Menengai Oil Refineries Limited v Bundi (Civil Appeal E039 of 2022)
[2024] KEHC 11122 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E039 OF 2022

RL KORIR, J

SEPTEMBER 23, 2024

BETWEEN

MENENGAI OIL REFINERIES LIMITED ..... APPELLANT

AND

ALEX OKARI BUNDI ..... RESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate, Omwange J. at the Magistrate's Court at Sotik, Civil Suit Number 50 of 2020)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and special damages that arose from a road traffic accident involving motor vehicle registration number KBY 003A/ZE 6371 which allegedly to belong to the Appellant and his motor cycle registration number KMDE 090D.

2. The trial court conducted a hearing where the Respondent produced three witnesses in support of his case. Through a Consent, the court adopted the Appellant's (then Defendant) witness statement and Medical Report by Dr. M. S Malik as the Appellant's evidence.

3. In its Judgment delivered on 1st September 2022, the trial court awarded a total of Kshs 907,550/= to the Respondent (then Plaintiff).

4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 19th September 2022 and relied on the following grounds:-

    I. That the learned trial Magistrate erred in law and in fact in awarding general damages so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the Respondent considering the injuries suffered by him.

II. That the learned trial Magistrate erred in law and fact by failing to consider and analyze the 2nd Medical Report by Dr. M. S. Malik and hence arrived at a wrong determination on the aspect of quantum awardable to the Respondent.

III. That the learned Magistrate proceeded on wrong principles when assessing damages to be awarded to the Respondent and failed to apply precedents and tenets of the law applicable.

IV. That the learned Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at an erroneous decision.

5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. See Peters v Sunday Post Ltd (1958) EA 424.

The Plaintiff's/Respondent's case.

6. Through his Plaint dated 10th August 2020, the Respondent stated that on 7th June 2020, he was aboard motor cycle registration number KMDE 090D when he was hit by motor vehicle registration number KBY 003A/ZE 6371 at corner "C" area along Nyamira-Roret road. It was the Respondent's case that the Appellant was the registered owner of the said motor vehicle.

7. It was the Respondent's case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the Plaint.

8. That as a result of the accident the Respondent suffered the following injuries:-

I. Left medial malleolus fracture.

II. Chest contusion.

III. Blunt trauma to the lower neck.

IV. Bruises on the parietal region on the scalp.

V. Bruises on the right lower limb.

VI. Bruises on the left lower limb.

VII. Bruises on the left elbow.

VIII. Bruises on the right elbow.

9. The Respondent prayed for Special and General Damages against the Appellant.

The Appellant's/Defendant's Case.

10. Through its Statement of Defence dated 27th October 2020, the Appellant denied the occurrence of the accident on 7th June 2020 and further denied that that the Respondent was aboard motor cycle registration number KMDE 090D. The Appellant also denied being the registered owner of motor vehicle registration number KBY 003A/ZE 6371.

11. It was the Appellant's case that if the accident occurred then it was caused by the negligence and recklessness of the Respondent. The particulars of negligence were contained in paragraph 5 of the Defence.

12. On 12th June 2024, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's submissions.

13. The Appellant submitted that the trial court erred when it failed to consider the second Medical Report by Dr. Malik. That the trial court only relied on the Dr. Morebu's Medical Report. The Appellant further submitted that this court should give more weight to Dr. Malik's Report as he was an orthopaedic surgeon and he gave a thorough and detailed analysis of the injuries sustained by the Respondent. The Appellant relied on Walter Gekombe Omari vs Vincent Kipkirui (2021) eKLR.

14. It was the Appellant's submission that the award of Kshs 500,000/= was manifestly high and proposed an award of Kshs 150,000/=. The Appellant relied on Karochwa Tea Company Ltd vs Josephat Indulachi (2017) eKLR where the court awarded Kshs 150,000/= for soft tissue injuries and an ankle dislocation and Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd (2015) eKLR where the trial court's award of Kshs 700,000/= was reduced to Kshs 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

15. The Appellant submitted that the trial court erred when it awarded Kshs 350,000/= for future medical expenses. That the second Medical Report by Dr. Malik indicated that the Respondent did not suffer any fracture of his ankle neither did he suffer any permanent disability. That this was in contrast to Dr. Morebu's Report which stated that the Respondent required Kshs 350,000/= for future medical expenses. The Appellant further submitted that Dr. Morebu's Report was exaggerated and inaccurate as to the injuries sustained by the Respondent. The Appellant relied on Benard Bisonga Sungura & another vs Lucas Oyolo Owino (2020) eKLR.

The Respondent's submissions.

16. The Respondent submitted that the award on general damages was fair and this court should not interfere with it.

17. It was the Respondent's submission that his injuries were confirmed by his doctor and the primary caregivers who attended to him at the time of his injury. That even though the Appellant's doctor (Dr. Malik) disagreed with his doctor's findings, he did not provide independent x-rays to back up his findings. It was his further submission that Dr. Malik confirmed that he had a below the knee plaster and the same was removed after three months.

