Kapoor v Dominos Pizza Kenya Limited t/a Dominos Pizza, Next Gen Mall (Civil Appeal E073 of 2022) [2024] KEHC 3231 (KLR) (Civ) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E073 OF 2022

CW MEOLI, J

APRIL 4, 2024

BETWEEN

GEETA KAPOOR ..... APPELLANT

AND

DOMINOS PIZZA KENYA LIMITED T/A DOMINOS PIZZA, NEXT GEN MALL ..... RESPONDENT

(Being an appeal from the judgment of L.T. Lewa (PM) delivered on 8th February 2022 in Nairobi Milimani CMCC No. 1213 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on 08.02.2019 in Nairobi Milimani CMCC No. 1213 of 2019 (hereafter the lower court suit). The suit was instituted on 27.02.2019 by Geeta Kapoor, the plaintiff in the lower court (hereinafter the Appellant) against Domino's Pizza Kenya Ltd t/a Domino's Pizza, Next Gen Mall, the defendant in the lower court (hereafter the Respondent).

2. The claim was for general and special damages in respect of an accident/incident that occurred on 23.07.2018. The Appellant averred that it was an express and or implied duty of the Respondent to take all reasonable precautions for the safety of their customers while within its premises and not to expose their customers to risk of damage or injury which the Respondent knew or ought to have known, and to take all reasonable measures for the customers' safety and security wile in the Respondent's premises. It was further averred that on the date in question, the Appellant was lawfully shopping at the Respondent's premises at Domino's Pizza, Next Gen Mall when her shoe hit a metal rail and was caught, because of which, the Appellant lost balance, fell, and sustained serious injuries. All resulting in loss and damage for which she held the Respondent liable.

3. The Respondent filed a statement of defence on 18.09.2019 denying the key averments in the plaint and liability. The Respondent further asserted to have taken all necessary and reasonable precautions to ensure the safety of their customers within its premises. Further in the alternative and without prejudice to the foregoing it was averred that if any accident occurred as alleged, which was denied, the same was solely and or substantially contributed to by the negligence of the Appellant. The suit thereafter proceeded to hearing during which both parties adduced.

4. In its judgment, the trial court found the Respondent 100% liable on grounds that the Appellant's case was not rebutted. The court proceeded to award damages in favour of the Appellant as hereunder: -

   General Damages – Kshs. 800,000.00/-

   Future Treatment Costs - Kshs. 150,000.00/-

   Total Kshs. 950,000.00 /-

5. Aggrieved with the outcome, the Appellant preferred this appeal solely on quantum of damages based on the following grounds in her Amended Memorandum of Appeal;

   > " 1. The learned trial magistrate misdirected herself erred in both law and in fact by awarding general damages for pain and suffering that are so inordinately low as to be erroneous vis a vis the injuries sustained by the Appellant.
   >
   > 2. The learned trial magistrate misdirected herself and erred in law and in fact in failing to consider the medical report on record and severity of the Appellant's injuries and hence arrived at an award that was not supported by the doctor's findings and hence arrived at an erroneous award that is so inordinately low as to be erroneous.
   >
   > 3. The learned trial magistrate misdirected herself and erred in law and in fact by failing to award medical expenses as proved.
   >
   > 4. That the learned magistrate misdirected herself and erred in fact by totally failing to consider the Plaintiff's submissions on record thus arrived at an erroneous finding on quantum." (sic)

6. The appeal was canvassed by way of written submissions which on the Appellant's part were riveted solely on quantum of damages. Counsel for the Appellant anchoring his submissions on the of-cited decision of *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 regarding the duty of this court on a first appeal. Addressing grounds 1 and 2 of the Amended Memorandum of Appeal, counsel cited the decisions in *Butt v Khan* (1977) eKLR to summarily submit that the trial court misdirected itself and erred in both law and fact by awarding general damages for pain and suffering that was so inordinately low as to be erroneous. That in support of her claim the Appellant had produced a medical report by Dr. W.M Wokabiwho opined that the Appellant experienced much pain and suffering due to severe strain to major ligaments that hold the ankle joint.

7. It was further argued that after surgery to fix the metal implants, the Appellant required rehabilitation that would take 15 months, and her disability subsequently assessed at 15%, with the possibility of developing arthritis on her left ankle joint because of her age. That the foregoing was confirmed by the medical report of Dr. Ashwin Madhiwala. In urging an award of Kshs. 1,500,000/-, counsel called to aid the decisions in *Joseph Musee Mua v Julius Mbogo Mugi & 3 Others* [2013] eKLR and HCCA No. E092 of 2021, Peter Mutemi Kariuki v Inasi Chewasi.

