Jaoko v Ithiri & another (Civil Appeal 260 of 2018 & 181 of 2019 (Consolidated)) [2024] KEHC 11170 (KLR) (Civ) (9 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 260 OF 2018 & 181 OF 2019 (CONSOLIDATED)

AC BETT, J

SEPTEMBER 9, 2024

BETWEEN

KALEB JAOKO ..... APPELLANT

AND

MUTALII SIMON ITHIRI ..... 1ST RESPONDENT

KIMATHI DERRICK ..... 2ND RESPONDENT

(Both appeals arising from the Judgment and Decree of Hon. A.M Obura (SPM) in Nairobi CMC Civil Suit No. 1407 of 2009 delivered on 8th May 2018)

JUDGMENT

1. By way of an amended plaint dated 27th May 2013, the appellant sued the respondents for special damages in the sum of Kshs. 4,163,465/=, general damages, cost of lost items amounting to Kshs. 110,400/=, costs of the suit and interest.

2. The appellant's case was that on or about the 22nd day of July, 2017 at about 11Am he was lawfully driving motor vehicle registration number KAT 614C along Nairobi Namanga road when on reaching near the Shell Petrol Station, the 2nd respondent negligently drove at a high-speed motor vehicle registration number KAE 549N registered in the name of the 1st respondent thus knocking his motor vehicle and causing damage to it and him sustaining serious injuries.

3. In an amended statement of defence dated 1st February 2016, the respondents admitted the occurrence of the accident which they claimed was caused by the negligence of the appellant.

4. In a judgment of the trial court delivered on 8th May 2018, the court found the defendants 100% liable for the accident and awarded the appellant general damages of Kshs. 3,000,000/ and special damages

of Kshs. 4,163,465/ together with costs of the suit and interest thereon. The defendants were found jointly and severally liable in those terms.

Civil Appeal No. 260 of 2018

5. Being dissatisfied with the decision of the trial court, the appellant lodged a memorandum of appeal dated 8th June 2018 seeking orders that the appeal be allowed with costs. The appeal is premised on the following grounds: -

    a. That the learned magistrate erred in fact and proceeded on wrong principles, or she misapprehended the evidence in some material respect on the level of incapacity of the appellant and arrived at a figure which was inordinately low on general damages.

    b. That to that the decision of the learned magistrate was a miscarriage of justice.

6. The appeal has been canvassed by way of written submissions in compliance with the directions of the court.

Appellant's Submissions

7. The appellant submits that it was his testimony that he lost his sense of hearing on both ears days after the accident and that the loss of hearing is permanent. He stated that he underwent operations in India to rectify the hearing problem and was fitted with a hearing aid on both ears which aids require service and replacement of the batteries from time to time and that he could no longer find spare parts for the hearing equipment as it was no longer manufactured and that he needed to replace the aids with a modern one. He contends that the trial court failed to factor in future medical expenses, and he pleads a sum of Kshs. 4,000,000/ due to the fact that he does not know how much the hearing aid will cost for the rest of his life and he cites the case of *Tracom Limited v Hassan Mohamed Ada*n (2009) eKLR.

8. He further cites the case of *Forwarding Company Limited & another v Kisilu; Gladwell (Third party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) where the court held 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."

9. He also argues that due to inflation, the price of the device and batteries has been changing though he further noted that it has been over 16 years since he acquired the hearing aid. He proposes that the award for general damages of Kshs. 3,000,000/ be reviewed upwards by factoring in medical expenses of Kshs. 4, 571,668.17/=.

Respondents' Submissions

10. The respondents submit that the trial court erred in finding the respondents liable for the appellant's post-accident surgery as no nexus was established between the accident and the appellant's loss of

hearing and they cite the case of *Statpack Industries v James Mbithi Munyao* (2005) eKLR where the court held as follows on causation:-

> " ....it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

11. They contend that during cross examination the appellant confirmed that at the time he was admitted at Mater Hospital he could hear properly and that he was treated for the fracture of the right leg. They further contend that the appellant testified that he filed a complaint against Mater Hospital for the loss of hearing, but the complaint was dismissed by the Kenya Medical Practitioners and Dentists Board. They also claim that it was the appellant's evidence that he recovered from the fracture he sustained and that on re-examination he stated that he lost his hearing one month after the accident.