18. The Respondent submitted that primary documents were vital in a case like this one and that he provided such documents to the trial court without alterations. That the said documents were consistent with his testimony in court. He relied on Stephen Kanini Wang'ondu vs The Ark Limited (2016) eKLR, Henry Binya Oyala vs Sabera Oltira (2011) eKLR and Sospeter Kimutai & another vs Isaac Kipleting Boit (2021) eKLR.

19. It was the Respondent's submission that the Appellant's doctor did not testify and was not cross-examined on the contents of his Medical Report. That the trial court had the benefit of hearing his doctor (Dr. Morebu) testify. It was his further submission that he was examined by the Appellant's doctor (Dr. Malik) one year after the accident.

20. The Respondent submitted that both doctors confirmed that he was completely immobilized for three months and had no way of fending for himself. That he lost his earning capacity and was thus entitled to general damages. He further submitted that the award was to compensate him for pain and suffering.

21. I have perused and considered the Record of Appeal dated 6th September 2023, the Appellant's written submissions dated 4th July 2023 and the Respondent's written submissions dated 1st July 2024. The two issues for my determination were liability and quantum payable.

22. It is trite law that the burden of proof lay on the person who alleges. Section 107 of the *Evidence Act* describes the burden of proof as follows:-

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

23. The standard of proof in civil cases is on the balance of probabilities. In James Muniu Mucheru vs National Bank of Kenya Ltd (2019) eKLR, the Court of Appeal stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

Liability

24. I have noted from the Memorandum of Appeal dated 19th September 2022 that the Appellant was aggrieved with the whole Judgment of the trial court and appealed against the whole Judgement. This was apparent from the fourth ground of appeal which encompasses both liability and quantum. I however observe that the parties majorly dwelt on quantum only in their submissions. I will however go through and analyse the evidence on the circumstances of the accident in order to arrive at my independent conclusion on liability.

25. From the record, the Respondent testified as PW1. He stated that the driver of motor vehicle registration number KBY 003A/ZE 6371 hit him while he was aboard motor cycle registration number KMDE 090D. Upon cross examination he stated that he was heading in the same direction with the Appellant's motor vehicle when the lorry's wheel hit his motorcycle on the right side as they were negotiating a sharp corner. It was PW1's testimony that the lorry was behind him before the accident occurred.

26. No. 107490 PC Millicent Makhandia (PW3) stated that she was not the investigating officer and testimony she gave was based on the entry in the occurrence book. PW3's testimony mirrored PW1's testimony but this court will disregard PW3's evidence on account of it being hearsay evidence.

27. The trial court allowed by consent to have the Appellant's witness statement and the Medical Report adopted as the Appellant's evidence. I have noted from the Judgement that the trial court indicated that despite the consent being recorded and adopted as an order of the court, the Appellant did not file its witness statement and this left the Respondent's evidence as uncontroverted. I have carefully gone through the trial court record and I have found that the Appellant did not file its witness statement. However, the same statement appears in the Record of Appeal.

28. As an appellate court, this court will be guided by the trial court record as it did not have the benefit of trying the case. Therefore, I agree with the trial court's finding that in the absence of the Appellant's witness statement, the Respondent's testimony as to the circumstances of the accident and in particular that the Respondent was hit from the back by the Appellant's motor vehicle remained uncontroverted. I thus uphold the finding that the Appellant bore 100% liability.

Quantum

29. The main issue in this Appeal was that the trial court disregarded the second Medical Report by Dr. Malik and relied on Dr. Morebu's Medical Report which led, in the Appellant's opinion, to an inordinately high award on general damages.

30. Dr. Peter Morebu (PW2) stated that he examined the Respondent and found that he had sustained a fracture on the left medium elbow bone, blunt injuries to the chest and lower back and bruises on the right lower limb. That he assessed permanent disability at 20%. He produced his Medical Report, P3 Form and a Discharge Summary as P.Exh 1, P.Exh 3 and P.Exh 5 respectively. When he was cross examined, he stated that he examined the Respondent on 28th July 2020 and that the Respondent was walking with the aid of crutches.

31. I have looked at the Medical Report (P.Exh 1) and it stated that the Respondent had initially been attended to at Nyamira County Referral Hospital based on his treatment notes and he found a cast on the Respondent's leg when he examined him. I have also looked at the P3 Form (P.Exh 3) and the Discharge Summary (P.Exh 5) and they all corroborate Dr. Morebu's testimony.

32. The second Medical Report by Dr. Malik was produced by consent. It is salient to state from the outset that Dr. Malik did not testify and he could not be cross examined on his findings or the contents of his Medical Report.

33. I have gone through the second Medical Report and it showed that the Respondent was examined on 13th May 2021. The Report acknowledged the treatment that the Respondent had previously received. The point of departure was that in the opinion of Dr. Malik, the Respondent suffered soft tissue injuries and a dislocation in his leg and not a fracture as found by Dr. Morebu.

