



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 77 OF 2018**

TEA WAREHOUSE LIMITED.....1<sup>ST</sup> APPELLANT

JUMA CHIWAYA.....2<sup>ND</sup> APPELLANT

VERSUS

KALYAN KARSAN KERAI.....RESPONDENT

*(Being an Appeal against the Judgment of the Chief Magistrate delivered on 17<sup>th</sup> April, 2018*

*before Hon. J. M. Nang'ea in Civil Suit No. 2030 of 2013)*

**CORAM: Hon. Justice R. Nyakundi**

**C. B. Gor & Gor Advocates for the Appellants**

**Sherman Nyongesa & Mutubia Advocates for respondent**

**JUDGMENT**

The respondent **Kalyan Karsan Kerai** by way of a plaint filed on 3.5.2011 he sought general and special damages for personal injuries suffered, which she allegedly sustained in a road traffic accident on 27.5.2010 involving motorcycle KMCF 038W.

The 1<sup>st</sup> appellant was the registered owner whereas, the 2<sup>nd</sup> appellant was in control and management of the motorcycle when the collusion occurred. Its averred that the respondent was at the material day lawfully walking along Haille Selasie Road when suddenly he colluded with the aforesaid motorcycle.

The particulars of the negligence alleged in the plaint are as follows:

- (a). Driving at an excessive speed.*
- (b). Failing to heed the presence of the plaintiff*
- (c). Failing to provide any adequate care and safety of the pedestrian being the plaintiff.*
- (d). Failing to exercise any or maintain proper control of the said motorcycle as to avoid knocking the plaintiff.*
- (e). Failing to stop, slow down, to swerve or so manage as to avoid knocking down the plaintiff.*
- (f). Veering off to the end of the road and there colluding and knocking down the plaintiff.*
- (g). Failing to hoot or in any other manner alert the plaintiff of the approach of the motor cycle.*

The appellant defence filed in court on 13.6.2011 admitted occurrence of an accident involving the respondent and subject motorcycle. The appellants however took issue with the particulars of injuries suffered and circumstances alleged when the accident occurred.

The appellant further denied that the driver, agent or servant was negligent in causing the accident as pleaded by the respondent. In essence, the appellant averred that the admitted accident was contributed to by the respondent in terms of the particulars of negligence alluded to in the statement of defence.

### **Evidence in the trial**

The trial commenced in earnest and the respondent on oath gave evidence on the sequence of events with regard to the collusion and injuries sustained. He was to find himself admitted at Mombasa Hospital for treatment, but due to the severities of the injuries he travelled to India for further management.

As a result of the injuries involving skeletal bone fractures of right tibia and fibula a medical legal report by **Dr. Ndegwa** dated 14.11.2016 was prepared documenting the particulars of injuries and prognosis.

In his evidence **Dr. Ndegwa (PW2)** testified that after conducting a medical examination the following positive findings were made in his report of 14.11.2016 duly and admitted in court as evidence in support of the respondent case.

*(a). Comminuted fracture of the right tibia.*

*(b). Comminuted fracture of the right fibula based on the examination and x-rays films. The tibia fracture has real united.*

There are therefore severe bone injuries suffered by the respondent. **Dr. Ndegwa** opined that the respondent is expected to recover with a 15% permanent disability due to the multiple weak union of the bones, chronic pain, surgical chronic pain, surgical scars that ruin his appearance lowering self-esteem and poor blood flow. That erupt the poor healed wounds, which may lead to leg amputation.

The medical implants at sometimes would require to be removed at a cost of Kshs.200,000/= at Mombasa Hospital. The respondent also produced a number of receipts on the pleaded expenses arising out of the accident and severity of the injuries sustained. The set of receipts and documentary exhibits were admitted as a bundle marked exhibit 1 and exhibit 2 respectively. The medical report was produced by **Dr. Ndegwa** as exhibits 30 and 38.

The appellant never adduced any evidence in rebuttal but the medical reports by **Dr. Sheth** was admitted as a second medical report in support of the opinion in respect with the diagnosis of the injuries.

That being the view of the matter, the issue on liability was resolved by consent apportioned at 25%:75% in favour of the respondent. In the end the Learned trial Magistrate task was to assess general damages, special and future medical costs.

