



Malindi Salt Works Limited & another v Odhiambo (Civil Appeal E164 of 2023) [2024] KEHC 4903 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E164 OF 2023
RE ABURILI, J
APRIL 11, 2024**

BETWEEN

MALINDI SALT WORKS LIMITED 1ST APPELLANT

MOMBASA MAIZE MILLERS 2ND APPELLANT

AND

ROXANNE ATIENO ODHIAMBO RESPONDENT

(An appeal arising out of the judgment and decree of the Honourable Cheruiyot in the Chief Magistrate's Court at Kisumu delivered on the 7th September 2023 in Kisumu CMCC No. 166 of 2022)

JUDGMENT

Introduction

1. In the Chief Magistrates' Court at Kisumu, the Respondent herein Roxane Atieno Odhiambo sued the appellants herein Malindi Salt Works Limited and Mombasa Maize Millers seeking for general and special damages as well as costs of the suit and interest, following the injuries sustained by the respondent when, on the 4th day of May 2021, the respondent, who was lawfully travelling as a pillion passenger on a motorcycle sustained injuries following a road traffic accident involving the appellants' motor vehicle KCM 716S/ZF 7018 Mercedes Benz Axor Truck.
2. The appellants filed a defence dated June 20, 2022 denying the respondent's claim and instead blamed the respondent for contributory negligence. The appellants also blamed the motor cycle rider for negligence.
3. The trial court in its judgement found the appellants 100% liable in negligence for the occurrence of the material accident and awarded the respondent general damages of Kshs. 2,000,000, costs of future dental treatment at Kshs. 153,000 and special damages of Kshs. 11,050.



4. Aggrieved by the judgment and decree of the Trial Court on quantum awarded, filed a Memorandum of Appeal dated 12th September 2023 raising the following grounds of appeal, which essentially challenge the quantum of damages awarded to the respondent:
 - i. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 - ii. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 - iii. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 - iv. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis a vis the respondent's claim.
 - v. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. The appellant's prayer is for this Court to set aside the trial magistrate's judgment and substitute it with its own assessment of damages.
6. The appeal herein was canvassed by way of written submissions.

The Appellants' Submissions

7. The appellants' counsel submitted that the trial court did not rely on any decided case law and that throughout the entire judgement, there was no case law referenced to guide the court in reaching a judiciously acceptable decision and that neither did the trial magistrate cite any law therein.
8. It was further submitted that the impugned judgement was not a reflection of the prayers sought nor was it a reflection of the in-depth analysis of facts and evidence and thus the evidence of the nature of injuries sustained by the respondent were not proven.
9. The appellants submitted that the award of general damages ought to be set aside and substituted with one of Kshs. 50,000. Reliance was placed on the following cases:
 - a. *Eastern Produce (K) Limited v Joseph Mamboleo Khamadi* [2015] eKLR where the court assessed general damages of similar nature at Kshs. 50,000
 - b. *Kipkebe Limited v Thomas Amoro Ngarisa* KSI HCCA No. 250 of 2011 [2015] eKLR where the plaintiff sustained deep cut wound on the right leg with continuing effects and pain on the right leg and was awarded Kshs. 70,000
 - c. *OMN (Minor suing through next friend EMW) v Jasper Nchonga Magari & another* [2021] eKLR where the plaintiff sustained similar but more grievous injuries, the appellate court found no reasons to interfere with an award of Kshs. 70,000 by the trial court.



10. On the costs of future dental treatment, it was submitted that in the absence of a dental x-ray report and further as Dr. Vitalis Ogola was not a surgeon and had no training in estimating future medical expenses, the award made under this hand were unjustified and ought to be set aside.
11. On special damages it was submitted that though the respondent pleaded total of Kshs. 166,050, she only proved Kshs. 11,000 which ought to be awarded. The appellants also prayed for costs of the appeal.

The Respondent's Submissions

12. The respondent's counsel submitted that the trial court did not misapprehend the law and that the finding of the court was on a sound legal basis and evaluation of the facts/evidence presented. Further, it was submitted that the appellants did not adduce any evidence which supported their case nor did they adduce any evidence to rebut or controvert the respondent's evidence.
13. It was submitted that the instant appeal was unmerited and ought to be dismissed with costs to the respondent.
14. The respondent further relied on the following listed cases: *Susan Munyi v Kesha Shiani* [2013] eKLR; *Makube v Nyamiro* [1983] KLR 403; *John Wainaina Kagwe v Hussein Dairy Limited* [2013] eKLR and *Great Lakes Transport Co Ltd v Kenya Revenue Authority* [2009] eKLR.

Analysis and Determination

15. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that. This principle is espoused in section 78 of the *Civil Procedure Act* as interpreted in many judicial pronouncements. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. From the evidence on record on injuries sustained by the respondent in the material accident and the submissions, I find the issue for determination to be whether the trial court erred in fact and law in its assessment of the damages in favour of the respondent.
17. It is trite law that an appellate Court can only interfere with the damages awarded by the trial court where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment, the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Court of Appeal in *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR held that:

“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of



the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in *Butt v Khan* [1981] KLR 349 where it was held per Law, JA:

“... 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...”

