Bosire v ENA Investment Limited (Civil Appeal E011 of 2024)
[2025] KEHC 7332 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 7332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E011 OF 2024

WA OKWANY, J

APRIL 3, 2025

BETWEEN

ZAKAYO MISIANI BOSIRE ..... APPELLANT

AND

ENA INVESTMENT LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment I the Chief Magistrate's Court at Keroka, in CMCC No. 174 of 2019 delivered by Hon. C. Ombija, Senior Resident Magistrate on 17th April 2024)

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where he sued the Respondent seeking, inter alia, damages arising out of a road traffic accident. The Appellant's case was that he was on 2nd November 2019, a lawful passenger travelling aboard motor vehicle registration No. KCP 839V when the Respondent's servant and/or agent carelessly and/or negligently drove, managed and/or controlled motor vehicle registration No. KCG 024Z thereby permitting it to collide with motor vehicle registration No. KCP 839V thus causing him severe bodily injuries. The Appellant sought the following orders in the Amended Plaint: -

    a. Special Damages in the sum of Kshs. 76,130/=

    b. General Damages

    c. Costs of the suit

    d. Interest on (a), (b) and (c) above at present court rates

    e. Loss of income

    f. Cost of future treatment at Kshs. 350,000/=

2. The trial court heard the case and on 17th April 2024, judgment was entered in favour of the Appellant as follows: -

   Liability at 80:20% against the Defendant

   General Damages – Kshs. 1,000,000/=

   Less 20% liability – Kshs. 800,000/=

   Special Damages – Kshs. 76,130/=

   Total Kshs. 876,130/=

3. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of Appeal in his Memorandum of Appeal: -

   1. That the Learned Magistrate erred in fact and in law by apportioning liability in the ratio of 80:20 in disregard of the Appellant's evidence on record indicating that the Respondent was to blame for the accident and that the Appellant was a mere passenger hence could not be blamed for the accident.

   2. That the Learned Trial Magistrate erred in fact and in law by failing to award loss of income despite the same being pleaded and not being controverted by the Respondents in the lower court and further that both doctors admitted disability suffered by the Appellant.

   3. That the Learned Trial Magistrate erred in fact and in law by failing to make an award of future medical expenses despite being pleaded and medical reports adduced by the Appellant and Respondent admitting the need for such an award hence arriving at a wrong conclusion.

4. The Respondent, on his part, filed another appeal in Nyamira Civil Appeal No. E013 of 2024 in which it challenged the trial court's award for general damages on the basis that the same was inordinately high and excessive. The Respondent/Appellant enumerated the following grounds in is Memorandum of Appeal: -

   1. That the Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate the applicable legal principles in assessment of damages and thereby arrived at an excessive and unjustified award.

   2. The Learned Trial Magistrate erred in law and fact by awarding general damages of Kshs. 1,076,130/= an award which was so excessive as to amount to an erroneous estimate of loss or damages suffered by the Plaintiff.

   3. The Learned Trial Magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.

   4. The Learned Trial Magistrate erred in law and fact by overly relying in the Respondent's submissions which were not relevant.

   5. The Learned Trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of a similar nature.

5. Directions were on 1st July 2024 issued for the consolidation of the two appeals. The appeal was canvassed by way of written submissions which I have considered.

6. In John Oketch Abongo vs. Republic [2000] eKLR the Court of Appeal outlined the duty of a first appellate court and held thus: -

> " The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony."

Analysis and Determination

7. I have considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether the trial court arrived at the correct findings on liability and quantum.

Liability

8. As I have already noted in this judgment, the trial court distributed liability at the ratio of 80%-20% against the Respondent. The Appellant's case was that the basis for apportioning liability against him was not established considering that he was a mere passenger and was therefore not having the control of the motor vehicle. He referred to the decision in Charles Wahome Muikia vs. James Kamau Mwangi & Another [2000] eKLR where it was held that: -

> " The parties entered into a Consent Order in which the Defendants were to bear 90% of the blame and the Plaintiff 10%. I fail to see however how the Plaintiff is to blame for the 10% when he was a mere passenger." [Emphasis added]

9. The Respondent, on its part, argued that Appellant was guilty of contributory negligence as he had testified that the motor vehicle was overloaded and that he had not fastened the safety belt.

10. I have perused the trial court's judgment and I note that the said court did not delve into explaining how it arrived at the distribution of liability at 80% to 20%.

11. It was not disputed that the Appellant was a passenger in the vehicle that collided with the Respondent's vehicle. In Ndatho vs. Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) [16 March 2022]) it was held thus:-

> " 19. There is no dispute that the respondent was a pillion passenger.
>
> 20 ..... As pillion passenger, the respondent had no control of the motorcycle and could not have done anything to cause or avoid the accident."

12. Applying the reasoning in the above cited case to the present appeal, I find that the trial court erred in apportioning liability as it did since the Appellant was merely a passenger in the motor vehicle that collided with the Respondent's motor vehicle. My humble view is that apportionment of liability could only have been possible between the owners of the two motor vehicles and not the passengers who were not in any way having the control of the said vehicles. For the above reasons and in the circumstances of this case, I find that the Respondent herein was solely responsible for the said accident.