In his considered decision, the Learned trial Magistrate held:

<i>General damages</i>	<i>Kshs.1,500,000.00/=</i>
<i>Special damages</i>	<i>Kshs.2,913,814.20/=</i>
<i>Future medicals</i>	<i>Nil</i>
<i>The total subjected to 25% contributory negligence</i>	
<i>Net Award</i>	<i>Kshs.3,310,360.65</i>

### **Costs and interest was awarded to the respondent**

Being aggrieved with the award of damages, the appellant lodged an appeal to this court. The appellant has put forward seven (7) grounds of appeal:

*(1). That the Learned Chief Magistrate erred in Law in awarding to the plaintiff Shs.1,500,000.00 for general damages in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the Plaintiff.*

*(2). That the Learned Chief Magistrate failed to give any or any adequate reason or reasons as to how he arrived at the figure of Shs.1,500,000.00/= general damages which he awarded to the plaintiff.*

*(3). That the Learned Chief Magistrate erred in Law and in fact in awarding to the plaintiff Shs.1,500,000.00/= as general damages when he took into account the plaintiff's written submissions that the plaintiff's right leg has been amputated when there was no or no credible evidence before him, medical or otherwise, that the plaintiff's right leg was amputated as a result of the injuries sustained by the plaintiff in the road accident on 27<sup>th</sup> May 2010.*

*(4). That the Learned Chief Magistrate erred in fact in not appreciating that the only material injuries suffered by the plaintiff as a result of the accident on 27<sup>th</sup> May 2010 were compound fractures of the right tibia and right fibula.*

*(5). That the Learned Chief Magistrate erred in law in awarding to the plaintiff Shs.2,913,814.20 as special damages when the*

*same had not been specifically proved by way of documentary evidence.*

*(6). That the Learned Chief Magistrate erred in Law and in fact when he awarded to the plaintiff Shs.2,913,814.20 as special damages when there was clear evidence before him that the plaintiff's treatment in India was for conditions wholly unrelated to the injuries suffered in the accident on 27<sup>th</sup> May 2010.*

*(7). That the Learned Chief Magistrate erred in Law and in fact in not holding that the plaintiff diabetic condition together with other illnesses had slowed down his healing process and all the medical expenses incurred in relation thereto and claimed as special damages were not payable.*

*(8). That the Learned Chief Magistrate erred in failing:*

*a. To appreciate the significance of the various facts that emerged from the evidence of the plaintiffs' and defence witnesses.*

*b. To consider or properly consider all the evidence before him and/or*

*c. To make any or any proper findings on the aspect of quantum of damages on the evidence before him.*

*(9). That the Learned Chief Magistrate erred in failing to adequately consider the written submissions filed by counsel for the defendants/appellants.*

The gist of the grounds of appeal mainly is in the excessive assessment of damages on both general and special damages which the appellants felt were not deserving to the respondent.

On appeal counsel for the appellants on assertion of the respondent's evidence argued and contended that the Learned trial Magistrate applied wrong principles to the facts of the case. He also took issue that the Learned trial Magistrate failed to take into account similar awards and as a result arrived at an erroneous decision on damages. On this legal proposition counsel cited the cases of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd {2013} eKLR**. The appellant counsel clarified given the misapprehension this court should ensure discretion in order to interfere with the award. In his further submissions there was no cogent evidence that his departure to India was attributable mainly to the injuries he had sustained in the line of the accident. Counsel submitted and invited the court to take due notice that the respondent had a preexisting diabetic condition which may have complicated the hearing process.

The second ground of appeal was on special damages pleaded under the category of medical expenses. Counsel contended that the quantum so awarded by the Learned trial Magistrate was not supported by any credible documentary evidence.

He therefore asked this court to vary or set aside the assessment as being erroneous altogether on the formulae and principles to guide the court in assessment of damages. Learned counsel cited and relied on the cases of **Tayab v Kinanu CA No. 29 of 1982**, **Lim Poh Choo v Camden & Islington Area Health Authority {1979} 1 ALL ER 332**, **West (H) & Son Ltd v Shepherd {1964} AC 326 at 345**, Learned counsel prayed for the appeal to be allowed and appropriate assessment be made in accordance with the evidence and gravity of the injuries suffered.

The respondent counsel on the other hand submitted that the challenge against the Judgment of the trial court is unmeritorious given the very clear evidence and physical injuries sustained by the respondent.

As regards special Learned counsel that the Learned trial Magistrate awarded far below the amount pleaded of Kshs.3,444,014.20 contended by Learned counsel that contrary to submissions from the bar, the respondent trip to India was to seek treatment specifically in connection the fractures diagnosed to the tibia and fibula this can be confirmed from the medical notes and discharge summary of **HCG – Medt Surgical Hospital PVT – Ltd**. According to counsel, this is an orthopedic hospital and not diabetic clinic.

Learned counsel submitted the large amount of medical expenses was incurred while the respondent was admitted in the Indian hospital as evidenced by the documentary records exhibited on the trial. Counsel for the respondent urged this court to find that the cases referred to by the trial court are appropriate in the award made to the claim on general damages.

