Third Engineering Bureau of China City Construction Group Company Limited v Lwanda (Civil Appeal E235 of 2023) [2024] KEHC 1082 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1082 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E235 OF 2023

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

THE THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION GROUP COMPANY LIMITED .... APPELLANT

AND

MOSES SIMIYU LWANDA .... RESPONDENT

JUDGMENT

1. The Appeal arises from the Judgement and Decree of Honourable R.N Akee, Senior Resident Magistrate delivered in Mombasa CMCC No. 1529 of 2021 on 10th August 2023 in favour of the Respondent as follows:

    1. Liability 100%
    2. General Damages Kshs. 1,500,000/-
    3. Future Medical Expenses. Kshs. 300,000/-
    4. Special Damages Kshs. 2,000.

    Total Kshs. 1,802,000/=

    with costs of the suit and interest.

2. The Appellant being aggrieved by the Award lodged the Memorandum of Appeal.
3. The Memorandum of Appeal raises only one substantive issue, that is,

    The Leaned Magistrate erred in properly appraising the evidence and the law regarding the assessment of damages and so arrived and an erroneous and excessive award of damages.

Pleadings

4. The Respondent instituted the suit in the lower court vide the Plaint dated 13th September 2021 claiming damages for an accident that occurred on 25/11/2020 involving Motor vehicle Registration Number KCM 023T while the Respondent was as Security Guard opening a string barrier to allow only construction vehicles to access the Changamwe Round-about when the Appellant's driven Motor Vehicle Registration Number KCM 023T hit and threw the Respondent in a ditch causing the Plaintiff serious bodily injuries. The Respondent set forth particulars of negligence for Motor Vehicle Registration Number KCM 023T. The Respondent also pleaded Ksh. 18,500/= as Special Damages and injuries as follows:

    a. Fracture of the right metacarpal bone

    b. Bruises and abrasions to the left forearm.

5. The Appellant filed Defence and denied liability while also blaming the accident on the rider of the Respondent.

Evidence

6. The Respondent as Plaintiff in the lower court suit testified as PW3. He relied on his witness statement and bundle of documents dated 13th September 2021. It was his case on quantum that he was still undergoing treatment and prayed the court to grant him surgery fees required of Kshs. 125,000/=.

7. Further, the Plaintiff also amended paragraph 6 of the Plaint to correct the particulars of injuries to accord with the Medical Report which he produced in evidence. The Amendments were allowed and consequently injuries were as follows:

    1. Fracture of the right humerus

    2. Fracture of the right medial malleous

8. PW2, Dr. Syombua Kiema produced her Medical Report dated 2nd June 2021.

9. The percentage of permanent disability was estimated at 35%. He estimated that the cost of removing the implant would be Kshs. 125,000/- on cross examination.

10. PW1, was PC Anami Swaleh. He blamed the driver of the motor vehicle for losing control and ploughing into the guardroom and causing injuries to the Plaintiff.

11. The Appellant did not call any witnesses.

The Appellants' Submissions

12. It was contended that the court erred awarding general damages for at Kshs. 1,500,000 that were excessive and inordinately high and occasioned injustice to the Appellant.

13. It was further contented that the trial court awarded damages for future medical expenses without evidence.

14. I was urged to allow the Appeal.

The Respondent's Submissions

15. On the part of the Respondent, it was submitted that the assessment of damages was at the discretion of the court and the award of the sum of Kshs. 1,500,000/= and Kshs. 300,000/= for future medical expenses was not inordinately high and was based on evidence and urged this court not to interfere with the awards.

16. Counsel further submitted that the learned trial magistrate was guided by the principles on assessment of damages and awarded commensurate compensation to the estate of the Deceased.

17. Counsel further submitted that the cost of removal of the plate was Kshs. 125,000/- and the cost of putting it was equally Kshs. 125,000/= per Dr, Kiema's report.

18. I have also considered the authorities filed by the parties in this case. They are grossly exaggerated and I will not be guided by them.

Analysis

19. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

20. Except, however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

21. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

22. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

23. This Appeal being on quantum only, the principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary.

24. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR as follows:

> 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.

25. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

26. The words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages are important to replicate herein thus:

> “ I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

27. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> “ I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

28. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> “ The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of

the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

29. It is thus common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...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 endeavour 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....."

30. With the above guide, if the Award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

31. There is no dispute that the Respondent suffered fracture of the right humerus, fracture of the left malleolus and bruises and abrasions to the left forearm.

32. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

33. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

34. The Trial Court relied on the case of Mehari Tewoldge t/a Mehari Transporters Ltd v Muasya Maingi (2013) eKLR. She awarded Kshs. 2,000,000/- for general damages. However, I note damages recorded were Kshs. 1,500,000/-. There is this a contradiction on the award on general damages stated as Kshs. 2,00,000/= and awarded as Kshs.1,500,000/=.

