Mwatela & another v Njuguna (Civil Appeal E127 of 2023)
[2024] KEHC 9805 (KLR) (Civ) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E127 OF 2023

DKN MAGARE, J

JULY 15, 2024

BETWEEN

ELISHA WEWA MWATELA ..... 1ST APPELLANT

GRAIN INDUSTRIES LIMITED ..... 2ND APPELLANT

AND

ANTONY KIMANI NJUGUNA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling of Hon. Kimemia, Chief Magistrate delivered on 24/10/2022 and the Judgment and Decree of the Honourable C.M. Maundu, Chief Magistrate, delivered on 26/7/2022 in Milimani CMCC Suit No. 7091 of 2019.

2. The appeal is on the quantum of damages only. The Appellants also appeal on the ground that the lower court erred in dismissing their application dated 26/8/2022 seeking to review the impugned judgement on account of an error apparent leading to failure to consider submissions filed by the Appellants in opposition to the suit.

3. The Memorandum of Appeal dated 28/2/2023 raised grounds that the lower court erred in law and fact:

    a. In dismissing the application for review dated 26/8/2022.

    b. In the award of general damages that were inordinately high and amounted to erroneous estimate of damages.

    c. In the award of future medical expenses that were excessive.

d. In the award of special damages that were not proved.

Pleadings

4. In the plaint dated 26/9/2019 and amended on 9/7/2021, it was pleaded that on 5/6/ 2018, the Plaintiff was travelling in his motor vehicle Registration No. KBA 012N along Eastern Bypass road when the 1st Defendant drove motor vehicle Registration No. KCS 053Y so negligently that it collided with the Plaintiff's motor vehicle causing the plaintiff severe personal injuries.

5. The Plaintiff pleaded the following injuries:

   a. Blunt head injury

   b. Soft tissue injury to the chest

   c. Soft tissue injury to the pelvis

   d. Trimalleolar fracture of the right ankle

   e. Segmental compound fracture of the tibia and comminuted fracture of the distal fibula of the left lower leg.

6. The Plaintiff prayed for judgment for Kshs. 51,505/= being special damages and also prayed for general damages, loss of earning capacity and future medical expenses.

7. The Appellants as Respondents in the trial court entered appearance. They filed defence denying the averments in the plaint.

Evidence

8. During the hearing, PW1 testified as Dr. Nassir Bhanji. He relied on his medical report dated 20/4/2019. In cross-examination, it was his case that the plaintiff would need arthrodes at a cost of Kshs. 1 Million at a private hospital. That the fracture of the ankle joint had limited movement and other fractures had metal implants.

9. PW2 was the plaintiff. He relied on his witness statement and bundle of documents filed in court which he produced in evidence. It was his testimony that he walked using crutches and could not do manual work or stand for long.

10. On the part of the Appellants, they did not call any witness. They produced the medical report by Dr. Madhiwalla dated 18/12/2020 by consent of the parties.

11. The trial court considered the case and rendered its Judgment on 26/7/2022, which was reviewed on 24/10/2022 as follows:

    a. Liability by consent 90:10 in favour of the Plaintiff

    b. Kshs. 3,000,000/- in general damages

    c. Kshs. 51,505 for special damages

    d. Kshs. 1,644,000/- for future medical expenses

    e. Kshs. 300,000/- for loss of earning capacity

Submissions

12. The Appellants filed submissions dated 26/2/2024. It was submitted that the lower court awarded general damages that were inordinately excessive and high. It was submitted that Kshs. 600,000/- would have been adequate compensation for the injuries. They relied inter alia on the cases of Hussein Sambur Hussein v Shariff A. Abdula Hussein & 2 Others (2022) eKLR and Tirus Mburu Chege & Another v JKN & Another (2018) eKLR.

13. It was also submitted that the damages for future medical expenses were improper and should be set aside. They relied on SJ v Francesco Di Nello & Another (2015)e KLR that claims under loss of future earnings and loss of earning capacity were different.

14. Further, it was submitted that there was no justification for the award on loss of future medical expenses and Kshs. 150,000/- as projected in the Appellant doctor's report is the amount the court ought to have awarded.

15. The Respondent also filed submissions dated 19/2/2024. It was submitted that the learned magistrate correctly applied the principles applicable for the award of general damages and arrived at a correct decision in the impugned judgement.