18. The award of general damages of Kshs. 2,000,000 is challenged for being such inordinately high and excessive and no comparable to the injuries sustained by the respondent. It was contended that the Trial Court did not take into account the authorities submitted by the appellants and in addition, that the Trial Court in its award considered that the respondent sustained a broken femur which was not proved by the respondent when making the award for damages.
19. In this case, the respondent pleaded that she sustained the following injuries:
 - i. Injury to head and neck with multiple bruises and swellings on forehead
 - ii. Periorbital swelling and red line in left eye
 - iii. Fractures of upper frontal incisor teeth, 11 and 15 teeth
 - iv. Swollen, tender and bruised right knee joint
 - v. Tenderness and lacerations on the hip joints
 - vi. Injury to left shoulder with swellings and lacerations
 - vii. Injury to right palm hand with bruises and lacerations
 - viii. Left eye corneal injury
 - ix. Left eye loss of vision
 - x. Corneal opacities resulting from corneal injury
 - xi. Myopic shift and astigmatism left eye causing blurred vision and increased near sightness.
20. The respondent testified and adopted her statement dated June 1, 2021 in which she reiterated her account of the accident that the appellants’ motor vehicle hit her from behind as she was alighting from the motor cycle. It was her testimony that in addition to the numerous soft tissue injuries she sustained, she also sustained injuries to her left eye and frontal incisor tooth. She blamed the driver of the appellants’ motor vehicle for the accident. The respondent also produced documents including a medical report by Dr. Vitalis Ogola from Royal Dental Clinic that provided for costs of future dental treatment plan at Kshs. 153,000
21. In cross examination, the respondent testified that she lost part of her front tooth and lost an upper incisor tooth which she wanted replaced. That she sustained a cut on the back of the head, scratches on the back, hands and elbow and that she was admitted in hospital though she admitted that there were no documents produced to prove that she was an inpatient.
22. In support of her case, the respondent produced various treatment notes as well as a P3 form that detailed the nature of her injuries as grievous harm and that she had sustained a broken upper frontal incisor tooth.



23. The appellants did not call any witness in support of their defence case nor did they produce any documents.
24. It is trite that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
25. However, the burden of proof lies on he who alleges and therefore even in formal proof hearing, the plaintiff must prove its claim on a balance of probabilities to warrant a judgment in their favour. What that means is that the fact that a defence is held as mere allegations in no way lessened the burden was on the plaintiff to prove her case. In *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016]e KLR, the court stated:
- “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
- (See *Kirugi and another v Kabiya and others* [1983] e KLR).
26. The respondent despite the absence of evidence from the appellants was obligated to prove her case on a balance of probabilities. The question is whether, examining the evidence adduced before the trial court, the respondent proved the injuries pleaded.
27. The documents proving the respondent's injuries were admitted into evidence without any challenge from the appellants and the appellant. The injuries
28. The trial magistrate awarded Kshs 2,000,000 for general damages, which amount the appellants regard as inordinately high. The respondent agrees with the trial magistrate on the award.
29. The Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that:
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
30. I have considered the authorities relied on by both parties in this appeal as well as before the trial court. I find the authorities relied on by both parties not to be relevant to the instant case and in addition, the trial court did not justify the award made in favour of the respondent.
31. In my humble view, the respondent's injuries were soft tissue injuries except the injury involving Fractures of upper frontal incisor teeth, 11 and 15 teeth leading to loss of frontal incisor tooth. In the case of *Isaac Muriungimbataru v Silas Kalumani* [2017] eKLR where the plaintiff sustained injuries to Soft tissue injuries on the right side of the face- there were swelling/lacerations and bruises, loss of 2



incisors (upper teeth) and tenderness and swelling of lower back, the appellate court awarded general damages of Kshs. 200,000.

32. Taking into account comparable case law, in the case of *BK Suing Thro' His Mother and Next friend EM v Wilson Gitari Mburugu* [2020] eKLR, where the Plaintiff suffered multiple injuries to the face; soft tissue injury to the thorax, abdomen as well as on his upper and lower limbs; severe injuries to the maxilla and mandible resulting to loss of five (5) teeth with cut on the lip. The injuries left him with cosmetic damage to the mouth. The Court made an award of Kshs. 400,000/- in February 2020.
33. Taking a cue from the above, I find that the award of quantum by the trial magistrate was on the higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries, with loss of an incisor tooth.
34. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Kshs. 2,000,000 as general damages and substituting it with one of Kshs. 800,000., taking into account the time lapse since the awards in the above cited cases were made, and the effect of inflation in Kenya.
35. On the costs of future dental treatment, the Court of Appeal in the case of *Tracom Limited & another v Hasssan 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 v 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...”emphasis added].

36. The respondent specifically pleaded for Costs of future dental treatment at paragraph 7 (f) of her plaint which was further substantiated by the report prepared by Dr. Vitalis Ogola dated September 22, 2021.
37. The appellants herein did not controvert or raise any issue with this evidence and neither did they ask for a second medical opinion to rule out the need for the proposed future medical expense thus the trial court proceeded to award the amount as prayed. I uphold the award and find no reason to interfere with the same as there was no second medical opinion disputing that claim.



- 38. On special damages, it is trite that the same must be specifically pleaded and proven. The appellants submitted that though the respondent pleaded total of Kshs. 166,050, she only proved Kshs. 11,000 which ought to be awarded.
- 39. I have perused the receipts attached to the respondent’s plaint and they all total to Kshs. 11,650 and as such I award the same.
- 40. In the circumstances I thus enter judgement as follows, taking into account the award on general damages was in my view inordinately high;
 - i. General damages for pain and suffering – Kshs. 800,000
 - ii. Costs of future dental treatment – Kshs. 153,000
 - iii. Special damages - Kshs. 11,650Total Kshs 964,650
- 41. Accordingly, this appeal succeeds on reduction of general damages. The general damages shall earn interest at court rates from the date of judgment until payment in full while special damages will earn interest from the date of filing suit until payment in full.
- 42. As the damages are substantially reduced, I award the appellant costs of this appeal assessed at Kshs 30,000 to be deducted from the award as reduced.
- 43. This file is closed and the lower court file to be returned together with copy of this judgment.
- 44. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2024

R.E. ABURILI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