8. Concerning ground 3, it was submitted that the trial court misdirected itself and erred in law and fact by failing to award medical expenses of Kshs. 579,393/- as proved. That the position on whether bills paid by insurance companies are recoverable by the insured has since been addressed in the decision in *Leli Chaka Ndoro v Maree Ahmed & S.M Lardhib* [2017] eKLR and McGregor on General Damages, Para.8-017. In summation the court was urged to allow the appeal as prayed.

9. The Respondent in defending the trial court's decision counsel cited the provisions of Order 42 Rule 12 of the Civil Procedure Rules to contended that the memorandum of appeal was served nearly three (3) months after it was filed. The delayed service intended to give time for the Appellant to engage the Respondent regarding payment, despite having secretly filed an appeal. Citing the Court of Appeal decision in *Andrew A. Apiyo v Michael M. O Mashere* [1983] eKLR, counsel urged the court to strike out the appeal for the unexplained non-compliance with the requirement for service of the memorandum of appeal within 7 days of filing. It was contended that the Appellant's actions in breach of rules of procedure were purely intended for the pursuit of payment of the decretal sum.

10. Responding to the Appellant's submissions on ground 1 and 2 of the Amended Memorandum of Appeal, counsel equally referred to the medical reports by Dr. W.M Wokabi and Dr. Ashwin Madhiwala. He argued that the authorities relied on by the Appellant both before the trial court and this court, related to claimants who sustained more severe injuries hence not comparable with the injuries sustained by the Appellant herein. Citing the decisions in *Civicon Limited v Richard Njomo Omwancha & 2 Others* [2019] eKLR and *Stanley Maore v Geoffrey Mwenda* [2004] eKLR counsel urged the court to sustain the trial court's award of Kshs. 800,000/- as adequate damages for the Appellant's pain and suffering.

11. Submitting on ground 3, counsel contended that during cross-examination the Appellant had confirmed to the trial court that her medical bills were settled by General Accident Insurance as shown in the documents filed and that the Appellant did not provide any receipts to prove personal payment of the said medical bills. It was thus asserted that the Appellant having failed to plead and prove her claim for special damages and or pending medical bills, the trial court was justified in declining to award the same. The Court of Appeal decision in *Hahn v Singh* [1985] KLR 716 was called to aid in the foregoing regard. In conclusion, counsel urged the court to dismiss the appeal with costs.

12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the parties' respective submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle* (supra) in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High 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.
>
> 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 account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. As earlier noted, the appeal before this court turns on the singular issue of damages. In considering the foregoing, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 that:

> " An appellate court will not disturb an award of 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".
>
> See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.

14. Pertinent to the determination of these issues are the pleadings, which form the basis of the parties' respective cases before the trial court and before the appellate court. See *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. The Appellant by her plaint averred at paragraph 6 that:

> "
>
> " 6. By reason of the matter aforestated, the Plaintiff herein sustained injuries and has suffered great loss and damage for which she holds the Defendant liable.
>
> Particulars of injuries suffered by the Plaintiff.
>
> a. Fracture of the left tibia malleolus.
>
> b. Fracture of the left fibula malleolus
>
> Particulars of special damages
>
> a. Medical expenses to be proved at the hearing hereof.
>
> b. Future medical expenses to be proved at the hearing hereof." (sic)

15. I find it apposite to quote in some detail the relevant facets of the judgment of the trial court. Upon restating the evidence tendered before it, the trial court pronounced itself as follows concerning quantum; -

> " On Quantum
>
> I have looked at the medical report produced in evidence and the proposals each party made on general damages.
>
> The Plaintiff is asking for Kshs. 2,000,000.00 whereas the Defendant is proposing Kshs. 450,000.00.

In as much as the Plaintiff's proposal is exorbitantly high, I cannot fail but find the Defendant's proposal to be a deeply low, considering the Plaintiff resulted a 15% permanent incapacity.

On that account and taking into consideration the authorities cited in support of the proposals, the soaring inflation and the current monetary trend, I am of the view that Kshs.800,000.00 shall be adequate settlement for pain and suffering.

On Special Damages

Though pleaded, no evidence was adduced in support of the prayers. I therefore refrain to grant the same as sought.

On future treatment costs

Dr. Wokabi observed the Plaintiff will require Kshs. 150,000.00 to remove the metal implants. The court therefore grants the same as sought.

On costs and interest

1 also grant costs and interest at the court rates.

In the upshot, judgment is hereby entered for the Plaintiff as against the Defendant in the following terms;-

1. General Damages.....Kshs. 800,000.00
2. Future treatment Costs.....Kshs. 150,000.00
3. Costs of the suit and interest at court rates

It is so ordered" (sic)

16. Having set out the foregoing, the court proposes to first deal with the Respondent's preliminary contestation. The Respondent argues that the appeal ought to be struck out on grounds that the memorandum of appeal was served nearly three (3) months after it was filed. The sole intent being to keep the matter secret while the Appellant engaged the Respondent in the settlement of the decretal sum, which was done. That the conduct was contrary to the provisions of Order 42 Rule 12 of the Civil Procedure Rules and the holding in *Andrew A. Apiyo v Michael M. O Mashere* [1983] eKLR.

