



China Henan International Cooperation Group Company Limited v Chesire (Civil Appeal E177 of 2022) [2024] KEHC 3482 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E177 OF 2022
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

CHINA HENAN INTERNATIONAL COOPERATION GROUP COMPANY LIMITED APPELLANT

AND

RAYMOND KIMELI CHESIRE RESPONDENT

JUDGMENT

Representation:

Justice R. Nyakundi

Mwinamo Lugonzo & Company Advocates

M/s Nyairo & Company Advocates

1. The appeal is on quantum only. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages, costs of future medical expenses in the sum of Kshs. 150,000/= plus costs and interest of the suit arising from road accident that occurred on 27/2/2021, wherein it is alleged that the Respondent was lawfully travelling as a passenger in Motor Vehicle Registration KCC 397 Z along Kapcherop – Cheprorwwa road when the motor vehicle KCC 397 Z developed mechanical problems and as a result it was involved in an accident and rolled and as a result the Plaintiff sustained injuries.
2. In a response to the Plaint dated 5/11/2021, the Appellant denied the occurrence of the accident and ownership of the said motor vehicle. Alternatively, he blamed the Respondent for travelling in motor vehicle registration no. KCC 397Z without authority and generally being negligent.
3. After trial Judgment was delivered on 28/10/2022 and the Appellant was found 100% liable and damages assessed as hereunder: -



- a. General Damages..... Kshs.1,500,000/=
 - b. Future medical expenses Kshs. 100,000/=
 - c. Special Damages..... Kshs.6,550/=
 - d. TotalKshs.1,606,550/=
 - e. Less 20% Kshs. 321,310/=
 - f. Total Kshs. 1,285,240/=
 - g. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal only on quantum on (19) grounds: -
- i. That the learned magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probability contrary to the evidence on record.
 - ii. That the learned trial magistrate erred in law and fact in awarding damages which were inordinately high considering the injuries sustained and the authorities cited for comparable injuries.
 - iii. That the learned trial magistrate erred in law and fact in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules and other provisions as required by law.
 - iv. That the learned trial magistrate erred in law and fact in awarding the sum of Kshs. 1,500,000/= as general damages without any justification which amount is manifestly high in the circumstances and does not reflect the correct estimate of the loss/damage suffered.
 - v. That the trial court erred in law and fact in awarding the Respondent herein general damages of Kshs. 1,500,000/= against the weight of the evidence on record as to the injuries suffered leading to an excessive award of damages that does not reflect the actual loss suffered.
 - vi. That the learned trial magistrate erred in law and fact in applying wrong principles in assessment of damages leading to an erroneous decision in the circumstances.
 - vii. That the learned trial magistrate erred in law and fact in failing to consider the Respondent's submissions and authorities cited.
 - viii. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's case with costs for want of proof of the claim on a balance of probabilities as required by law.
 - ix. That the learned trial magistrate erred in law and fact in making an award for future medical expenses without any proof of such need supported with medical documents.
5. The appeal was canvassed vide written submissions. The Appellant on 15/11/2023 filed submissions dated 14/11/2023 while the Respondent on 15/09/2023 filed submissions dated 15/09/2023 .

The Appellant's Submissions

6. With regard to quantum, Counsel submitted on the following 4 broad issues:
- i. Whether the Respondent proved his injuries
 - ii. Whether the trial magistrate erred in her award of general damages



- iii. Whether the trial magistrate erred in its award of future medical expenses
 - iv. Whether the trial erred in awarding special damages.
7. On the first issue, it was submitted for the appellant that he who alleges must prove and such an obligation is underpinned in section 107 and 108 of the *Evidence Act*. In the present case, the Respondent alleged to have sustained the following injuries: cut wound on the lower lip, cut wound on the right hand, cut wound on the right leg and a fracture of the right femur.
 8. Counsel submitted that in proving the injuries, the Plaintiff called Dr. Paul Rono (PW1) who conceded that:
 - i. He was not the one who treated or attended to the Plaintiff when he visited Moi Teaching and Referral Hospital.
 - ii. The cut on the lower lip, right hand on the right leg were not noted in the discharge summary.
 - iii. No permanent disability was assessed.
 - iv. There was no mention of future medical expenses to be incurred by the Respondent in the discharge summary.
 - v. He did not produce a copy of the x-ray films to prove the fracture.
 9. Further that the Respondent also called Dr Joseph Sokobe who produced a medical report and P3 form. He also conceded to the fact that:
 - i. He did not treat the Plaintiff
 - ii. He filled the P3 form and prepared the medical report on 15/10/2021.
 - iii. The Plaintiff was admitted at Moi Teaching and referral Hospital on 28/2/2021.
 - iv. The cut wound on the lip, the right hand and right leg were not indicated in the discharge summary.
 - v. The Plaintiff would require Kshs. 150,000/= fir further treatment but the amount varies from institution to institution and can be less than Kshs. 150,000/=.
 10. The Respondent's counsel submitted that when the Respondent took the stand, he testified that:
 - i. An accident occurred on 27/2/2021
 - ii. He was treated at Chebororwa Health Centre and later at Moi teaching and Referral Hospital.
 - iii. He did not have treatment notes from Chebororwa Health Centre.
 - iv. He did not have X-Ray films
 11. It was submitted that from the above testimony, the Respondent did not sustain the said injuries. The said position was maintained for reasons that though the Respondent claimed that he sustained cut wound on the Lower lip, right hand and right leg, the initial treatment notes from Chebororwa Health Centre were never produced and the discharge summary from MTRH did not contain the said injuries.
 12. Counsel stated that the first time the aforementioned injuries cropped up is in the P3 form and the medical report prepared by Dr. Josph Sokobe. That the said Doctor during his testimony in court confirmed that he did not treat the Plaintiff on 27/2/2022 when the accident occurred and only saw the Plaintiff for the first time on 15/10/2022 which was over 6 months after the alleged accident.