35. I have also perused the judgement relied upon by the Trail Court and note the injuries therein were incongruent and diametrically dissimilar to this case. The Trial Court appears to have only relied on

the authority based on 8% permanent incapacity therein which is also divergent from the percentages estimated in this suit. The injuries suffered in the cited case were stated as follows:

1. "Blunt injury to the chest;
2. Fracture 3 ribs 4, 6, 7 on the right side with puncture of the pleural leading to heamathorax.
3. Blunt injury to the abdomen with a tear in the liver and severe internal bleeding leading to heamoperitoneum;
4. A deep cut on the upper right arm with skin and muscle deficit near the axilla;
5. Many cuts and bruises on the whole right arm;
6. Fracture right scapula; and
7. Several fractures on the right tibia and fibula at the ankle joint."

36. It was pertinent for the Trial Court to assess similar fact situations on the basis of similar injuries and nit solely on the basis of similar incapacity levels. On this factor alone, the assessment of damages was arrived at without regard to relevant principles.

37. I have analyzed similar fact cases with regard to the fact that no single case is typically identical to the other. in Penina Waithira Kaburu v LP [2019] eKLR, the Court stated thus on the issue of award of general damages –

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

38. In Alphonza Wothaya Warutu & another v Joseph Muema [2017] eKLR, the Plaintiff sustained injuries of deep cut wound on the forehead, compound fracture on the midshaft of the right Humerus, compound fracture of the right tibia and deep cut wound on the right lower leg and the court upheld an award of Kshs. 800,000 as general damages.

39. The injuries in the above case are, however, slightly more severe than this case.

40. In the case of Philip Mwago v Lilian Njeri Thuo [2019] eKLR, the High Court sitting on appeal upheld an award of Kshs. 500,000/= general damages for a claimant who had suffered a broken humerus with 8% residual functional disability.

41. Further, in the case of the respondent suffered a fracture of the right humerus arm bone (mid 1/3), a deep cut on the right eye, abrasion on the head and a blunt injury to the right shoulder and chest. The trial court awarded general damages of Kshs. 450,000/- which was upheld on Appeal to this Court.

42. Therefore, stemming from the Award by the Trial Court of Kshs. 1,500,000/- in General Damages, I am of the view that this was inordinately high award. The Trial Court erroneously relied solely on the percentage if permanent disability ti estimate general damages. I will consequently interfere with the award.

43. In my view, the case Philip Mwago (supra) would presently a more comparable factual situation as far as the injuries herein are concerned. However, therein, the injuries involved a broken humerus but herein it is fracture of the humerus and fracture of the right medial malleolus. The percentages of incapacity therein is also 8% while herein the Plaintiff's doctor estimated 35% and the Defendant's Doctor 20%. A midpoint of 28% permanent disability would suffice. The injuries herein are thus more severe. On this basis, an award in General Damages of Kshs. 750,000/- would in my view be adequate compensation to the Respondent. I consequently interfere with the Judgment of the Trail Court to this extent.

44. On future medical expenses, in the case of, Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> " 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.

45. Future medical expenses, it has been held are based on medical opinion. They as such constitute an amount of pecuniary loss which the Plaintiff can prove based on the facts pleaded. I am persuaded by the reasoning of Odunga J, (as he then was) in Bash Hauliers Limited v Peter Mulwa Ngulu [2020] eKLR where the learned Judge stated as follows:

> 34. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.

46. However, as was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

47. On future medical expenses, the Trial Court awarded Kshs. 300,000/-. The opinion of the Plaintiffs' Medical Doctor was that the Plaintiff suffered 35% permanent incapacity and would require Kshs. 50,000/= per annum for physiotherapy and Kshs. 250,000/= for the removal of the fixed metal plates.

48. The medical report of the Appellant's doctor recommended 20% disability. It was held by the Court of Appeal in Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 that:

> " The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

49. In this case, I do note that the Medical Report by the Plaintiff's Doctor to contradict the Medical Report of the Defendant's Doctor to contradict her oral testimony and that of the Plaintiff. The Medical Report estimated Kshs. 50,000/- per year for physiotherapy and Kshs. 250,000/- for the removal of the metal plates. On the hand, the testimonies were that the Plaintiff would require Kshs.

125,000/- to remove the plates. Therefore, I will reduce the expenses required for the removal of the metal plates from Kshs. 300,000/- awarded to Kshs. 125,000/-.

50. Either, the Defendant's Medical Report and evidence did not negate the fact that the Plaintiff would require expenses on physiotherapy and removal of the metal plate. It was upon the defense medical officer to project whatever costs that would apply in his view for consideration by the Court. He did not. I find no reason to disturb the award of the Trial Court of Kshs. 50,000/= under this head which neither considered irrelevant factors nor failed to consider relevant factors. The total award on damages for future medical expenses is thus Kshs. 175,000/=.

51. In the upshot, I make the following orders: -

    i. The Judgement of the Trial Court on General Damages is set aside and substituted with an Award of Kshs. 750,000/=.

    ii. The Judgement of the Trial Court on Future Medical Expenses is set aside and substituted with an Award of Kshs. 175,000/=.

    iii. The Appellant shall have the costs of this Appeal I assess at Kshs. 75,000/-.

    iv. Respondent to have costs in the Court below.

    v. 30 days stay.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 7TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Achieng for the Appellant

Njoroge for the Respondent

Court Assistant - Brian