12. They fault the trial court's finding that the appellant lost his hearing ability from the accident since there was no medical report to explain how he lost his hearing and that the trial magistrate relied on discharge form from Mater Hospital, the P3 form, the letters and discharge form from Amrita Institute of Medical Sciences yet they did not show any casual link between the accident and the appellant's loss of hearing.

13. They urge this court to substitute the sum of Kshs. 3,000,000/= awarded by the trial court as general damages with Kshs. 1,000,000/= and in that regard they cite the following decisions. One is the case of *Kiautha v Ntarangwi* (Civil Appeal No. E050 of 2021) (2022) KEHC 10595 (KLR) where the court found an award of Kshs. 2,000,000/= to a victim who had suffered bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and amid shaft femur fracture and where the victim was left with anatomical and functional defects to be excessive and substituted it with an award for Kshs. 800,000/=. The second case is that of *Hillspark Investment Company Limited v Murimi* (Civil Appeal No. E006 of 2021 (2022) KEHC 10622 (KLR) where the court upheld an award of Kshs. 1,500,000/= as general damages where the respondents suffered multiple deep cut wounds on the face, left eye and occipital region with generalized tenderness and swelling with associated impaired hearing, extensive laceration on the left side of the chest, deep cut wound on the left arm, dislocation on the right wrist, deep extensive lacerated would on the left leg, fracture on the left tibia and fibula bones, dislocation and sprain on the left knee joint, deep cut wound on the right left and fracture of the 5th and 6th ribs.

Civil Appeal No. 181 of 2019

14. The appeal was initiated by the respondents against the appellant vide a memorandum of appeal dated 18th March 2018 seeking orders that the appeal be allowed with costs and that the judgment of the lower court be set aside with costs. The appeal is premised on the following grounds: -

    a. The trial magistrate erred in law and in fact in holding the applicants 100% liable for the respondent's claim for post-accident surgery deafness while the plaintiff failed to establish a nexus between the accident and his hearing problem.

    b. The trial magistrate erred in law in holding that the appellants were liable for the respondent's loss of hearing without the evidence of a doctor.

c. The award of general damages on the injuries that were suffered by the respondent as a result of the accident was excessive. The respondent suffered minor soft tissue injuries which he had fully recovered from at the time of trial.

d. The learned trial magistrate erred in law and fact in making an award of Kshs. 3,000,000/ as general damages for loss of hearing which was excessive in the circumstances.

e. The learned trial magistrate erred in law and fact in making an award of Kshs. 4,163,465/44 pleaded as special damages by the respondent. The magistrate failed to take into account that;

i. The respondent had admitted that his employer, Sameer Africa Limited, had settled the medical bill for Kshs. 958,090/ at the Mater Hospital as set out in the receipts issued to the respondent.

ii. The cost of travel accommodation and other expenses incurred at Amrita Institute of Medical Sciences and Research Centre for purposes of correcting the hearing problem were not payable by the applicants. There was no nexus between the accident and the loss of hearing.

f. The learned magistrate erred in law and in fact in failing to properly consider and evaluate the appellant's submissions dated and filed on 25th July 2017.

g. Without prejudice to the foregoing, the award of damages in any event was manifestly excessive.

15. In respect to this appeal I can only see the appellants' submissions on record.

16. The appellants reiterate their submissions in Civil Appeal No. 260 of 2018 and further aver that the respondent prayed for special damages of 4,163,465/= from which he was not entitled to the sum of Kshs. 1,062,966/= incurred at Mater Hospital as the bill was settled by his employer and that the respondent did not produce evidence to show that this amount was claimed by his employer. They also argue that no evidence was tendered by the respondent to justify the claim of Kshs. 110,400/ for items that were allegedly lost as a result of the accident. In addition, the appellants claim that the respondent did not produce evidence to show that he would not have incurred the cost of Kshs. 389,500/= in hiring another vehicle upon returning motor vehicle KAT 614C to his friend Ben Namwamba following the accident.

17. They assert that the special damages incurred by the respondent in attending to his hearing problems as proven were; a) the costs incurred in visiting specialists amounting to Kshs. 104,876/=, expense incurred for air travel to India amounting to kshs. 732,275/=, medical expenses at Amrita India amounting to Kshs. 1,798,052/= and accommodation expenses in India amounting to Kshs. 130,347.56/= totaling to Kshs. 2,765,550. 56/=. They further propose that the award for general damages of Kshs. 3,000,000/= be reduced to kshs. 1,000,000/=.