16. They relied among others on Mbogo v Shah (1968) EA 93 to submit that the appellate court would not interfere with the exercise of discretion of the lower court unless satisfied that the lower court misdirected itself as to lead to an injustice. I was urged to dismiss the Appeal with costs.

Analysis

17. I have considered the appeal as well as submissions and authorities filed in court. The issue is whether the lower court erred in the award of general damages, damages for future medical expenses, loss of earning capacity and special damages.

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

19. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

20. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

21. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.

22. I proceed to determine whether the court erred in the award on quantum. The principles guiding this court as the first Appellate court have crystalized. This is in recognition that the award of damages in discretionary.

23. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> 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.

24. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional....."

25. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. For the Appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

26. The trial court is this case awarded damages as follows:

    a. Kshs. 3,000,000/- in general damages

    b. Kshs. 51,505 for special damages

    c. Kshs. 1,644,000/- for future medical expenses

    d. Kshs. 300,000/- for loss of earning capacity

27. In the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR the court stated that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as

far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others [2004] eKLR).

28. Therefore, it is trite law that in assessment of damages in this case, regard should be had to the nature, severity and extent of the injuries suffered by the Respondent which, as is clear from the pleadings and evidence of the medical reports were as follows:

    a. Blunt head injury

    b. Soft tissue injury to the chest

    c. Soft tissue injury to the pelvis

    d. Trimelleolar Fracture of the right ankle

    e. Segmental compound fracture of the tibia and comminuted fracture of the distal fibula of the left lower leg.

29. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

30. On future medical expenses, the Appellants contended that future medical expenses were excessive and erroneous since Kshs. 150,000/- would have been adequate compensation under this head. However, I note that in the amended plaint dated 9/7/ 2021, the Respondent fragmented the cost of future medical expenses as follows:

    a. Physiotherapy for the right ankle joint of the lower limb– Kshs. 144,000/- being three sessions a week for 3 months at Kshs. 4,000 per session.

    b. Arthrodesis of the right ankle the lower limb in future, an operation that will costs Ksh. 1,000,000/-

    c. Removal of intramedullary nail in the right ankle joint of the lower limb at Kshs. 500,000/-

31. On my perusal of the medical report dated 23/4/2021, I note the Respondent's doctor to have indeed recommended the above as appropriate prognosis for the injuries sustained by the Respondent. The said medical doctor however, in reference to the arthrodesis, which he described as replacement of the ankle joint, was not conclusive. He opined that the cost of Kshs. 1,000,000/- would be incurred in case of the need for arthrodesis. In his testimony in court, he was particular that in case of osteoarthritis in the right ankle joint, the Respondent would eventually need arthrodesis or replacement of the right ankle.

32. In my view therefore, the claim for future medical expenses in the nature of arthrodesis for Kshs. 1,000,000/- was not conclusive. It was based on the occurrence of osteoarthritis leading to the need for the replacement of the right ankle. I therefore find that the award on future medical expenses erroneously took into consideration the cost of arthrodesis that was not determined as an eventuality.

33. On the cost of removal of the nail plate and physiotherapy, being Kshs. 500,000/- and Kshs. 144,000/- respectively, I find no basis to interfere with the award by the lower court. It was based on a conclusive opinion in the medical report. The proposal of Kshs. 150,000/- was in my view not supported as did not specify whether it was solely for physiotherapy or removal of the nail plate or both. In the case

of, Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> " 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."

34. Consequently, I tend to believe the medical report by the Respondent's doctor more than the Appellant's doctor. Consequently, I only allow the appeal against the finding on future medical expenses by reducing the same with Kshs. 1,000,000/- which was not a determined cost to be incurred.

35. I am fortified by the reasoning of the court in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, where it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

36. On the General damages awarded at Kshs. 3,000,000/-, I have to consider whether the award was inordinately high.

37. I have perused the authorities relied on by the Appellant. They present injuries that are not similar to the injuries suffered by the Respondent. Therein, the injuries are largely fracture of the tibia and fibula and dislocation of the right ankle.

38. In Ziporrah Nangila v Edoret Expess Limited & 2 others [2016] eKLR, the plaintiff was awarded Kshs. 2.4 million for the following injuries:

    i. Bilateral leg injuries

    ii. right wrist injury

    iii. Fracture dislocation of the right ankle

    iv. comminuted compound fracture of the distal and fibular

    v. Fracture of the left distal and tibia and fibular

vi. Total functional loss with a lifeless right foot and ankle at 70%.