17. Order 42 Rule 12 of the Civil Procedure Rules provides that;-

> " Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar."

18. A perusal of the record before this court and Case Tracking System (CTS) system reveals that the appeal herein was filed on 21.02.2022 and subsequently, the Amended Memorandum of Appeal was filed on 29.03.2022. The latter appears to have been served upon the Respondent sometime in May of 2022 and was received under protest. Subsequently, directions pursuant to Section 79B of the *Civil Procedure Act* as read with Order 42 Rule 11 of the *Civil Procedure Rules* were issued on 20.07.2023. Evidently, therefore, the Amended Memorandum of Appeal was served more than a year before directions were issued pursuant to Section 79B of the *Civil Procedure Act*.

19. That said, this Court having perused the decision in Andrew A. Apiyo (supra), noted that it related to proceedings before the Court of Appeal where the rules therein required service of the Notice

of Appeal, Memorandum of Appeal and Record of Appeal to be served within seven (7) days of either being lodged. Before the High Court, service is to be effected seven (7) days after a Judge admits an appeal pursuant to Section 79B of the *Civil Procedure Act*. Consequently, the Respondent's preliminary contestation is not well taken in this instance.

20. Moving on to the substance of the appeal, at the trial, the Appellant testified as PW1. She produced the medical report by Dr. Wokabi as PExh.2 and Discharge Summary from Aga Khan University Hospital as PExh.7. The earliest report, PExh.7, was prepared some four (4) days after occurrence of the accident. It listed the Appellant's injuries to comprise of a fracture of the ankle and leg. It further documented the fact that the injury was managed by way of Open Reduction and Internal Fixation (ORIF) and antibiotics. It went on to capture the Appellant's clinical condition at discharge to be "Fine".

21. The above injuries were confirmed by PExh.2 which was prepared three (3) months after the incident. The report set out in detail the Appellant's injuries as a fracture of the left tibia malleolus and fracture of the left fibula malleolus with attendant sequela. The prognosis on the Appellant was captured therein as follows; -

> " She suffered a lot of pain from the fractures of the left tibia and fibula malleoli that she sustained.....After the surgery to fix the metal implants she suffered a lot of pain also. She is still healing and rehabilitating on the left leg. As she is now the leg and ankle foot joint are very swollen.
>
> Expectation is that optimum healing and rehabilitation of the left ankle joint will take up to 15 months to achieve. At optimum rehabilitation disability will have settled at 15% (fifteen percent)
>
> At her age possibility of developing arthritis of the left ankle joint will be quite high.
>
> Elective removal of the metal implants will cost her Kshs. 150,000/- (one hundred and fifty thousand shillings to remove) ....." (sic)

22. These injuries were not seriously challenged at the trial by the Respondent. It seems that at the Respondent's behest, the Appellant was subjected to a second medical examination. Hence the medical report by Dr. Ashwin Madhiwala dated 27.08.2020 that was produced as DExh.2 by Francis Njoroge Mwangi who testified as DW1. The said report was prepared more than two (2) years after the incident and was the most recent on the Appellant's injuries. The report set out in detail the Appellant's injuries and attendant sequela. The prognosis was captured therein as follows; -

> " On examination – There is a well healed surgical scar on the lateral aspect of the left ankle 11cm long and on the medial aspect 6cm long. Left ankle joint is slightly swollen, but no pain or tenderness found. There is slightly restricted movement of the joint because of swelling but she walks and works normal not limping. She gets pain while standing for long.
>
> In my opinion – The above named suffered from the above injury which has healed well left with mild restricted left ankle joint movement and pain while standing for long. She will require to remove implant anytime will cost approximately 100,000/- to 120,000 at the same hospital. We can consider permanent disability of 10% only." (sic)

23. Undoubtedly, the injuries suffered by the Appellant herein were relatively severe and must have caused her a great deal of pain and an extended period of morbidity. According to PExh.2 and DExh.2, the injuries predisposed her to residual attendant disability. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting

injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The trial court in its judgment reviewed in detail the evidence and submissions before it in respect of the Appellant's injuries, primarily PExh.2 and DExh.2. And further considered the authorities and proposals by the respective parties before it. Therefore, the first limb of Ground 4 of the Appellant's Amended Memorandum of Appeal must fail.

24. As to whether the finding of the trial court on damages was erroneous, the Court of Appeal exhorted in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001 [2004] eKLR that the award of general damages is discretionary and "an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance". The Appellant's injuries in this case, though of relative severity, resulted in between 10% and 15% permanent disability as confirmed by PExh.2 and DExh.2 respectively.