18. This court has considered the grounds of both appeals, the proceedings of the lower court and the submissions by the parties and discerns the issue for determination to be:-

(1) Whether there was sufficient proof that the deafness suffered by the appellant was as a result of the accident.

(2) Whether the award made by the trial court was reasonable.

19. Whereas the appellant contends that the damages awarded by the trial court were inordinately low for failing to factor in future medical expenses, the respondents contend that the general damages were

excessive for the reason that the appellant failed to prove that he suffered deafness from the accident and that the some of the special damages awarded by the trial court were not proved.

20. Though I have not seen a medical report listing the nature of the injuries the appellant suffered, the clinical summary and the amended plaint states the injuries suffered by the appellant following the accident to be as follows;

    a. Multiple cuts/bruises of the soft tissue of the body

    b. Fracture of the right femur

    c. Cut the right eye lid.

    d. Post-accident and surgery trauma

    e. Post-accident/surgery deafness.

21. The trial court found the defendants 100% liable for the accident and awarded the appellant general damages of Kshs. 3,000,000/= and special damages of Kshs. 4,163,465/= together with costs of the suit and interest thereon.

22. The instances where an appellate court will disturb the trial court's discretion in the award of damaged was discussed by the court of appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the court held as follows;

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A 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."

23. The appellant argues that the trial court failed to factor in future medical expenses in the award of general damages. As rightfully cited by the appellant, the court of appeal in *Tracom Limited & another v Hasssan Mohamed Adan* [2009] eKLR (P. K. Tunoi, J.W. Onyango Otieno, P. N. Waki JA) held as follows on future medical expenses;

> " 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 thereon 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 the 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."

24. The above authority is to the effect that future medical expenses ought to be pleaded.

25. That being the position in law, the question that then arises is whether the claim for future medical expenses was pleaded in the case before the trial court. I have also looked at the amended plaint and noted that the amendment did not incorporate a claim for future medical expenses.

26. Having found that the plaintiff did not plead future medical expenses, the learned trial magistrate correctly applied the law in not awarding the same.

27. On whether the damages awarded by the trial court were excessive, the respondents have argued that there was no evidence to the effect that the appellant lost his hearing as a result of the accident.

28. The appellant on cross examination stated that he went to be treated for a fracture on the upper part of the leg and that during his admission he could hear but then by the time he was discharged, he had lost his hearing senses. He further stated that he had perfect hearing prior to the accident. The law of causation was explained in the case of *Elijah Ole Kool vs George Ikonya Thuo* [2001] eKLR where the court held that;

" This argument relates to the law of causation. When will an act or omission be said to be the cause of the Plaintiff's injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff's injury or the act or omission is so connected with it as to be a cause materially contributing to it."

29. The law of causation was further explained in the case of *Redemptor Ndunge Ndawa (Suing in his capacity as the Administrator and legal representative of the estate of Christopher Muloki Masila-Deceased v Solomon Gikaru Kariri* [2020] eKLR where the court held that;

" 24. Normally the intervening incident that breaks the chain of causation and constitutes a novus actus interveniens has to be an abnormal one and not one foreseen by the person injuring another. A novus actus interveniens, or nova causa interveniens is an abnormal, intervening act or event, judged according to the standards of general human experience, which serves to break the chain of causation: see *South African Criminal Law and Procedure*, vol. 1, 4th ed., by Jonathan Burchell, at p 102.

25. In the case of *Elijah Ole Kool v George Ikonya Thuo* [2001] eKLR, it was observed that;

> "Although the Plaintiff may be able to trace even a consequential connexion between an injury and the negligence of the Defendant, the law does necessarily attach liability to the Defendant who has been negligent. In *Walker v Goe* [1859], 4 H. & N. 350, it was held that there can be no liability unless the damage is the "proximate" result of the negligence. It, therefore, remains upon the Plaintiff to prove both that the Defendant was negligent and that his negligence caused or materially contributed to the damage (see *Graig v Grasgaw Corpn*. [1919] 35 TLR 214, at p. 215 per Lord Buckmaster). The Learned Authors of Volume 28 of *Halsburys Laws of England* (3rd Edition) say as follows at page 28:
>
> > - "Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability fallows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen."
>
> In other words, causation is a matter of fact to be determined by common sense principles. Lord Wright said as follows in *Yorkshire Dale S.S. Co. Ltd. v Minister of War Transport* [1942] AC 691, H.L. at p. 706: -
>
> > ".....the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.
> >
> > "As Lord Denning said in *Davies v Swan Motor Co. (Swansea) Ltd.* [1949] 2 C.B. 291 at p. 321; "the efficiency of causes does not depend on their proximity in point of time." It is enough that the cause forms part of a chain of events which has in fact led to the injury. What cause will be effective? The Learned Authors of Halsburys Supra at p. 28 say as follows: -
> >
> > > "In the absence of intervention by voluntary human action the original act is to be regarded as a cause of the injury, provided that its effect is still actively continuing and has not been superseded by some independent natural cause.....If in fact the defendant's neglect of a proper precaution has caused the injury, the court will not enter

