



Multi Hauliers Limited & another v JMN (Suing as the father and next friend AMM (Minor) (Civil Appeal E124 of 2019) [2024] KEHC 3612 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E124 OF 2019**

MW MUIGAI, J

MARCH 7, 2024

BETWEEN

MULTI HAULIERS LIMITED 1ST APPELLANT

JAMES KARISA AMANI 2ND APPELLANT

AND

**JMN (SUING AS THE FATHER AND NEXT FRIEND AMM
(MINOR) RESPONDENT**

*(Being an appeal from the judgment and decree of the Hon E.H. Keago
SPM delivered on 12.09.2019 Machakos CMCC NO. 182OF 2012)*

JUDGMENT

1. Vide a Complaint filed on 20.02.2012, it was averred that the cause of action arose on 25.06.2011. The Plaintiff was lawfully crossing Mombasa – Nairobi road within Kiunduani Shopping Centre when the motor vehicle and trailer registrations number KBK 626T and ZB5475 respectively were carelessly, recklessly or negligently driven, managed and controlled by the 2nd appellant that it knocked down the plaintiff hence in the consequence thereof causing him grievous harm and the plaintiff suffered loss of future earning capacity, damage and injuries.
2. The following orders were sought from the trial court;
 - a. General damages
 - b. Special damages kshs 51,700
 - c. Costs of the suit
 - d. Interest on (a) and (b) at court rates



- e. Any other relief that the court may deem fit to grant

Defence

3. The Defendant's filed a defence on 18.04.2012 denied the contents of the Plaint and averred that any occurrence of the accident was solely and substantially contributed to by the Plaintiff's own negligence. Further, that if the accident occurred, the same was beyond the control of the Defendants. The court was urged to dismiss the claim.

Hearing

4. At the hearing, the Plaintiff had one witness. PW1 was JM who is the father to the victim. He testified that the victim was involved in a road traffic accident and lost his ability to understand issues. That after the accident the victim was treated at Makindu Hospital, Machakos Level 5 and later at Shalom Hospital. He stated that the victim was injured on the left knee which was degloved, right hand had fracture and right shoulder blade and on the humerus, his ears were cut off. He was operated and K nail inserted. He was admitted for one and half month. He stated that the victim was examined by a doctor who prepared a medical report produced as exhibit 1 and a receipt for the medical report Kshs 1500 as exhibit 2. He also stated that his lawyer conducted a search and verified the ownership of the motor vehicle as Multi-hauliers. He testified that his son was a form 2 student at [Particulars Withheld] secondary school and had documents to show that he was in school. He stated that his son was very helpful at home but had now lost his hand permanently and needed to be helped. He continued to testify that he had now employed someone to take care of the victim. He could not recall the amount spent on treatment but had receipts 210 in number and add upto kshs 50,200. He prayed for damages and to have his son treated as his brain was no longer intact.
5. Upon cross examination, he stated that he was the father to the victim AM and that the birth certificate was at home and he did not produce it. He stated that his son was injured on the head and was taken to 3 hospitals Makindu, Machakos Level 5 and Shalom and was admitted for one and half month. There was a treatment note from Machakos level 5 hospital there was no discharge summary as it was at home and he could produce it if sought. He stated that the receipts forms for his son who was active and in school but was now at home and had employed someone to assist him. He stated that he had asked for future medical expenses as his son still needed treatment related to his injuries.
6. The Defendants did not call any witness.

