Muriuki v Mbaabu (Civil Appeal E021 of 2022)
[2025] KEHC 402 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL E021 OF 2022

AK NDUNG'U, J

JANUARY 17, 2025

BETWEEN

DAVID WAMBUGU MURIUKI ..... APPELLANT

AND

JAMES MUTHURI MBAABU ..... RESPONDENT

(Appeal from the decision and judgment of Hon. V.M. Masivo, Senior Resident Magistrate delivered on 10th August 2023 in Nanyuki Cmcc No. 189 of 2022)

JUDGMENT

1. The Appellant, David Wambugu Muriuki aggrieved by the decision and judgment of the Senior Resident Magistrate Court in Nanyuki CMCC No. 116 of 2018 delivered on 10th August 2023 hereby appeals the Quantum awarded in the said decision and judgment and sets forth the following grounds;

    1. That the trial magistrate erred in both law and fact by awarding general damages at Kshs. 700,000/= which was inordinately too low in the circumstances and against the weight of evidence adduced and in particular the severity of the injuries sustained by the appellant thereby occasioning a miscarriage of justice.

    2. That the trial magistrate erred in both law and fact in analyzing the principles applicable against the weight of the evidence adduce on quantum of damages, the cited relevant authorities and the appellant's submissions.

    3. That the trial magistrate misdirected himself in analyzing the evidence adduced and in particular the injuries sustained by the appellant and proceeding to make a finding that the appellant had sustained two (2) fractures instead of 3 (three) against the pleadings and the evidence adduced.

4. That the trial magistrate erred in both law and fact by failing to make an award for future medical expenses yet the same had been pleaded and proved which was against the evidence adduced in favour of the appellant.

5. That the trial magistrate erred in both law and fact by disregarding the medical evidence by both parties on the need for future medical expenses thereby failing to make an award on the same yet the same had been pleaded and proved.

6. That the trial magistrate erred in both law and fact by making an erroneous ward on special damages and in particular failing to award medical expenses actually incurred by the appellant which had been pleaded and proved by production of receipts.

7. That the trial magistrate erred in both law and fact by making a finding that the medical expenses pleaded by the appellant were settled by the National Hospital Insurance Fund (NHIF) which was against the evidence adduced in form of receipts to show that the same was actually paid out of pocket by the appellant.

2. The Appellant prays for orders that this appeal be allowed and the decision and judgment delivered on 10th of August 2023 be set aside and be substituted with appropriate/enhanced awards on General and special damages and the Respondent be condemned to pay costs of this appeal.

3. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 14th June, 2024 and filed in court on 28th June, 2024. In the said submissions, it is the Appellant's case that liability was settled at 80:20 in favour of the plaintiff as against the defendant. The plaintiff's statement was adopted as his evidence and all documents listed in his list of documents were all admitted in evidence by consent.

4. It is submitted that on 10th August 2023, the court awarded Kshs700,000 in General damages less 20% contribution, special damages at3,550 and costs and interest.

5. On General damages, it is submitted that in the plaint, the following injuries were pleaded;

   a. Injury to both upper limbs.

   b. Injury to the right lower limb

   c. Swollen tender and dysfunctional right arm near the right shoulder joint.

   d. Swollen tender and dysfunctional left arm.

   e. Deformed, swollen and tender right leg.

   f. Fracture of the right proximal humerus.

   g. A commuinuted fracture of the left proximal humerus.

   h. Fractures of the distal tibia and fibula bones.

6. Counsel submits that these injuries were proved through various medical documents including the discharge summaries from the 2 hospitals in which the plaintiff was seen. It is urged that the evaluation of the evidence on injuries by the court was erroneous leading to an erroneous assessment of damages which, it is submitted, were inordinately too low in light of the severity of the injuries.

7. It is counsel's submission that the instances where an appellate court can interfere with damages by a trial court have been defined in various cases. Reliance was placed on the case of Nderitu v Repkoi and

Another[2004]e KLR and in Kemfro Africa Ltd t/a Meru Express Services vs Lubia & Another. Also cited are the cases of Butt vs Khan(1977)1 KAR and Kenya Breweries Ltd[1991]e KLR.