13. According to counsel, the said doctor confirmed that the discharge summary from MTRH did not bear these three injuries. It then follows that there is no certainty whether the injuries noted in the P3 form and the medical report and which were not reflected in the discharge summary were sustained by the Respondent on 27/2/2022 or later on. Counsel therefore submitted that the respondent did not adequately prove the soft tissue injuries on the lower lip, right hand and right leg as particularised in paragraph 6 of the Plaint and as such the trial magistrate erred in awarding compensation for injuries that were not adequately proved. On this counsel cited the decision in *Timsales Limited V Wilson Libuywa Nakuru HCCA No. 135 of 2006*
14. Counsel maintained that the court erred in awarding compensation for injuries that were not proved and prayed that the court finds that the Respondent did not prove his injuries.
15. As to whether the trial magistrate erred in her award of general damages, it was submitted that the respondent did not prove the injuries and therefore not entitled to any award. That both doctors who testified confirmed that no permanent disability was assessed in respect of the injuries the respondent allegedly sustained.
16. In his submissions before the trial court, the Respondent proposed an award between Kshs. 1,300,000/= - Kshs. 1,500,000/= while the appellant proposed an award of Kshs. 200,000/= - Kshs. 350,000/=.
17. The Appellant's counsel argued that the award was excessively high and against the well-known principle highlighted in the Court of Appeal case of *Odinga Jacktone Ouma v Moureen Achieng Odera (2016) eKLR* in which the Court stated that "comparable injuries should attract comparable awards"
18. On the claim for future medical expense, counsel stated that according to Dr. Joseph Sokobe's evidence, no disability was assessed. Further that the future medical expenses would vary depending on the facility. It was submitted that no amount ought to have been awarded as the claim for future medical expenses was merely speculative. In so submitting, the appellant relied on the case of *Zacharia Waweru Thumbi v Samuel Njoroge Thuku (2006) eKLR*.
19. As to whether the magistrate erred in awarding special damages, counsel argued that the same ought to be specifically pleaded and proved. In the instant case, the same was not strictly proved and therefore no award ought to have been made as special damages.
20. Finally, on costs, the appellant argued that given that parties had recorded a consent on liability, each party should bear its own costs.

The Respondent's Submissions

21. To start with, the Respondent submitted that the duty of the appellate court is to review the evidence on record against the decision of the trial court to see if the conclusion by the court should stand or be disturbed. On this, counsel cited the decision in *Selle Versus Associated Motor Boat Company Ltd (1968) E.A 123*.
22. On quantum, the Respondent submitted that from the medical documents tendered the Respondent sustained the following injuries: Cut wound on the lower lip, cut wound on the right hand, cut wound on the right leg and fracture of the right femur.
23. Counsel for the Respondent urged this court to maintain the award since it is reasonable and commensurate to the injuries sustained by the Respondent. The Respondent relied on two authorities:



