Kyoga Hauliers Kenya Limited v Munyendo (Civil Appeal E072 of 2022) [2024] KEHC 5318 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E072 OF 2022

DK KEMEI, J

MAY 17, 2024

BETWEEN

KYOGA HAULIERS KENYA LIMITED ..... APPELLANT

AND

GRACE LEILA MUNYENDO ..... RESPONDENT

(Being an appeal arising from the judgment and decree of Hon.T. Olando (PM) delivered on 29.06.2023 in Bungoma CMCC No.297 of 2022)

JUDGMENT

1. The appeal herein arises from the Judgement and decree of Hon. T. Olando (PM) in Bungoma CMCC No.297 of 2022 delivered on 29.06.2023 wherein the trial court awarded general damages of Kshs. 4,500,000/=, future medical expenses of Kshs.1,920,744/= and Kshs. 1,716,222/= for special damages which were to be subjected to a consented contributory negligence of 90% to 10% in favour of the respondent. The Appellant was ordered to pay the costs of the suit.

2. The cause of action arose as a result of injuries that the respondent sustained in a road traffic accident which occurred on the 16.5.2021 where the respondent was travelling as a passenger along Bungoma-Webuye road aboard motor vehicle registration number KBC 480F which was hit by motor vehicle registration number KCC 676/ZE 881 at Bukembe area.

3. A full trial ensued and at the end, the trial magistrate entered judgement in favour of the Respondent as hereinabove stated.

4. Being aggrieved with the said judgement, the Appellant preferred this appeal which is premised on grounds that: -

    a. That the learned trial magistrate erred in law and in fact in making an award which was manifestly excessive having regard to the injuries sustained by the plaintiff.

b. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in making a determination on the damages payable to the respondent thereby arriving at an erroneous decision.

c. That the learned trial magistrate erred in law and in fact in failing to take into account relevant issues and/or factors in making a determination as to the damages payable thereby arriving at an erroneous decision.

d. That the learned trial magistrate erred in law and in fact by failing to take in to consideration and/or be guided by relevant authorities and/or precedents with comparable injuries like the ones sustained by the respondent thereby arriving at an excessive amount payable for general damages.

e. That the learned trial magistrate erred in law and in fact by awarding damages for future medical expenses which was manifestly excessive without taking into account the evidence on record.

f. That the learned trial magistrate erred in law and in fact in awarding special damages of Kshs. 1,716,222/= despite the fact the same were not proved by way of receipts.

g. That the learned trial magistrate erred in law and in fact in failing to consider the appellants written submissions on quantum.

5. By this appeal, the Appellant prays that;

a. That this appeal be allowed.

b. That the Honourable court be pleased to set aside the award made by the trial magistrate on damages and re-assess the same downwards.

c. That the Honourable court be pleased to set aside the award made by the trial magistrate for future medical expenses and award only what was pleaded.

d. That the Honourable court be pleased to set aside the award of special damages by the trial court in its entirety and award only what was proved by way of receipts.

e. That costs of this appeal be awarded to the appellant.

6. The appeal proceeded by way of written submissions. Both parties filed and exchanged their respective submissions.

7. The appellants filed submissions dated 18.12.2023 where they submitted on three issues. On the fist issue, the appellant submitted that the respondent raised fresh issues in her submissions which closed them out from challenging this set of evidence. It was submitted that the plaintiff in her submission stated that she had not healed since she had difficulties in breathing and could not walk without support. It was stated that the respondent further submitted that she was a student at Daystar University and as a result of the accident she missed classes and could not graduate. It is on this set of evidence the appellant contends the trial magistrate misguided himself and awarded inordinately high awards on general damages. Reliance was placed in the case of *South Nyanza Sugar Co. Ltd v Mary A. Mwita & Another* [2018] eKLR and *Mbaka Nguru & Another vs. James George Rakwar* [1998] eKLR. The appellant submitted that an award of Kshs. 600,000/= and Kshs.800,000/= would be sufficient in the circumstances and referred the court to the cases of *Joseph Mwangi Thuita v Joyce Mwole*[2018] eKLR, *Kihara & Aother vs. Mutuku* (Civil Appeal 27 of 2018) and *Hussein Sambur Hussein v Sharrif A. Abdalla Hussein& 2 Others* [2022]eKLR.

