinion on the need for future medical costs.

13. That the trial court erred in law and in fact in failing to find the fact that the Respondent had not attended any therapy sessions since the accident meant that the claim for future medical costs was not proved and was unfounded.

14. That the learned magistrate erred in law and in fact in failing to find that the treatment notes did not prescribe the need for use of painkillers or physiotherapy as alleged in Dr. Kiema's medical report and completely erred in disregarding the appellant's submissions in that regard.

Background

3. The Respondent filed a suit on March 20, 2020vide a plaint dated March 19, 2020alleging that on or about August 5, 2019he was lawfully and carefully walking on the pedestrian lane off the road along Kemri road near Jambo travelers at Mtwapa township heading to Shanzu when Motor vehicle registration No KAQ 025U which was coming from the same direction heading to Shanzu and driven by the defendant and/or authorized driver, servant, and/or employee so carelessly, recklessly and/or negligently hit the plaintiff from behind. As a result, he suffered the following injuries; head injury with loss of consciousness, post-concussion syndrome and blunt object trauma soft tissue injuries to the neck with post traumatic stiffness. He blamed the defendant for the occurrence of the accident on negligence and breach of duty of care as particularized in paragraph 5 of the plaint. The defendant filed his statement of defence on June 5, 2020denying the occurrence of the accident, particulars negligence and that the respondent suffered any injuries associated with the accident.

Evidence at Trial

4. At the trial, the plaintiff testified and called one witness in support of his case. The defendant did not testify nor call witnesses to testify on his behalf. Parties recorded a consent producing the Medical report dated August 12, 2020by Dr. Udayan Sheth as DEX.1

5. PW1 Faraj Najib Haji under oath adopted his written statement dated 20/3/2002 and produced as exhibits documents as per list of documents dated 9/3/2020.

6. On cross examination by Ms. Achieng, he stated that the accident occurred at around 7.00 pm, at Jambo travelers at that at around 7.00pm, traffic is usually busy. He told the court that he was not drunk and that there is no designated pedestrian lane but there is a place with no tarmac where pedestrians walk. He also stated that he was knocked from behind and he lost consciousness and was rushed to the hospital and was admitted for a few hours. That he did not suffer any fracture though he is not fully recovered.

7. PW2- Dr. Darius Kiema under oath, stated that he is a general medical practitioner MBCHB (UON). He produced a medical report dated 13/12/2020 prepared by himself.

8. On cross examination, he stated that he is not an orthopedic surgeon nor did he treat the plaintiff. He stated that the plaintiff was supposed to go for occupational and speech therapy. He added that the plaintiff had suffered soft tissue injuries with a disability of 3% and recommended physiotherapy for one year. It was his statement that the plaintiff should be well.

9. Parties recorded a consent on liability at 90% against the defendant and 10% against the plaintiff.

10. The plaintiff's advocate in the lower court while submitting, for general damages, proposed a sum of Kshs. 850,000 citing the rate of inflation and relied on the authorities of *Prem Gupta & another v Grimley Otieno & 3 others* where the court awarded Kshs. 800,000/= for moderate head injury with brain oedema and bleeding classified as grievous harm Lucy Ntikuka v Bernard Mutwiri and others where the plaintiff was awarded Kshs. 800,000 for head injuries with resultant cerebral concussions, lacerations on the lateral side of the right eye, lacerations and cut wound on the left arm (elbow).

11. On future medical costs, it was submitted that the plaintiff testified that he has been using painkillers since the accident and the same was corroborated by PW2's medical report.

12. The defendant through his advocate while submitted that general damages of Kshs. 70,000 would suffice since the plaintiff suffered soft tissue injuries and the 3% partial disability was unjustified since the plaintiff did not suffer any fracture nor paralysis. On future medical costs, it was submitted that the doctor who treated the plaintiff did not indicate that he needed permanent use of painkillers. He cited the authorities of *Johnstone Amanya v Barrack Odhiambo & 2 others* HCCC Civil Appeal No. 47 of 2003 Bungoma where the plaintiffs were awarded Kshs. 40,000- 60,000 as general damages for soft tissue injuries & *Samuel Mburu Ng'aari and 4 others v Wangiki Wangare & Another* Civil Suit No. 173 of 2008 where the 4th plaintiff was awarded Kshs. 50,000 in general damages for minor injuries, abrasions and bleeding.