- a. Mombasa HCCC No. 8 of 1997; Julian Mumo Kisimbi versus Mohammed Sheikh Omar Bin Dahman & Anor. In this one, the Plaintiff sustained fracture of the femur, fracture left tibia, fracture right tibia and right and left mandible. The general damages were assessed at Kshs. 1,300,000/=.
 - b. Mombasa HCCC No. 30 of 1993; Humphrey Kaingu versus KPA. The court in this case assessed general damages at Kshs. 1,500,000/= where the Plaintiff sustained fracture of femur, fracture of left tibia, dislocation of the left foot at ankle joint and chest injuries.
24. Counsel submitted that from the medical report by Dr. Joseph Sokobe, the injuries sustained by the Plaintiff were quite serious and hence the need to award the sum of Kshs. 150,000 being future medical expenses to remove implants. He maintained that the award was not inordinately high so as to warrant the interference of the award by the appellate court.
 25. Further, the respondent urged the court to uphold the costs of future medical treatment in the sum of Kshs. 100,000/= as awarded by the court as the same was specifically pleaded and the same was supported by Dr. Joseph Sokobe. On this counsel relied on this court's decision in Naivasha HCCA No. 34 of 2020 Guardian coach Ltd & Anor versus Langat Kiptoo.
 26. The Respondent urged this court not to disturb the award by the trial court and prayed that the appeal may be dismissed with costs.

Analysis & Determination

27. Being a first appeal, the Court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“...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. In particular, this 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 into account of particular circumstances or probabilities materially to estimate the evidence.”
28. As stated above the appeal is only on quantum. The issue for determination here is whether the award of general damages of Kshs.1,500,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. Further to that, the court is also called to determine whether the respondent is entitled to future medical expenses and special damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
29. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.
30. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] Kneller. J.A, stated:

“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. See *Ilangov. Manyoka*[1961] E.A. 705, 709, 713; *Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto*[1970] E.A., 414, 418, 419. This Court follows the same principles.”

31. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
32. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph Sokobe as:
 - a. Cut wound on the lower lip
 - b. Cut wound on the right hand
 - c. Cut wounds on the right leg.
 - d. Fracture of the right femur.
33. Counsel took issue with the fact that the said injuries were not adequately proved. That the soft tissue injuries on the lower lip, right hand and right leg as particularised in paragraph 6 of the Plaintiff were not proved and as such there should be no award.
34. It then calls to question the expert evidence adduced by Dr. Joseph Sokobe. In the case of *Stephen Kinini Wang'ondu –vs- The Ark Limited* [2016]eKLR, the court had the following to say on expert opinion:

“...Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less....This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones



35. Considering that this court ought not to consider expert evidence in a vacuum, I have gone through the treatment notes, the discharge summary form (The question on prove of injuries, my line of thought has been on the expert evidence, I am thinking the injuries were not sufficiently proved. It might then affect the provisional award given below.)
36. At this juncture it is worth pointing out that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.
37. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
38. From the evidence adduced by Dr. Joseph Sokobe medical report it is clear that the Respondent herein sustained the injuries outlined therein, which he was recovering well. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.
39. I have considered the authorities relied on by the Respondent and the injuries therein are far much more serious than the ones sustained by the Respondent herein.
40. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court's award was inordinately high.
41. I have considered the awards in the following cases. In *Kiru Tea Factory & Another v Peterson Watheka Wanjohi* (2008) eKLR this Court upheld an award of Kshs. 800,000/= for degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius, ulna and right iliac bone and generalized pains
42. In *Easy Coach Limited v Emily Nyangasi* (2017) eKLR the respondent had sustained facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wounds. The court upheld an award of Kshs. 700,000/=.
43. In *Hashim Mohamed Said & Another v Lawrence Kibor Tuwei* (2018) eKLR the High Court reduced an award of Kshs. 300,000/= to Kshs. 200,000/= in a case where the respondent had sustained a compound fracture of the left femur among other soft tissue injuries.
44. I have looked at the authorities cited by both parties in the case herein, whereas it is impossible to find authorities with exact injuries. I find the award of Kshs. 1,500,000/= to have been excessive. I consider a sum of Kshs. 400,000/= to be adequate compensation for the injuries sustained.
45. On future medical expenses, the Court of Appeal in the case of *Tracom Limited & Another -vs- Hassan Mohamed Adan* [2009] eKLR stated: -

“...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..."

46. From the foregoing decision, it is my humble opinion that the amount pleaded for future medical expenses was proved in evidence adduced by Dr. Joseph Sokobe. I find no reason to disturb the award.
47. Turning to special damages, Kshs.6,550/= was pleaded and strictly proved as was held in the case of Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

"Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

In the end the Court finds merit in this appeal and therefore proceeds to enter judgment in favour of the Appellant in the following terms;

- a. General Damages..... Kshs. 400,000/=
- b. Future medical expenses Kshs. 100,000/=
- c. Special Damages..... Kshs.6,550/=
- d. TotalKshs. 506,550/=
- e. Less 20% Kshs. 101,310/=
- f. Total Kshs. 405,240/=
- g. Plus, costs and interests

Interim stay of execution for 15 days for parties to internalise the decision.

It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024.

In the Presence of:

Mr. Kinyanjui for Mwinamo

Kemboi for the Appellant

.....

R.NYAKUNDI



JUDGE