25. The Respondent maintains on this appeal that the award in general damages was justified and before the trial court had urged an award of Kshs. 450,000/- based on the decision in *Civicon Limited v Richard Njomo Omwancha & 2 Others* [2019] eKLR. The 2nd claimant's injuries in the said case cited by the Respondent in the lower court included multiple soft tissue and skeletal injuries , such as deep cut wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint. On appeal the 2nd claimant therein was awarded Ksh.450,000/- in general damages. Obviously, these injuries were more and severer, than the Appellant's limited skeletal injuries.

26. The Appellant relied on *Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & Another* [2014] eKLR and *James Gathirwa Ngungi v Multiple Hauliers (E.A) Limited & Another* [2015] eKLR. The claimant in the former case sustained extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg, fractured left collarbone with an average assessment of permanent disability of 55%. In the latter case the claimant sustained compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations, pathological /re-fracture of the right leg. The court had awarded the claimants Kshs. 2,000,000/- for their respective injuries. Once more, it appears that the injuries sustained by both claimants above were severer, involving as they did multiple fractures and soft tissue injuries. These injuries hardly compare to those sustained by the Appellant herein.

27. These decisions were the basis of the Appellant's proposal for the award of Kshs. 2,000,000/- before the trial court and Kshs. 1,500,000/- before this court. That said, Appellant is guilty of citing on this appeal, authorities not placed before the trial court. This practice is to be frowned upon and this court echoes the sentiments of Ochieng, J. (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR in that regard. The trial court in assessing damages in the sum of Kshs. 800,000/- for the Appellant's injuries did not specifically cite decisions of the superior court from which it drew guidance.

28. Upon my own review of the material presented before the trial court and authorities cited on this appeal, it appears that despite the failure by the trial court to justify its award on any specific decision, the sum eventually awarded was reasonable and not so low as to constitute an erroneous estimate in the circumstances of this case. Consequently, the court does not feel justified in interfering with the trial court's award of damages for pain and suffering.

29. In that regard, the sentiments of the English Court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 bear restating:

> "But money cannot renew a physical frame that has been battered and shattered. All the 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 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional."
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> See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Kigaraari v Aya (1982-88) 1 KAR 768.

30. Concerning the challenge raised in Ground 4 of the Amended Memorandum of Appeal on medical expenses, it is trite that special damages must be strictly pleaded and proved. The Court of Appeal in *David Bageine vs. Martin Bundi* [1997] eKLR stated: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
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> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;
>
> "Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."
>
> See also Ouma v Nairobi City Council (1976) KLR 304 and Hahn -v- Singh [1985] KLR 716.

31. In *Associated Electrical Industries Ltd v William Okoth* (2004) eKLR, Visram J. (as he was) stated:

> "I entirely agree with the Appellant's submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved".

32. No doubt the learned Judge was echoing the words of the Court of Appeal in *Galaxy Paints Company Ltd V. Falcon Guards Ltd* (2000) eKLR; where the court stated:

> "It is trite law, and the provisions of OXIV of the CPR, are clear that issues for determination in a suit generally flow from the pleadings, and unless the pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of OXXr4 of the aforesaid rules, may only pronounce judgment on the

issues arising from the pleadings or such issues as the parties have framed for the court's determination".

33. The Appellant by her plaint sought what was stated to be "future medical expenses to be proved at the hearing". This being a claim in the nature of special damages was not specifically pleaded as required. Nevertheless, the Appellant produced documents marked as PExh.3, PExh.4, PExh.5 and PExh.6 in support of the claim for medical expenses. It appears that the Appellant left it to the trial court to extract from PExh.3, PExh.4, PExh.5 and PExh.6 the unstated amount sought as medical expenses, but asserted in submissions before this court to amount to Kshs. 579,393/-. The trial court, while erroneously stating that special damages had been properly pleaded, declined to award the claim.

34. Given the failure by the Appellant to specifically plead and prove the claim in respect of medical expenses, it would be moot to consider the Appellant's contestation that medical expenses settled by the insurance company were recoverable by the insured. The foregoing notwithstanding, the issue raised with regard to recovery by an insured of medical expenses settled by the insurer was recently addressed by this court in Nairobi Milimani HCCC No. E116 of 2021, George Kagucia (suing as the next friend and father to WKK-a minor) v Hillcrest Investments Limited t/a Hillcrest International Schools wherein this court adopted the settled position of the Court of Appeal in *Forwarding Company Limited & another v Kisilu Gladwell (Third party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR). Suffice to say that in the circumstances of her case, these authorities do not give succor to the Appellant's claim for medical expenses.

35. For all the foregoing reasons, the court is unable to find fault with the judgment of the lower court. The appeal herein is without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Mahugu

For the Respondent: Ms. Njoki

C/A: Erick