Analysis and Determination

13. The appeal was canvassed by way of written submissions. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely

on the evidence that is on record. This duty was well stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

14. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "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."

15. The discretion of this court to interfere with the determination of the trial court also exercising it's discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

> "I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion"

16. On the issue of an appellate court interfering with 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."

17. I have read and understood the grounds of appeal by the appellant as well as the submissions by the parties and the issues arising for determination are;

    1. Whether the grounds of appeal are merited?

    2. Who shall bear the costs of the appeal?

18. One of the issues recurrent on the grounds of appeal is that the learned magistrate erred in failing to take into consideration the medical report by Dr. Udayan Sheth yet the same was produced by consent of the parties.

19. Where parties intend to rely on medical reports only they ought to confirm that the same are substantially the same in terms of injuries sustained. I place my reliance on the authority of *James Njoro Kibutiri vs. Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 where the court of Appeal held; that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In *Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd* [1973] EA 167 it was however, held that:

> "The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."

20. However, once the parties produce the same by consent the court has no option but to make the best out of them. In *Ali Ahmed Naji vs. Lutheran World Federation* Civil Appeal No. 18 of 2003, the Court of Appeal held that:

> "The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as "No qualifications disclosed; the doctor is not a consultant". If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident."

21. In this case, the two medical reports find that the plaintiff suffered the injuries as hereinabove described. The point of divergence is to their conclusion on the future medical costs and permanent disability. I find fault in the trial magistrate's disregard of the appellant's medical report especially that the same was produced by consent. There was no justification to disregard the same.

Quantum

22. The appellant submits that the award of Kshs. 850,000 was excessive and the court disregarded authorities for more comparable injuries. I have reviewed the authorities by all the parties before the trial court to acquaint myself with what guided the learned trial magistrate in arriving at the award of Kshs. 850,000. Appellate courts have reviewed awards downwards where they are convinced that the award was inordinately high. My determination is guided by this fact and the principles laid down in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 stated as;

> "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. In 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."

24. The injuries suffered by the Respondent have been described as soft tissue in nature. It is trite that parties are bound by their pleadings. In the plaint at paragraph 6, the injuries are described as; head injury with loss of consciousness, post-concussion syndrome and blunt object trauma soft tissue to the neck with post traumatic stiffness. In determining the award of damages, the court has to rely on recent comparable awards and this was appreciated by the Court of Appeal stated in *Mbaka Nguru and another vs. James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR where it was held that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

25. I do find that the award by the trial court for Kshs. 850,000 in damages was manifestly high and does call for the intervention of this court.

Future Medical Expenses

26. The law on future medical expenses is well settled. The Court of Appeal in the case of *Tracom Limited & Another –vs-Hasssan Mohamed Adan* [2009] eKLR stated: -

> " ...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..."

27. The plaintiff pleaded for future medical expenses under paragraph 6. To support his claim, is the medical report prepared by PW2 for future costs of physiotherapy and purchase of painkillers for at least two years. I have also looked at the treatment notes from Coast Province General Hospital which indicated that the plaintiff required occupational and speech therapy. I have also considered the medical

report by the defendant whose conclusion was that the plaintiff was fully recovered with no deformity. I have also taken into account Pw2's testimony on cross examination that the plaintiff should be well. The plaintiff did not file any documentation indicating how long both the occupational and speech therapy would be required as per the attending doctor. Both therapies would have been ongoing and there would be documentation to show the same. This was not supplied. I also note that the trial magistrate never noted that at the time of testifying the plaintiff's speech was impaired. This would have certainly caught his eye. That said, I find that there was no basis for the award of future medical expenses by the trial court.

28. Flowing from the foregoing, I do allow the appeal and set aside the award on general damages of Kshs. 850,000 by substituting it with Kshs. 360,000. I have factored in the aspect of the rate of inflation. The award for future medical expenses is set aside.

29. There are no orders as to costs.

It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF OCTOBER, 2022.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Manani for the Appellant

2. Mr Furaha for the Respondent