34. The court is faced with two conflicting Medical Reports. By their nature, the Medical Reports are expert evidence and it is trite law that expert evidence is only persuasive and not binding to the courts and if faced with conflicting reports, as in the present case, the court considers such Reports alongside other evidence.

35. After analysing the two Medical Reports, I am persuaded by Dr. Peter Morebu's Report (P.Exh 1). This is so because Dr. Morebu examined the Respondent on 28th July 2020 which was approximately seven weeks after the accident occurred. He found the Respondent with a plaster on his leg and the contents in the Discharge Summary (P.Exh 5) from Nyamira County Referral Hospital where the Respondent was first treated corroborated Dr. Morebu's findings. Dr. Morebu (PW2) was cross examined and his testimony remained unchallenged. On the other hand, the Respondent was examined by Dr. Malik on 13th May 2021 which was approximately a year after the accident occurred and I am not persuaded that after the lapse of one year, Dr. Malik could conclusively examine the Respondent's leg and decisively state that he suffered from a dislocation and not a fracture without the benefit of x-rays.

36. Flowing from the above, it is my finding therefore that the Respondent suffered the following injuries:-

    I. Left medial malleolus fracture.

    II. Chest contusion.

    III. Blunt trauma to the lower neck.

    IV. Bruises on the parietal region on the scalp.

    V. Bruises on the right lower limb.

VI. Bruises on the left lower limb.

VII. Bruises on the left elbow.

VIII. Bruises on the right elbow.

37. For the above injuries, the trial court awarded Kshs 550,000/= as general damages.

38. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. In the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko (2006) eKLR, the Court of Appeal stated that:-

> " It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964] AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

39. On the issue of General Damages, the Appellant submitted that the award of Kshs 550,000/= was inordinately high and they proposed an award of Kshs 150,000/=. On the other hand, the Respondent asked this court to uphold the award as it represented a fair award.

40. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In the case of Kigaragari vs. Aya (1982 - 1988) I KAR 768, it was stated:-

> " Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

41. Additionally, in the English Court in the case of West (H) & Son Ltd vs Stephard (1964) AC 345 it stated as follows:-

> " 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."

42. The Respondent suffered soft tissue injuries to his lower limbs, elbows, lower back, chest contusion and a left medial malleolus fracture. I have found the following cases quite helpful in terms of comparison:-

    I. Akamba Public Road Services vs Abdikadir Adan Galgalo (2016) eKLR where the award of Kshs.800, 000/= was substituted with an award of Kshs.500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.

    II. In Tirus Mburu Chege & another vs JKN & Another (2018) eKLR, the sum of Kshs.800,000/= was reduced on appeal to Kshs.500,000/= for fracture on tibia and fibula on both legs, blunt injury on forehead, broken upper right second front tooth, nose bleeding and loss of consciousness.

    III. In Vincent Mbogholi vs Harrison Tunje Chilyalya (2017) eKLR the injuries suffered were a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and Bruises on the left forearm, right foot and right big toe. The Appellate court upheld the award of KShs.300,000/=.

43. I have considered the authorities above and the nature of the injuries suffered by the Respondent and I find that the Kshs 550,000/= awarded as general damages by the trial court was fair and was reasonable compensation for the injuries suffered.

44. With regards to the special damages, the Respondent pleaded and particularized them as follows:-

    Medical Expenses Kshs 50/=

    Medical Report Kshs 6,500/=

    Copy of records Kshs 1,100/=

45. The Respondent only produced the receipt for Medical Expenses as P.Exh 4, a receipt for the Medical Report by Dr. Morebu as P.Exh 2 a receipt of motor vehicle search as P.Exh 7.

46. From the above, it is my finding that the Respondent pleaded and proved his claim on special damages and I uphold the award of Kshs 7,500/= as awarded by the trial court.

47. With regard to the future medical expenses, Dr. Morebu stated that the Respondent would need Kshs 350,000/=. This was strenuously opposed by the Appellant in this Appeal who stated that according to Dr. Malik, the Respondent did not suffer any fracture and thus there was no need to award future medical expenses.

48. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of Tracom Limited & another vs Hassan Mohamed Adan (2009) eKLR, the Court of Appeal 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 vs. 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..."

49. The prayer for future medical expenses was pleaded in the Plaint and was supported by Dr. Morebu's (PW2) testimony. As earlier stated, I was not persuaded by Dr. Malik's Medical finding that the Respondent did not suffer a fracture. It is my finding therefore that the award of Kshs 350,000/= was reasonable and I uphold the same.

50. In the final analysis, there is no reason for this court to interfere with the final award of the trial court as both awards for general and special damages were reasonable and just. I have found no evidence to suggest that the trial court acted on the wrong principles when it arrived at its decision.

51. In the end, the Memorandum of Appeal dated 19th September 2022 has no merit and is dismissed. The Respondent shall have the costs of the Appeal and the costs in the original suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Oduor for the Appellant, Ms. Kusa holding brief for Ms. Gogi for the Respondent and Siele (Court Assistant).