Trial Court Judgment

7. On liability, the Trial Court apportioned liability in the ratio of 70.30 for the plaintiff as against the defendant as this was recorded as consent between the two parties.
8. In conclusion, the court awarded as follows;
 - a. Liability in favor of the Plaintiff against the Defendants as ratio of 70.30 percent
 - b. General damages for pain, suffering and loss of amenities Kshs 4,500,000
 - c. Diminished earning capacity Kshs 300,000
 - d. Future medical expenses Kshs 80,000
 - e. Cost of hiring a minder Kshs 1,870,200
 - f. Special Damages Kshs 51,700



- g. Less 30% contribution kshs 4,725,140

The Appeal

9. Dissatisfied by this judgment, the appellants who were the De in the Trial court filed a memorandum of Appeal dated 05.08.2021 seeking the following orders;
- i. That this appeal be allowed.
 - ii. The Court to review and reduce the amount of damages awarded by the learned magistrate
 - iii. The costs of the Appeal be and cost of the Trial Court awarded to the Appellant.
 - iv. That such further relief as may appear just to the Court.
10. The same is founded on the grounds that;
- a. The learned Trial Magistrate erred in law and in fact in awarding general damages to the respondent amounting to kshs 6,750,000.
 - b. That the quantum of damages is excessive and erroneous estimate of the damages that may be awarded to the respondents considering the circumstances of the case before the subordinate Court and the weight of the precedents in similar circumstances.
 - c. The learned Trial Magistrate erred in law and in fact by disregarding established principles in awarding damages in the case before her.
11. The Appeal was canvassed by way of written submissions.

Submissions

12. The Appellants filed submissions on 1.9.2023 and indicated that the issue for determination was on the quantum of damages.
13. On the head of general damages it was submitted that they wished to rely on the medical report by Dr. R.P. Shah dated 31st October 2012 and that it was omitted in the record of appeal and wished for it to be produced in the supplementary Record of Appeal.
14. It was submitted that the consultant surgeon's opinion was that operation of the unhealed wound in the upper arm for removal would cost kshs 30,000 in any government hospital in Kenya. That general damages of kshs 800,000 would be fair and adequate compensation.
15. Reliance was made to the case of *Silvanus Arthur Odhiambo vs Special steel mills Ltd [2000]*eKLR, *Wycliffe Sigani Analo vs Bernard Musyoki & another [2006]*eKLR, *Harun Habel Mnjau vs Ngui Makau & 2 others [2002]* on comparative award for general damages.
16. On loss of earning capacity, It was submitted that the factors to consider under this head include age and qualifications of the plaintiff, his remaining length of working life. That there was no documentation indicating any qualification or prospective ability to be able to ascertain the respondent's earning capacity and that the minor was not entitled to that claim.
17. Reliance was made to the case of *Coast Bus (Msa) LTD vs Harrison Kenga Hare[2017]*eKLR which buttressed the threshold to be followed by court in deciding to award under this head.



18. On the future medical expenses, It was submitted that this is a prayer under general damage and should not be awarded separately. Reliance was placed to the case of Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] and the case of *Christine Mwigina Akonya v Samuel Kairu Chege [2017]* eKLR where the Court declined to award a claimant a sum of Kshs 868,000 since the same was only proven by invoices.
19. It was submitted that the awarding damages for future medical cost was irregular and the learned magistrate misdirected herself in awarding the same.
20. On the issue of hiring a minder/care giver It was submitted that this should be compensation for an expense incurred falls under the ambit of special damages which should be specifically pleaded and proved. Reliance was made to the case of M.M. Kisoso v Express (k) limited (1999) and that there was no proof of employment of a minder and had not attached proof of payment of any expense towards the payment of a nurse. It was thereof urged that the court dismisses the claim under this head as there was no cogent proof of payment of the same.
21. The Court was thus urged to allow the appeal and cost be borne by the respondents and that as a results the damages awarded by the Trial Magistrate be revised down wards.
22. The Respondent filed submissions on 23.8.2023 and reliance was placed in the case of Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) on the principles to be considered on awarding quantum of damages.
23. It was submitted that the learned Trial Magistrate followed the law in awarding damages per the relevant factors including circumstances of inflation.
24. Reliance was placed in the case of *Savanna Saw Mills Ltd v George Mwale Mudomo (2005)* eKLR where it was stated that the governing principles is that comparable injuries should attract comparable awards.
25. Reliance was also made to the case of *Mbaka Nguru and another v James George Rakwar [1998]* eKLR where it was stated that an award must reflect the trends of previous, recent and comparable awards. It was submitted that the Trial Magistrate kept within the guidelines set out in the Kemfro Africa Limited case and that there was no reason of interfering with his finding on quantum.
26. On the head of loss of future earning capacity, It was submitted that loss of earning capacity and loss of future earning capacity are distinctively different and the authority relied on by the Appellants (*Coast Bus (MSA) LTD vs Harrison Kenga Hare* (2017) eKLR describes factors taken into account in considering damages under the head of loss of earning capacity.
27. Reliance was placed on the case of *SJ v Francesco Di Nello & another [2015]* eKLR which distinguishes between claims under loss of future earning and loss of earning capacity. The respondent submitted that although he was a student and had no income, there was evidence that he had future dreams and prospects.
28. On the head of future medical expenses, it was submitted that future medical expenses are special claim within the general claim and it has to be pleaded if evidence thereon is provided and court can make an award thereon. Reliance was made to the case of *Tracom Limited & another v Hassan Mohammed Adan [2009]* eKLR to buttress the above point and in the case of *Ireri v Owuor (civil Appeal 82 of 2019)* where the court declined to interfere with the award on future medical expenses that was pleaded.
29. On the head of hiring of a caregiver, it was submitted that the respondent clearly required a caregiver to take care of him because of his severe injuries as he was already a burden to the family.