8. On the second issue, it was submitted that on future medical expenses, the trial magistrate erred in awarding as he did arguing that future medical damages are like special damages which ought to be specifically pleaded. Reliance was placed in the case of *Tracom Limited v Hassan Mohamed Adan*[2009]eKLR, *Kenya Bus Services Ltd v Gituma* 92004) 1EA 91 and *Jackson Wanyoike vs. Kenya Bus Services Ltd & Another* Nairobi Milimani HCCC No. 297 of 2002. The appellant submitted that the plaintiff pleaded for Kshs. 350,000/= for future damages and supported his claim with the medical report by Dr. Kipkorir Rono. The appellant argued that the trial court despite the evidence on record went ahead and awarded Kshs 1,920,744/= without giving any concise reason for the award. It was submitted that an award of Kshs. 300,000/= to 350,000/= would have been sufficient in the circumstances.

9. On the third and last issues, the appellant submitted that the trial magistrate erred in awarding excessive special damages. The respondent pleaded for Kshs.1,716,222 which is the amount awarded by the trial court. The appellant however submitted that the total receipts produced amounted to Kshs.1,464,573. It was their submission that the respondent and the trial court included invoices in their calculations which they submit do not prove payment. They quoted the case of *Total (Kenya)Limited formally Caltex Oil (Kenya) Limited v Janevans Limited* [2015] eKLR. It was their submission that and award of Kshs. 1,464,5733 being the proved special damages proved was appropriate.

10. In conclusion, the appellant submitted that an award between Kshs. 800,000/= to Kshs. 600,000/= would be sufficient for special damages, urged that the future medical award of Kshs. 1,920,744 be substituted with Kshs 350,000/= and lastly the special damages award of Kshs. 1,716,222/= be substituted with Kshs. 1,464,573/=.

11. The respondents on her part filed submissions dated 28th February, 2024 where she submitted on four issues. On the first issue, she submitted on the award for general damages. It was her submission that the award of the trial court was appropriate and in tandem with the injuries sustained as recorded in the medical report, P3 Form and treatment notes. It was submitted that the injuries sustained by the appellant were termed as grievous harm yet the injuries in the authorities presented by the appellant were soft tissue injuries. The respondent urged the court to retain the award of the trial court and quoted the case of *Shreeji Enterprises Ltd v John Mungai Chai* [2020] eKLR where Kshs. 4,176,323/= was awarded for comparable injuries.

12. On the second issue, the respondent submitted on the award of special damages. It was her submissions that in the amended plaint dated 21.10.2022 she pleaded for special damages of Kshs. 1,716,222/= and filed a further list of documents in support of her claim. She urged the court not disturb the award stating that it was adequate.

13. On the third issue, she submitted on the award of future medical expenses. The respondent submitted that in support of this she attached invoices in her list of documents which indicate medical costs yet to be settled. She added that there are pending medical procedures not claimed for since she is still undergoing treatment and that the same can only be catered for under this head. Again, the court was urged not to disturb the award. Lastly, the respondent sought for costs of the appeal to be borne by the appellant.

14. The court has considered the evidence and submissions at the trial and the submissions made by the respective parties on this appeal. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not see the witnesses testify. See Peters v Sunday Post Limited [1958] EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* [1968] EA 123, Williams *Diamonds Limited v Brown* [1970] EA 1. have the

opportunity to see or hear the witnesses testify. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88] IKAR 278 stated that:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"

15. The point of contention in this appeal is the quantum of damages awarded by the subordinate court, viewed by the Appellants as inordinately high or unjustified. In considering the appeal, 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. It was held in that case that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages."

16. The sentiments of the English Court in *Lim Poh Choo v Health Authority* [1978]1 ALL ER 332 were echoed by Potter JA in *Tayab v Kinany* [1983] KLR14, quoting *dicta* by Lord Morris Borth-y-Gest in *West (H) v Sheperd* [1964] AC 326, at page 345 as follows:

> " 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." (Emphasis added).

17. In this case, the respondent listed that she sustained head injury (moderate, cerebral atrophy, tracheal stenosis, poor eye sight and scar on the neck), Chest and abdomen (blunt injury to the chest and abdomen, upper limbs (olecranon bursitis) and lower limbs (bilateral fractures of the femurs, DVT right lower limb, scars on both legs due to operation for implants). The appellant on the other hand listed the respondent's injuries as traumatic brain injury, blunt injuries to the chest and abdomen, lacerations on the olecranon, fracture of the right femur and fracture of the left femur. The respondent is assessed to have suffered 10% disability.

