



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 626 OF 2017

FAIRMILE SCHOOL LIMITED.....1ST APPELLANT

CHARLES MUSALIMA.....2ND APPELLANT

-VERSUS-

JACOB IMBALI IMBENZI.....RESPONDENT

(Being an appeal from the judgment and decree of Honourble E. Wanjala (Miss) (Senior Resident Magistrate) delivered on 8th March, 2017 in CMCC NO. 7607 of 2015)

JUDGEMENT

1. The respondent who was the plaintiff in CMCC NO. 7607 of 2015 instituted the suit against the appellants vide the plaint dated 30th October, 2015 claiming general and special damages together with costs and interest thereon.
2. The respondent pleaded that sometime on or about 11th February, 2013 while he was travelling aboard the motor vehicle registration number KBB 271B along Ngara Road, the 1st appellant being at all material times the driver of motor vehicle registration number KBK 517Q belonging to the 2nd appellant negligently drove the said vehicle, causing it to veer off the road and collide with the motor vehicle the respondent was a passenger, resulting in various injuries to his person.
3. The appellants entered appearance and filed a joint statement of defence dated 4th March, 2016 to the effect that while it is admitted that the accident occurred on the date and in the manner indicated in the plaint, the same was not caused by negligence on the part of the 1st appellant and that instead, the accident was the result of negligence on the part of the driver of motor vehicle registration number KBB 271B, the particulars of which were set out in the defence.
4. When the matter proceeded for hearing, the parties recorded a consent on liability in the ratio of 80:20 in favour of the respondent and further agreed by consent to have all the documents being relied on tendered as evidence without calling their makers where necessary. In that case, parties filed written submissions in respect to quantum.
5. Ultimately, the trial court entered judgment in favour of the respondent as follows:

<i>a. General damages for pain and suffering</i>	<i>Kshs.1,300,000/=</i>
<i>b. Special damages</i>	<i>Kshs. 2,500/=</i>
<i>c. Future medical expenses</i>	<i>Kshs. 120,000/=</i>
TOTAL	<i>Kshs.1,422,500/=</i>
6. The aforesaid judgment is now the subject of the appeal. The appellants' memorandum of appeal dated 13th November, 2017 raises nine (9) grounds of appeal touching on the award on general damages.
7. The appeal was disposed of through written submissions which the parties filed and exchanged. On their part, the appellants contend that in arriving at an inordinately high award of general damages, the learned trial magistrate did not consider the content of the two (2) medical reports on record, including the discrepancies in the nature and extent of injuries sustained by the respondent.
8. The appellants also submit that the learned trial magistrate did not indicate how she arrived at the award of Kshs.1,300,000/= despite the

respondent and appellants proposing the respective sums of Kshs.2,000,000/= and Kshs.400,000/= respectively.

9. Further to the above, the appellants argued that the learned trial magistrate had no basis on which to award future medical expenses when the same had not been specifically pleaded in the plaint.

10. In his opposing submissions, the respondent argued that the learned trial magistrate's award was reasonable and based on recent, comparable awards; going further to argue that the appellants had cited old cases without incorporating factors such as inflation.

11. On the subject of the future medical costs, it is the respondent's position that the learned trial magistrate properly exercised her discretion in choosing to apply the amount of Kshs.120,000/= indicated in the medical report by Dr. Wokabi as opposed to the sum of Kshs.70,000/= laid out in the medical report prepared by Dr. Wambugu; adding that in any event, medical opinions of doctors have no binding effect on the courts.

12. I have considered the rival submissions on appeal alongside the cited authorities. I have also re-evaluated the evidence tendered before the trial court and looked at the impugned decision. As earlier mentioned, the appellants have raised 9 grounds of appeal which will be considered two (2) separate limbs.

13. The first limb is on whether the learned trial magistrate made an exorbitant award as captured in *grounds 1), 3), 4), 5) 6), 7) and 9)* of the appeal. I wish to begin by mentioning that this being an appeal against an award of damages, this court can only interfere with such award under certain specific instances restated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* and reinforced in *Paul Kipsang Koech & Another v Titus Osule Osore [2013] eKLR* thus:

a. Whether an irrelevant factor was taken into account.

b. Whether a relevant factor was disregarded.

c. Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

14. At the trial, two (2) medical reports were relied on and produced by the respective parties. The first is dated 28th September, 2015 and prepared by Dr. W.M. Wokabi. Therein, he indicated the injuries sustained by the respondent as follows:

a) *Fracture of left orbit*

b) *Fracture of left temporal bone*

c) *Fracture of left zygomatic bone*

d) *Fracture of left maxilla*

e) *Lacerations on the left forearm*

f) *Fracture of left tibia*

15. In his prognosis, the good doctor concluded that the respondent did not suffer any deformities resulting from his injuries and that the metal implants inserted on his left leg would need to be removed later on at the cost of Kshs.120,000/=.

16. The 2nd report dated 26th July, 2016 and prepared by Dr. P.M. Wambugu cited the injuries as hereunder:

a) *Fracture of left tibia and fibula*

b) *Non-displaced facial bones fracture involving left orbit, zygomatic and maxilla*

c) *Abrasional wound on the left forearm*

17. In making his prognosis, the abovementioned doctor termed the respondent's injuries as skeletal and soft tissue in nature, further stating that the metal implants could be removed at an all-inclusive cost of Kshs.70,000/= at Kenyatta National Hospital. The good doctor went ahead to award the respondent 4% permanent incapacitation.