30. It was finally submitted by the respondent there was not fault in the decision of the trial court and urged the court to dismiss the appellant's appeal with costs to the respondent.

Determination

31. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.

32. This is a 1st Appellate Court and as aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 this Court should evaluate and/or assess the evidence on record as follows:-

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”

33. From the Memorandum of Appeal, the appellant took issue with the quantum of damages awarded.

34. In *Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR* that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

35. The circumstances under which an appellate court can interfere with an award of damages were therefore restated by Court of Appeal in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 where it was held that: “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 or 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 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”

36. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988- 92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”



37. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

38. The Appellant submitted that the award of general damages was excessive and erroneous considering the circumstances of the case. The Court will look into the awards under the different heads and determine on its own discretion whether they were excessive.
39. On the head of general damages for pain, suffering and loss of amenities, the Trial Magistrate awarded kshs, 4,500,000. In this case, the respondent sustained the following injuries: fracture of the right humeral neck, traumatic amputation of the right forearm, degloving injury on the left ankle, deep cut on the right foot, deep cut on the left ear and blunt injury on the upper left jaw and 50 % permanent incapacity, going by the nature of the injuries and the authorities relied upon by the respective parties, I do not find a reason to interfere the award under this head.
40. On the head of loss of future earning, the trial magistrate awarded kshs. 300,000, it was stated that the respondent was a student in form 2 this means that the Court cannot overlook the fact that he had a bright future ahead of him which had been shuttered by the injuries in the accident. I find that the Trial Court was fair in awarding the kshs 300,000 under this head.



41. On the head of future medical expenses, the medical report by Dr Okere indicated that the plaintiff would require kshs. 80,000 for the removal of the metal plate in the fracture of the right humeral neck, I find no reason to dispute a doctor as an expert finding on that.
42. On the head of hiring a caregiver, the Respondent in his testimony indicated that the victim was now tied down by the injuries and would need help and that he had hired a caregiver, I reiterate the finding in the case of Awuor Maseno vs Deacons (K) Limited T/A Suncity Bus Service [2009] and adopt the multiplier used by the Trial Court.

Disposition

1. In the end, the Appeal fails and the Judgment of the Trial Court is upheld as it is.
2. It is so ordered.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Mr Ogingi - for the Appellant

Mr. Rono - for the Respondent

Geoffrey/patrick - Court Assitant(s)

(Judge Bereaved)

Judgment released to registry on 26/3/2024.

M.W.MUIGAI

JUDGE