Having already analyzed the material events, submissions and the trial court Judgment which culminated to this appeal it is clear that the appellant is of the view that both awards should be varied, or set aside and a completely figure be substituted as a just and proportionate assessment for the claim.

## **Analysis**

The powers of the first appellate court in dealing with appeals of this nature is guided in the principles in the cases of **Butt v Khan 1981 KLR 349**, **Kitavi Coastal Bottlers {1985} KLR 470**, **Peters v Sunday Post {1958} EA 424** and **Selle v Associated Motor Boat Company Ltd {1968} EA 123 at 126**.

Appreciating the laid down principles and dicta in the above cases, the purpose of the whole object of first appeal court is to examine, re-evaluate and scrutinize the entire record carefully on the findings of fact and Law on which the decision was based with a view to set it aside, vary or quash it or affirm it as a valid Judgment of the court.

## **Assessment of general damages**

It is trite that assessment of damages is a discretionary function by the tribunal or court. This was restated in the case of **Simon Takeru v Mercy Mutiku Njeri** the court held:

***“On our part we have that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and compensable award for comparable injuries.”***

On appeal, the jurisdiction is in away restrictive going by the principles in the above cited authorities. The basic guide is for an appeal court to scrutinize, the evidence, assess it and be able to draw its own conclusions of the matter.

It must however, be observed that the appeal court has neither seen or heard the witnesses which mainly the purview of the trial court. In view of the **KEMFRO Africa Limited T/A Meru Express Services {1987} KLR 27 and Gathongo Kanini v A. M. Lubia and Olive Lubia 1982 – 88 IKAR 727** the appeal is only justified to interfere with the following criterion has been met:

***“That the court is satisfied that either the trial Magistrate in assessing 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 low or so inordinately high, that it must be wholly erroneous estimate of the damage.”***

In the instant appeal, the respondent gave cogent evidence on the injuries, admission at Mombasa and later transfer to HCG Orthopedic hospital in India. **Dr. Ndegwa** noted and examined the injuries and gave a prognosis at 15% permanent disability. The x-rays and other assessment done confirmed the gravity of the injuries. With regard to **Dr. Sheth's** medical report as much as he is knowledgeable in scientific skill and in medicine which qualifies him as an expert witness under Section 48 of the Evidence Act, his opinion appeared to me to be suspect and lacking foundation in evidence. This is contrary to the report and opinion by **Dr. Ndegwa** particularly on the severity of injuries and progress made on recovery by respondent.

In my view **Dr. Sheth's** opinion lacked probative value to assist the court on expert opinion under Section 48 of the Evidence Act. Furthermore, his testimony was never a subject of cross examination by respondent to establish the basis of his opinion that the respondent had fully recovered from the injuries and with no expected permanent disability. Therefore, his evidence fails the threshold under Section 48 of the Evidence Act.

As for **Dr. Ndegwa** and other medical reports their opinions adopts a flexible approach stressing on the findings made through physical examination, treatment history and the prospects of recovery based on the proffered expert observations.

That as it may be its always prudent for a trial court to summon an expert witness who is of a contrary opinion with another on the same set of facts so that the court can be in a position to perfectly reject or admit the expert evidence to assist in establishing the existence or non-existence of a fact.

Coming back to the appeal itself, the appellant counsel is aggrieved with limb on general damages as being too excessive and generous.

However, Learned counsel forgot that ordinarily money cannot renew a physical frame that has been battered and shattered (**West H & Sons Ltd v Shepherd 1964 A. C. 326**).

I am therefore prepared to accept the findings by **Dr. Ndegwa** and other supporting medical evidence from UHC hospital in India on the gravity of injuries in line with the findings made by **Hon. Nang'ea** in his Judgment in favour of the respondent.

In affirming the decision of the trial court, I primarily rely on the following cases **Frankline Chinebasi Spii v Kirangi Liston {2017} eKLR**, the plaintiff suffered from comminuted fracture of the tibia and fibula a sum of Kshs.1,500,000/= was awarded in June 2017. **Joseph Musee Mua v Julius Mbogo & 3 Others {2013} eKLR** the plaintiff suffered serious injuries resulting in several surgeries in several hospitals and treatment. He had an injury to the left leg, head, the left leg tibia and fibula were fractured.

The court awarded Kshs.1,300,000/= general damages. When I weigh the injuries suffered by the respondent there are proportionately similar to the above cases particularly with comminuted fractures of the tibia and fibula bones.

It is noted that the respondent suffered serious injuries at the age of 59 years and yet by the time **Dr. Ndegwa** conducted final medical examination for purposes of compiling a report the fractured bones of the right fibula had healed with mal union. Physical and mental anguish caused by an injury besides physical damage to the injury particularly discomfort to fractured bones and the resultant disability impairs ones capacity to enjoyment of life experienced in the past or to be experienced in the future.