39. In Dorcas Wangaithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR an award of Kshs. 2,000,000/= was upheld on appeal for multiple injuries, blunt injury to the head, fracture of the left radius/ulna, compound fracture to the right tibia/fibula and compound fracture of the left tibia/fibula in 2015.

40. In China Road and Bridge Corporation(Kenya) v Job Mburu Ndungu [2021] eKLR, the Respondent suffered fracture of the left radium, fracture of the left ulna, fracture of the right tibia and fracture of the right fibula and an award of Kshs. 2,000,000/- was upheld in general damages in 2021.

41. The injuries in Ziporrah Nangila (supra) in my view presents the closest similarities with the instant case. In the other cases cited, the injuries were slightly less severe as the fracture of the ankle was not found. The award of Kshs. 3,000,000/- for general damages was inordinately high as is close to the award in the said case.

42. Bearing in mind inflation and the ever increasing cost of life, an award of Kshs. 3,000,000/- was proper compensation to the Respondent herein. The court rightly exercised its discretion.

43. Lastly, on special damages, the Respondent amended the plaint to include Kshs. 25,000/- being for the medical report. On perusal, I note the initial medical report was pleaded in the plaint to be Kshs. 8,000/- and a receipt was filed in support thereof. However, the award of special damages based on the subsequent medical report by Dr. D.H. Bhanji of Kshs. 25,000 was not supported.

44. The Respondent ought to have filed a further bundle of documents if he was to rely on the receipt by Dr. D.H. Bhanji. I therefore find that Kshs. 25,000/- for medical report was pleaded but not proved. I set it aside.

45. On earning capacity, it was contended that the award of Kshs. 300,000/- was without justification. In SJ v Francesco Di Nello & Another [2015] eKLR it was held: -

> "Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved."

46. The position was enunciated in Fairley V John Thomson Ltd [1973] 2 Llyod's Law Reports 40 At Pg. 14 wherein Lord Denning M.R. stated as follows:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

47. Therefore, it is my considered view that the Respondent pleaded that the injuries suffered had an impact on his future life. His testimony was that he could not do manual work. That he used to do business and was also a turn boy. That he used to earn Kshs. 22,000/- per month and was currently not working. I note that the court awarded damages for loss of earning capacity at Kshs. 300,000/- as a global sum. The Appellants contend that the award was not supported. I do not accede myself to the position that the Respondent aged 28 years at the time he suffered the injuries had no income

of his own. In any event, whereas the Appellants contended his income, they did not contest that the Respondent earned a living. I find no basis to interfere with the award of Kshs. 300,000/- by the lower court under this head. It was a reasonable award.

48. I am fortified by the reasoning of the Court of Appeal in *Tile & Carpet Center Warehouse v Okello (Civil Appeal 74 of 2019)* [2022] KECA 5 (KLR) (4 February 2022) (Judgment) as follows:

> "...The fact that the respondent's injuries had an impact on his earning capacity cannot be overlooked, especially considering the nature of the respondent's work..."

49. In the same vain, this court in James Mukatui Mavia v M. A. Bayusuf & Sons Limited [2013] eKLR, stated as follows:

> "The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life."

50. I also note that the Respondent had pleaded loss of earnings. Although the court did not render a determination under this head, loss of earnings is not a subject under this appeal and I will let it rest.

51. Before I pen off, I understand the Appellants to have also prayed that the Ruling dismissing their application dated 26/8/2022 be set aside. I find no basis to do so. The ruling arose from an application for review in which the Appellant sought a finding that there was an error apparent on the face of the record when the lower court did not consider the submissions filed by the Appellant. The determination of the issues raised herein against the Judgment of the lower court effectively addresses the Appellants' reason to challenge the finding on review and comprehensively determines Appeal both against the ruling and the judgment.

52. Equally, submissions are not evidence. In Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.

53. The Court of Appeal in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgment can be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules].

54. The same court in Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

55. Consequently, the Appeal partly succeeds.

Determination

56. In the upshot I make the following orders:

    a. The Appeal against the award on the loss of earning capacity is dismissed.

    b. The appeal on General damages is dismissed.

    c. Special damages of Kshs. 51,505/- is set aside and substituted with Kshs. 34,505/-.

    d. The award on future medical expenses is set aside and substituted with an award of Kshs. 644,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellants

Mr. Mwangi for the Respondent

Court Assistant – Jedidah

M. D. KIZITO, J.