8. It is the appellant's case that the court misapprehended the evidence in some material aspect particularly the injuries suffered by the plaintiff thereby arriving at a figure that was inordinately too low.

9. Based on authorities submitted at trial with awards ranging from Kshs.3,000,000 and Kshs2,400,000, the Appellant submitted for an award of Kshs. 2000,000.

10. On future medical expenses, it is submitted that in his amended plaint the appellant claimed Kshs 300,000 being estimated costs of future medical expenses. This cost was confirmed by Dr Muleshe in his report. The Respondent's doctor recommended Kshs 160,000 for the same. The court is faulted for failing to make an award on this head yet even the Respondent had conceded it at Kshs 160,000.

11. On special damages, it is submitted that a total of Kshs. 163,844 was pleaded as special damages. Only 3,550 was awarded on the basis that the hospital bill was paid by NHIF. It is urged that this was a misapprehension of the facts as the claim was the sum of the part of the bill the appellant paid, the total bill having been 598,608.

12. For the Respondent, it was submitted that it is trite law that special damages must be specifically claimed and specifically proved.

13. Counsel urges that the Appellant had submitted an interim bill showing that the payer was NHIF and there was no evidence whatsoever that the Appellant paid a sum of Kshs. 160,000/= for his medical expenses. Indeed, having established that the same was paid by the NHIF the trial court was right in finding that the same could not be awarded in accordance with Section 42 of NHIF Act.

14. Turning to the award, the Respondent placed reliance on 2 cases on quantification of general damages, in particular, Samuel Mungai Niau v Wanainchi Sanitary & Hardwar Ltd (2004) eKLR the High Court awarded general damages of Kshs. 150,000/= where the Plaintiff suffered (a) crushed leg, compound fracture of the right tibia and fibula (b) fracture of 1,2, 3rd and 4th metatarsal of right foot, and (e) superficial wounds over right arm. The doctor who confirmed the injuries noted the leg would have been amputated but they managed to save it.

15. In Ibrahim Kalema Lewa v Esteel Co. Ltd [2016] eKLR, the appellate court upheld the trial court's award of Kshs. 300,000/= in general damages where the Appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains. The recorded evidence further shows that the Appellant was admitted in hospital for two months and thereafter he attended outpatient clinics. The doctor who examined the Appellant also opined that he had suffered 25% permanent incapacity. The doctor further noted that the Appellant would not regain normal functional capacity of his limb.

16. Further, that in Sundries Bargains (Nairobi) Limited v Richard Karinga Mwangi [2019] eKLR, the High Court substituted the lower court award on general damages from Kshs. 600,000/= down to Kshs. 400,000/= where the Plaintiff suffered fracture of the lower right fibula, swollen right leg, blisters right foot, soft tissue injuries and fracture of the 2nd metatarsal.

17. It is urged that the above authorities clearly establish that the award of Kshs. 700,000/= was within the range of recent authorities and therefore it is unreasonable/arbitrary to interfere with the same. We urge the Court to uphold the trial court award of Kshs. 700,000/= for pain, suffering and loss of amenities considering the inflation levels.

18. As regards cost of future medical expenses, it is submitted that the Appellant did not state that he would be undergoing the removal of metal implants and as such an award on this head would be speculative. It is the Respondent's case that the Appellant is expected to fully recover as per his medical report. Thus the trial court did not err in making no award for future medical expenses as the Appellant had not indicated that he would be undergoing any future treatment for the removal of the metal implant.

19. I have considered the appeal and submissions on record. Of determination is whether the damages as awarded by the trial court were appropriate and whether a basis has been laid for the court to interfere with the quantification arrived at by the trial court.

20. There is no magic in the computation of general damages. It is now settled that an award in general damages must reflect the trend of previous, recent and comparable awards.