Quantum

13. The trial court awarded the Appellant Kshs. 1,000,000/= General Damages for pain and suffering. The Respondent argued that the trial court's award was inordinately high considering the Appellant's injuries. The Respondent proposed an award of Kshs. 300,000 general damages.

14. The Appellant, on the other hand, submitted that the trial court's award of Kshs. 1,000,000 general damages was proper and commensurate with his injuries and within the range of awards made in recent similar cases.

15. In Sheikh Mustag Hassan vs. Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457 it was held thus: -

> " The Appellate court is only entitled to increase an award of damages by the High court if it is so inordinately low that it represents an entirely erroneous estimate of the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect..... A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that the other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..... The judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country".

16. This court is also aware of the principle that comparable injuries should attract comparable awards. I note that the Appellant sustained the following injuries in the accident in question: -

    i. Deep cut wound on the forehead

    ii. Chest Injuries

    iii. Bruises on the hands

    iv. Dislocation of the right foot

    v. Compound left tibia fracture

    vi. Compound left fibula fracture

    vii. Deep cut wound on the left foot

    viii. Left limb deformity Blunt trauma to the back

    ix. Deep cut wound on the right leg.

17. The said injuries were confirmed through the exhibits that were produced by both parties, to wit, Medical Reports by Dr. Morebu (P.Exh 8a) and Dr. Kahuthu (D.Exh1), the Discharge Summary and Treatment Notes (P.Exh1) and the P3 Form (P.Exh6).

18. I note that while Dr. Morebu, for the Appellant, assessed permanent disability at 40%, Dr. Kahuthu, for the Respondent, who examined the Appellant 8-9 months after the accident assessed permanent disability at 20%. To my mind, this means that the Appellant was on the path to recovery.

19. Dr. Morebu also testified that the dislocation of the Appellant's right foot was likely to deteriorate later. It is also noteworthy that Dr. Kahuthu informed the court that the Appellant will have to undergo a further surgery to correct the shortened leg that sustained a fracture. She estimated the cost of this future surgery at Kshs. 110,000/. She produced a quotation from The Kenyatta National Hospital in support of the future medical expenses while Dr. Morebu gave an estimate of Kshs. 350,000/= for future medical expenses but did not provide any basis for the same.

20. I have considered the following comparable past cases: -

    a. In Harun Muyoma Boge vs. Daniel Otieno Agude (2015) eKLR the victim sustained blunt chest injuries, cut wound on the right wrist, deep cut wound on the right foot, fracture of the right tibia and fibula and soft tissue injuries with permanent disability assessed at between 5% - 25%. The court awarded Kshs. 300,000/= general damages.

    b. In *Kimita vs. Travel Budget Express & another (Civil Appeal E042 of 2022)* [2024] KEHC 6435 (KLR) (4 June 2024) (Judgment) Nzioka J. upheld an award of Kshs. 800,000/= general damages where the Appellant had sustained fracture of the distal end of the left tibia and fibula, severe soft tissue injury of the left leg, deep cut wound on the forehead leading to severe soft tissue injuries, cut wound on the zygomatic area leading to severe soft tissue injuries, deep cut wound on the left arm leading to soft tissue injuries, fracture of the right tibia, compound fracture of the left tibia and a deep cut wound on the chin.

    c. In Daniel Otieno Owino & Anor vs. Elizabeth Atieno Owour [2020] eKLR, the court awarded Kshs. 400,000/= to the claimant who had sustained compound fractures of the tibia and fibula bones, deep cut wound and tissue damage to the right leg, blunt injury to the chest and head injury with a cut.

21. Having regard to the above cited cases and the multiple injuries that the Appellant suffered in the accident coupled with the high inflationary trends, I find that the trial court's award of Kshs. 1,000,000 general damages was on the higher side. I find that an award of Kshs. 800,000 will be reasonable compensation for pain and suffering.

22. On special damages, it is trite that the same must not only be specifically pleaded but must also be strictly proved. In this case, the Appellant sought Special Damages in the sum of Kshs. 76,130/=. I have perused the receipts that the Appellant presented in court in support of the special damages and I am satisfied that the same was proved to the required standard.

23. Turning to the claim for future medical expenses, I find that the same was also proved and ought to have been awarded since the doctors who testified for the Appellant and the Respondent were in agreement that the Appellant will be required to undergo a corrective procedure to remove the metal implants and to rectify the shortened leg. The recommendation by Dr. Kahuthu was Kshs. 110,000 while Dr. Morebu's quoted Kshs. 350,000. In balancing the two proposals I will award the Appellant 230,000 for future medical expenses.

24. Lastly, on the claim for loss of income, I find that the same was not supported by any evidence as the Appellant did not show how much he would to earn on a daily basis and how the injuries affected his said earnings. I will therefore not make any award for loss of income.

25. In the final analysis, I find that the Appeal is merited and I therefore allow it by setting aside the judgment by the trial court and entering judgment for the Appellant as follows: -

    Liability at 100% against the Respondent

General Damages – Kshs. 800,000/=

Special Damages – Kshs. 76,130/=

Future Medical Expenses – Kshs. 230,000/=

Total – Kshs. 1,106,130=

26. I award the Appellant interests on the above sum at court rates till payment in full.

27. I award the Appellant half the costs of the appeal which I hereby assess at Kshs. 50,000/-.

28. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF APRIL 2025.

W. A. OKWANY

JUDGE