



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 77 OF 2020**

**IBRAHIM NDUNGU GIKONYO.....APPELLANT**

**VERSUS**

**GEOFREY NYAMWEYA OMAE.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Hon. E. MUCHOKI, Senior Resident Magistrate delivered on 17/6/2020 in Mombasa CMCC No. 2503 of 2018)***

**JUDGMENT**

1. The Appellant was the Defendant in **Mombasa CMCC No.2503 of 2018**. The Appellant was sued by the Respondent on a personal injury claim where the facts of the case were that on or about **30<sup>th</sup> December, 2017**, at 5. 20 pm the Respondent was a lawful pedestrian along Miritini Road near KCC Miritini area, where the Appellant or his authorized driver, servant and/or agent negligently drove the said Motor Vehicle Registration **No.KCN 249D Toyota Fielder** causing it to veer off the road causing an accident by knocking the Respondent hence causing him to sustain serious injuries.
2. The Respondent's case was that the accident occurred due to the negligence of the Appellant, his authorized driver, servant and/or agent. The Respondent stated that due to the negligence he suffered; *wedge compression fracture of lumbar vertebral back bone no. L2; blunt object injuries to the lower back and blunt object injury on the head (scalp)*.
3. In his **Amended Plaintiff** dated **18<sup>th</sup> January, 2019** filed in the Trial Court, the Respondent sought as against the Appellant *general damages; medical treatment expenses; future medical treatment expenses; special damages of Kshs.2,000/= and costs plus interest*.
4. The Appellant filed a **Statement of Defence** on the **19<sup>th</sup> December, 2018** in which he denied that any accident occurred, and if the same occurred, it was due to the negligence of the Respondent. The Appellant sought that the Respondent's suit be dismissed against them with costs.
5. The Respondent called three (3) witnesses while the Appellant neither called any witness nor file any witness statements. The Plaintiff/ Respondent testified as PW1 and stated that on **30<sup>th</sup> December, 2017**, he was from his house when he boarded a Matatu to Miritini. He stated that he alighted at Miritini and walked towards SGR Mombasa terminus when a speeding motor vehicle speeding from behind, lost control and hit him.
6. PW1 stated that he was rushed to Nyali Health Center by a good Samaritan where he was later referred to Jocham Hospital for X-ray. He stated that he suffered injuries on his back, hands, knee and head.
7. It was PW1's testimony that the accident was reported at Changamwe Police Station where he was issued with a P3 form and a police abstract. PW1 stated that the Appellant was the owner and driver of the motor vehicle at the time of the accident and was to blame for the accident. He stated that his back is not normal, he cannot stand for long nor sleep in bed and he required surgery for an estimated cost of KShs.250,000/=. He prayed for compensation, costs and interest of the suit.
8. **PW2** was **Dr. Ajoni Adede** who stated that he prepared the medical report after examining the Respondent on **3<sup>rd</sup> July, 2018**. He stated that the Respondent was injured in a road traffic accident on **30<sup>th</sup> December, 2017** and has a wedge compression fracture of back bone L2, he suffered blunt object injury root to the back and head. He further stated that the Respondent suffered 5% permanent partial disability because of the stiffness of the back and to mitigate the said injury Kshs.250,000/= is required.
9. PW2 stated that a lot of force went to the back of the Respondent, he cannot resume his normal life. He further stated that to arrive at the amount of Kshs.250,000/= he was guided by the **Middle Hospital Guidelines of 2007**.

10. **PW3** was **No 77730 CPI George Nyamweya** who was stationed at Changamwe Police Station performing traffic duties. He stated that **PC Anami** was the Investigating Officer but could not come to court due to other assigned duties.

11. PW3 testified that on **30<sup>th</sup> December, 2017** at around 05:00 hours an accident occurred at Miritini along Miritini SGR road that involved a Toyota Fielder as driven by **Ibrahim Gikonyo** and pedestrian **Nyamweya Omae**. He stated that the driver was to blame for the accident, he hit the pedestrian as he walked along the road on the left side. He further stated that the vehicle emerged from behind and hit the pedestrian off the road.

12. It was PW3's statement that the driver recorded a statement and as per his statement, he stated that he had lost control and according to the police abstract driver of **KCN 249D** was to blame.

13. The Defendant did not call any witnesses. The suit was thus, undefended.

14. The Trial Court after hearing the parties, the Trial Court delivered its **Judgment** on **17<sup>th</sup> June, 2020** and awarded the Respondent Kshs.600,000/= as general damages, Kshs.250,000/= as future medical expenses, special damages of Kshs.2,000/= and costs plus interests.

15. Being dissatisfied with the quantum for future medical expenses, the Appellant filed an appeal before this Court and raised the following ground: -

**1. That the learned trial magistrate erred in law in making an award for future medical expenses of Kshs.250,000/= that was neither pleaded nor proved.**

16. The Appellant prayed that the Appeal be allowed and the court do set aside the Judgment of Kshs.250,000/= being costs of future medical expenses and dismiss the claim for future medical expenses and costs of this appeal be awarded to the Appellant.

17. Directions were then given on **2<sup>nd</sup> November, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **15<sup>th</sup> September, 2020** while the Respondent filed theirs on the **29<sup>th</sup> January, 2021**.

18. Parties relied on their written submissions in their entirety.

#### **Analysis and determination**

19. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witness nor heard the evidence when the parties were testifying to see their demeanour. ( See the case of **Peters-vs-Sunday Post Ltd [1958] EA 424**).

20. I have carefully considered the pleadings and submissions filed herein. The issue for determination is *whether the claim on future medical expenses as awarded at Kshs.250,000/= was pleaded and proved*.

21. 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: -***

***“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...”***

22. The Respondent at **paragraph 7** of the **Amended Plaintiff** dated **18<sup>th</sup> January, 2019** stated:-

***“The Plaintiff further avers that he incurred treatment costs and will be incurring further treatment expenses which he is also claiming.”***

23. Further at **paragraph 10(c)** of the same **Plaint**, the Respondent made a claim for an award of future medical treatment expenses. I thus find that the claim for future medical treatment expenses was pleaded.

24. In line with the case of **Kenya Bus Services Ltd –vs- Gituma** (supra) I, find that it was not necessary for the Respondent to plead the amount for future medical expenses.

25. During the trial, both PW1 and PW2 stated that the Respondent required surgery at an estimated cost of Kshs.250,000/=. There was no evidence that was produced by the Appellant before the Trial Court to rebut this finding. The report dated **16<sup>th</sup> May, 2019** as was adduced by the Appellant, was not proper evidence before court as the maker of the said document was never called before the trial court to adduce the said report. This Court therefore cannot consider the said report.

26. I, agree with the finding of Matheka J, in the case of **Geoffrey Kamuki & Another –vs- RKN (Minor suing through her late father and next friend ZKN [2020] eKLR**, where he stated: -

*“...To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it...”*

27. PW2 told the court that the Respondent needed an implant at a cost of Kshs.250,000/=. He said that the amount was as provided in the **Middle Hospital Guidelines 2007**.

28. It is therefore my humble opinion and find that the claim on future medical expenses was pleaded and proved in evidence by the medical report that was provided by PW2.

29. Having found so, the award of Kshs.250,000/= was proper and I see no reason to tamper with the same.

30. The upshot is that the appeal lacks merit and is dismissed with costs. The Judgment of the learned trial Magistrate is upheld and the award of Kshs.250,000/= for future medical expenses maintained.

31. Costs to the Respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 28TH DAY OF APRIL, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**28/4/2021**