18. In his written submissions placed before the trial court, the respondent proposed the sum of Kshs.2,000,000/= as a reasonable award for general damages, citing a number of authorities where the respective courts awarded various sums ranging between Kshs.800,000/= and Kshs.2,000,000/= plus special damages as proved by way of the receipts produced.

19. On their part, the appellants proposed an award of Kshs.400,000/= with reliance on three (3) separate authorities decided between 2000 and 2008 and where the respective courts awarded sums between Kshs.250,000/= and Kshs.600,000/=.

20. In her decision, the learned trial magistrate cited the nature of the injuries sustained as per the two (2) reports and equally noted the authorities and proposed awards of damages brought forth by the parties. Having done so, she reasoned that the authorities cited by the appellant constituted inordinately low awards given the nature of injuries suffered, thereby settling for the award of Kshs.1,300,000/=.

21. This appeal raises two (2) main issues for determination. The first issue concerns whether the learned trial magistrate failed to consider the two (2) medical reports while the second issue is whether the award made is inordinately high.

22. On the first issue, I have re-evaluated the medical reports on record it is apparent that, contrary to the position taken by the appellants, they indicate a similarity in the nature of injuries sustained. Both reports indicate that the respondent sustained multiple fracture which fact was noted by the learned trial magistrate.

23. I note that while both medical reports indicated that the respondent would require a removal of the metal plates inserted in his body, the cost differed from one doctor to another. The second medical report by Dr. Wambugu specified the hospital in which the procedure would likely cost the Kshs.70,000/=. In my view, while it would have been important for the learned trial magistrate to explain why she chose to rely on the costs of Kshs.120,000/= offered in the first medical report as opposed to the second, I am satisfied that she drew guidance from the medical evidence on record in making such an award. In any event, the procedure for removing the metal plates is not restricted to one hospital and the cost varies from one facility to another.

24. I have noted the appellants' submission which is to the effect that since the future medical expenses were not pleaded as special damages in the plaint, the learned trial magistrate had no basis on which to award the same.

25. I have re-looked at the plaint on record and it is clear that the claim for future medical expenses was categorized under general damages and the costs were specifically indicated in the plaint. Further to this, the medical report by Dr. Wokabi confirmed that the costs generally amount to approximately Kshs.120,000/=; there is no doubt that this constitutes the cost of the procedure for removing the metal plates. Future medical costs are, to mind, a special kind of general damages so to speak, hence the same was properly claimed by the respondent. The Court of Appeal in the case of *Simon Taveta v Mercy Mutitu Njeru [2014] eKLR* with reference to *Kenya bus Services Ltd v Gituma, (2004) EA 91* stated as follows inter alia:

“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 damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof...”

26. Going by the reliefs sought and having re-evaluated the same together with the evidence on record, I am satisfied that the respondent appropriately sought for future medical costs/expenses which falls under the ambit of general damages albeit in a special form. In the circumstances, I am satisfied that the learned trial magistrate correctly applied her mind and discretion in awarding the same as she did.

27. In respect of the second issue, I have considered the various authorities cited by each party. The cases cited by the appellant are in respect of injuries which are similar to those suffered by the respondent. However those authorities were decided close to 10 years prior to the date of judgment hence I am in agreement with the learned trial magistrate's finding that the same were on the lower side.

28. As concerns the authorities cited by the respondent, I find that the same are in respect of injuries which are slightly more serious than those obtaining in this case.

29. I have considered a few comparable awards decided recently: in *Joseph Kimanathi Nzau v Johnson Macharia [2019] eKLR* the court substituted an award of Kshs.450,000/= with that of Kshs.800,000/= for multiple fractures amongst other injuries, whereas this Court in *Dorcas Mututho Ileve v Muithya Lydia [2018] eKLR* equally substituted an award of Kshs.300,000/= with one of Kshs.600,000/= for a plaintiff who had sustained multiple fractures.

30. Taking into consideration the passage of time between the accident and the delivery of the trial court judgment, as well as the respondent's injuries, I am persuaded that the learned trial magistrate arrived at an inordinately high award of Kshs.1,300,000/= and I therefore find it necessary to interfere with the same and substitute it with a reasonable award of Kshs.800,000/=.

31. The award made on special damages was not brought to question and I therefore have no reason to interfere with it.

32. The second limb concerns whether the learned trial magistrate considered the 20% liability pursuant to the consent entered into between the parties, as raised in *grounds 2) and 8)* of the appeal.

33. The proceedings confirm that on 9th November, 2016 the parties did indeed enter into a consent on liability in the ratio of 80:20 in favour of the respondent. The learned trial magistrate equally took note of this in her judgment but did not subject the award to the 20% contribution.

34. Accordingly, the appeal is hereby allowed and the trial court's award on general damages and total award are hereby set aside and substituted with the following award:

a) General damages Ksh.800,000/=

b) Special damages Ksh. 2,500/=

c) Future medical costs Ksh.120,000/=

Total Ksh.922,500/=

Less 20% contribution Ksh.184,500/=

Total Ksh.738,000/=

The special damages shall earn interest from the date of filing of the suit at the trial court while the general damages shall earn interest from the date of judgment of the trial court until payment in full. Each party shall bear its own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants

.....for the Respondent