Based on the evidence, this court should not lose sight that computing damages in any given claim has to be predicated on the above factors and evidence to that effect. In the final analysis there might be no identical case to go by reliance on past awards. **Lord Carswell in Seeper Sad v Theophilus & Capital Ins. Ltd UKPC 86 OF 2002** pointed out:

***“The caution that ought to be exercised in following awards which are old. “their Lordships entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution. The more so when it is important to ensure that in computing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are, of some antiquity such comparisons can do no more than demonstrate a friend in very rough and general terms.”***

Respectively, I have considered the appeal with available evidence at the trial and the conclusion reached by the trial Magistrate his assessment of damages to me is unassailable.

In the circumstances, the decision of the Learned trial Magistrate was fully justified. That the respondent was entitled to an award of Kshs.1,500,000/= for pain and suffering and loss of amenities.

**(b). Special damages**

The sum awarded must fall within the settled principles in **Ouma v Nairobi City Council {1976} KLR 297, Idi Ayub Omari Shabani v City Council of Nairobi 1982-88 IKAR, Ali v Jackson M. Nyambu T/A Sisera Store {1990} KLR 534.**

It is the law that special damages must be specifically pleaded and proven by way of cogent and credible evidence.

In this appeal, counsel for the appellant opposed the award on the ground that the Learned Magistrate had no sufficient evidence to rely on in awarding special damages. I have taken the liberty in these circumstances to appraise the documentary evidence and receipts produced before the trial court. I accept the respondent claim on special damages as supported by the various receipts related to the treatment, consultation fees, admission, surgery, x-ray and other radiological reports flowing from the injuries sustained during the accident.

There is no rebuttal to this prima facie evidence tendered before the trial court. The receipts provided to me apparently provide the cost and medical expenses of more than the amount awarded. All these taken into account, there is nothing to persuade me to interfere with the discretion of the trial court. This ground also fails.

One of the issue which caught my attention was the manner in which the trial court handled the claim on future surgery to remove the implants in the body of the respondent. According to **Dr. Ndegwa**, who examined and attended the respondent, there would be need for the respondent to undergo surgery to remove the metal implants. All these according to him was necessitated to have the fracture be treated by surgical intervention and insertion of the metals to assist in the union of the bones.

Thus following the radiological and medical appraisal suture removal is to be done at a future date. This prima facie evidence was never controverted by the appellant or their corresponding expert opinion with the same knowledge and skills set by **Dr. Ndegwa**. There can be no doubt that from the evidence admitted by the Learned trial Magistrate he was wrong in throwing away the claim on future medicals just because by its very nature it did not appear in the limb for special damages.

On the future medicals, the expert opinion given was sufficient to invite the court to exercise discretion to award the figure in the medical report or any other reasonable expense to meet the cost stated to be in the future for the benefit of the respondent. The admission of the medical report by Dr. Ndegwa was without prejudice and reservation from the appellant. It is apparent from the doctors opinion that the surgery to remove the implants is still pending.

I verily believe that there would be no other suit at the end of the day the respondent can have an opportunity to ventilate his claim on future medicals.

In my opinion, the most appropriate exercise of discretion is to deal with the issue by giving a reasonable figure or the proposed cost by the expert to take cater for such future expenses. It is not disputed such a loss arises directly from the act of negligence by the appellant and should be treated as such.

From the foregoing it is clear that the Learned Magistrate misdirected himself by not taking into account a relevant factor arising from the injuries sustained by the respondent to assess future medicals.

There is nothing stopping this court from reinstating the claim for future medicals as estimated by **Dr. Ndegwa** at a reasonable figure of Kshs.200,000/= at Mombasa hospital or any other hospital within the same range of costs. It is a matter of public knowledge that the costs of treatment continue to appreciate in the upward trend. Depending on the time such surgery could be recommended by the doctor this costs may or may not fit the surgery. In the absence of such scheduled dating of the surgery the fact remains he was compensated for the loss.

In conclusion, the appeal fails in all the nine grounds with an additional enhanced award on future medicals of Kshs.200,000/=.

This appeal is therefore dismissed and the Judgment of the trial court in so far as to assessment of damages is affirmed in its entirety. The respondents will also have the costs for future medicals of Kshs.200,000/=. With these, the costs of this appeal and interest at court rates be shouldered by the appellants. By dismissing this appeal, the decretal sum becomes due and payable to the respondent forthwith.

These are the orders of the court.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Khalifa for S. B. Gor for the appellant
2. Ms. Naliaka for Nyongesa for the respondent