18. The issue of liability was compromised at the ration of 90:10 in favour of the respondent as against the appellant. The trial court while relying on the case of *Osman Mohammed & Anor vs. Saluro Bandit Mohammed* Civil Appeal No. 30 of 1997 awarded Kshs,4,500,000/=. The appellant in referring the Court to various cases quoted elsewhere in this judgment and this Court notes that in the said cases the plaintiff suffered fractures and soft tissue injuries which are less severe to those suffered by the respondent in this case. As for the case referred to by the respondent, the plaintiff therein suffered multiple (more than 5) fractures, again in my view these injuries were a bit more severe that those in this case.

19. In the case of *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura and Another* [2015]eKLR where the plaintiff sustained multiple soft tissue injuries, blunt injury to the head, fracture of the right radius/ ulna, compound fracture of the right and left tibia and fibula and was awarded Kshs. 2,000,000.00.

20. In the case of *Githuka v Serem* (Civil Appeal 32 of 2021) [2023] KEHC 427 (KLR) the trial court awarded Kshs. 1,500,000/= as general damages where the plaintiff sustained injuries to the head with loss of consciousness for two weeks, blunt injury to the neck blunt injury to the chest, prick wound (penetrating) injury to the right hand, fracture of the right femur, left hip joint dislocation.

21. In *Damaris Wamucii Kagechu v Joseph Kirui & Another* [2019] eKLR the court awarded Kshs. 1,600,000.00, the plaintiff suffered bilateral compound fractures of the tibia and fibula to both right and left legs. Subsequently, the fracture showed malunion and at the time of the hearing she could not walk. Permanent disability was assessed at 8%.

22. The decisions i have sited are fairly recent and bear comparable injuries as the ones sustained by the Respondent. I have considered the fact that the respondent suffered 10% disability, the prognosis by both doctors that she will require subsequent orthopedic, ENT and physiotherapy clinics, that she will not be able to walk without support and that the right lower limb has been shortened as compared to the left lower limb. Guided by the above precedents and in consideration of the medical evidence placed before this Honourable court, i find the award made by the trial court in the sum of Kshs. 4,500,000 in general damages was excessive. I therefore set aside the award and award the respondent general damages in the sum of Kshs 2,500,000/= as the same is reasonable in the circumstances.

23. On the issue of future medical expenses, in the medical report dated 22nd February, 2022 Dr. Kipkorir Rono produced by the respondent's states that;

> " She will require to purchase tracheal implant to correct the tracheal stenosis at a cost of between Kshs. 180,000/= and Kshs. 200,000/=. The operation for the tracheal implant will costs about Kshs. 150,000/=."

The 2nd and re-examination report by Dr. Z. Gaya produced by the appellants states that;

> " The metal implants are still in situ and will require to be removed at an appropriate cost of Kshs. 150,000/=, She will undergo intramedullary lengthening nail of the right lower limb at a cost of Kshs.150,000/=. She will undergo further resection and reconstruction so that she can breathe normally at approximate costs of Kshs. 300,000/=."

24. The trial court in awarding Kshs. 1,920,744/= stated in its judgment that it had considered the medical report and receipts produced. It is my considered view that future medical expenses are in the nature of special damages, which have to be pleaded and proved by evidence. The respondent in paragraph 8 of her plaint pleaded for future expenses of "over Kshs. 350,000/="and supported her claim vide the medical report produced as PExhibit 5. It is not in doubt that at the time of trial, the respondent was still undergoing treatment.

25. The Court of Appeal in *Tracom Limited & v Hasssan Mohamed Adan* [2009] eKLR held as follows: -

> " ...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.

26. In *Forwarding Company Limited & Another V Kisilu; Gladwell (third Party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR), the court stated as follows

> " In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

27. Given the severity of the injuries sustained by the respondent as evidenced in the separate medical reports and guided by the above principles, i see no need to interfere with the award of the trial court on future expenses.

28. Turning to the award of special damages, it is noted that they were all specifically pleaded and strictly proved in evidence and thus the same will remain undisturbed. I find that there is no reversible error made by the trial court.

29. In the result, the appeal partially succeeds. The judgement of the trial court dated 29.6.2023 is hereby set aside and substituted with judgement being entered for the Respondent against the Appellant as follows;

    Liability 90% 10%

    General damages Kshs. 2,500,000/=

    Future medical expenses Kshs.1,920,744/=

    Special damages Kshs.1,716,222/=

    Total Kshs. 6,136,966/=

    Les 10% liability Kshs. 613,696.60

    Total Kshs. 5,523,269.40

    The respondent shall get full costs of the suit in the lower court but for this appeal the order that best commends itself to me is that parties bear their own costs as the appeal has succeeded only in part.

    It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D. KEMEI,

JUDGE.

In the presence of:

Miss Langat for Appellant

Keter for Respondent

Kizito Court Assistant