> into hypothetical inquiry to establish whether the Plaintif f's injury must necessarily have happened with or without the defendant's negligence."

In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff's injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence.

In The Oropesa [1943] 1 All ER 211 at 213 Lord Wright said as follows: -

> "Certain well -known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other."

30. Following the accident, the most evident and significant injury suffered by the appellant was a fracture of the right leg among other injuries that saw the appellant admitted at Mater Hospital. At the time of his admission the appellant could hear. It was only at the time of being discharged after treatment for injuries sustained during the accident that the appellant discovered that he had lost his ability to hear. There was no evidence to the effect that some other cause came into play after the accident that may have caused the appellant to lose his sense of hearing. The evidence as a whole lead to the conclusion that the appellant lost his sense of hearing as a result of the accident. There was no expert evidence tendered by the respondents disproving the appellant's averments as to the cause of injury.

31. On the respondents' contention that the general damages awarded were inordinately high, the Court of Appeal in the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards".

32. The trial court awarded the appellant general damages in the sum of Kshs. 3,000,000/ and in so arriving, the court considered the case of Joel Motanya v Swan Carriers Limited (2015) eKLR where the high court awarded Kshs. 1,500,000/= for partial loss of hearing. The court further indicated that it had been guided by factors such as inflation trends and the fact that the appellant had lost hearing for both ears. I have looked at the decision and I am of the view that the trial court applied the correct principles and that the award was not inordinately high for the injuries suffered by the respondent to justify the interference by this court.

33. The respondents have further argued that the appellant failed to prove all the special damages pleaded.

34. The court of appeal in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 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."

35. The respondents faulted the trial court's award of Kshs. 1,062,966/= in medical expenses incurred at Mater Hospital as the bill was settled by his employer and the respondent did not produce evidence to show that this amount was claimed by his employer.

36. During the trial, the appellant on cross examination conceded that his employer, Sameer Africa Limited, settled his bill at the Mater Hospital and that his employer had not sued him to recover the money.

37. The court in *Peter Maore Itabari vs Godfrey Thairu & Ano* [1999] eKLR held as follows on a claim for medical expenses footed by an employer;

> "As to the Special Damages the Plaintiff admitted that most of his bills were paid by his employer. It was the advocate who stated from the bar that the employer demanded refund of this amount from him. The plaintiff produced no letter to this effect nor proof that the amount as being deducted from his salary. It is his employer who ought to have come to claim any money paid."

38. I therefore find that the trial court erred in awarding the appellant medical expenses in the sum of Kshs. 1,062,966/= since this is not an expense that was directly or indirectly incurred by the appellant.

39. For the cost of lost items amounting to Kshs. 110,400/=, I can see the same was not awarded by the trial court.

40. As for special damages for costs incurred in leasing an alternative motor vehicle after the loss of leased motor vehicle registration number KAE 549N, the appellant produced receipts from Kakasu Car Hire which were a receipt for Kshs. 49,500/=, a receipt for Kshs. 90,000/=, four receipts for Kshs. 45,000/= each and four receipts for Kshs. 17,500/= each, all totaling Kshs. 389,500/=. I therefore find that special damages under this head was proved.

Rendition and Final Orders

41. For the reasons set out above, I dismiss the appellant's appeal and allow the cross appeal only to the extent that the award for special damages in the sum of Kshs. 4,163,465/= is hereby reduced by Kshs. 1,062,966/= to a sum of Kshs. 3,100,499/=.

42. The upshot is that the appellant is entitled to the following sums:-

    General damages: Kshs. 3,000,000/=

    Special damages: Kshs. 3,100,499/=

    Total Kshs. 6,100,499/=

43. Since the main appeal is dismissed and the cross appeal partially succeeds, I will make no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 9TH DAY OF SEPTEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Okoth for Appellant

Andiwo holding brief for Mr. Makori for Respondent

Court Assistant: Polycap