21. The parameters under which an appellate court will interfere with an award in general damages were set out in Butt v Khan [1978] eKLR thus: -

> " An appellate court will not disturb an award for general 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..."

22. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia [1982 –88] 1 KAR 727 at p. 730 Kneller J.A. said: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the 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 a wholly erroneous estimate of the damage."
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> (See also Loice Wanjiku Kagunda v. Julius Gachau Mwangi *CA 142/2003* and Gitobu Imanyara & 2 others v Attorney General [2016] eKLR).

23. In Rahima Tayah & Another v. Anna Mary Kinaru [1987-88] 1 K A R 90 Potter, JA. gave the following advice:-

> " I would commend to trial judges the following passage from the speech of Lord Morris of Borthy-Gest in the case of West (H) & Son Ltd v Shepherd [1964] A.C. 326 at pg. 345: -"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 endeavor 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 sustained by the Appellant compare well with the injuries in Damaris Wamucii Kagechu vs Joseph Kirui & Another [2019]eKLR including on the aspect of degree of permanent incapacitation save to note that in the Damaris case, the fractures were compound fractures. I think the trial magistrate despite looking at various decisions in the past failed to appreciate the real nature of the injuries

and thus arrived at a wrong assessment of damages. The award ended up being inordinately low and did not reflect the extent of the injuries sustained by the Appellant. Moreover, it is clear that the decisions cited by both parties are over 2 years old hence the inflation ought to be taken into account. In the circumstances and for these reasons, I would increase the award of general damages to Kshs. 1,00,000.00.

25. Regarding future medical expenses, the governing principle was explained by the Court of Appeal in Kenya Bus Services Ltd v Gituma [2004] EA 91 as follows:

> " And as regards future medication 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. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded".

26. The Court of Appeal in Tracom Limited & v. Hassan Mohamed Adan [2009] eKLR held as follows: -

> " ...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..."

27. A cursory glance at the Amended Plaint shows that the Appellant pleaded future medical expenses. Both medical reports alluded to the possibility of future medical expenses being incurred and estimated the cost, Dr. Muleshe at Kshs 300,000 and Dr. Wambugu at Kshs. 160,000. In Mbaka Nguru & Another v James George Rakwaro NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR, the Court of Appeal put it this way;

> " We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head ...."

28. Having considered the appeal, I am satisfied that the Appellant's claim on future medical expenses is founded on the basis that the same was pleaded and was confirmed by the doctors on both divides save for the disparity in the amount required. In their submissions at trial, the Respondent had conceded to the sum proposed by their doctor at Kshs. 160,000. I have considered the proposed costs. In the absence of other suitable parameters to assess the cost now that the doctors do not agree, I have had recourse to a recent decision in similar circumstances in Mary Maina v. Joseph Maingi Wambua [2020] eKLR, the court of appeal upheld a sum ofKshs.300,000.00 for the removal of two implants. Am satisfied that a sum of Kshs 300,000 would suffice.

29. On special damages, this head of damages should not pose any difficulties. It is normally a clear cut claim of costs pleaded and proved by way of evidence. Medical expenses were pleaded at Kshs. 160,294. The Respondent has argued that the bills were paid by NHIF. The record shows that this contention is not entirely correct. There are invoices showing a total bill of Kshs 598,608. Though the exhibited invoices indicate that NHIF was the payer, the Appellant has demonstrated through evidence that he directly paid Kshs. 160,294 towards medical treatment and equipment and is entitled to the same as part of the special damages. There is evidence of 6 receipts showing direct payment by the Appellant totaling 160,294.

30. With the result that the appeal herein succeeds. The judgement of the trial court is set aside and substituted with a judgement for the appellant for;

    a. General damages 1000,000.

    b. Future medical expenses Kshs. 300,000

    c. Special damages Kshs 163,844

       Total Kshs 1,463,844

       Less 20% contribution 292,768.80

       Net 1,171,075.20

    d. The Appellant shall have the costs of the Appeal

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17 TH DAY OF JANUARY 2025.

A.K. NDUNG'U

JUDGE