



**Wanguba v Karisa (Civil Appeal 231 of 2019)
[2023] KEHC 2055 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 231 OF 2019
F WANGARI, J
MARCH 10, 2023**

BETWEEN

FRANCIS WANGUBA APPELLANT

AND

SANDE CHARO KARISA RESPONDENT

(Being an appeal from the Judgement and Decree of the Mombasa Senior Principal Magistrate Hon. F. Kyambia delivered in Mombasa Chief Magistrate Civil Case No. 1840 of 2016 15th November, 2019)

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable F. Kyambia, Senior Principal Magistrate on 15th November, 2019. The Appellant being dissatisfied with the said judgement has preferred this appeal.
2. I note that from the Memorandum of Appeal, it appears that the Appellant appealed against the entire judgement and decree. However, from the Appellant's submissions, the appeal is only partial on the aspect of award of future medical expenses by the Lower Court. I equally take note of the fact that liability was agreed at the ratio of 30:70 in favour of the Respondent before the Lower Court.
3. The Appellant preferred the following two (2) grounds of appeal in urging this court to set aside the award of Kshs. 250,000/= as future medical expenses in the judgement delivered on 15th November, 2019: -
 - i. That the Learned Trial Magistrate erred in law and fact in making an award for Kshs. 250,000/= for future medical expenses without the same being pleaded and prayed for.



- ii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that future medical expenses or costs are a special damage that must be pleaded specifically with particularity and be strictly proved.
4. He therefore sought for the award of Kshs. 250,000/= for future medical expenses be set aside and the same be dismissed with costs. Directions were taken to have the appeal disposed of by way of written submissions on 28th February, 2022. The Appellant complied by filing his submissions on 31st March, 2022. On 6th April, 2022, an application by the Respondent's Counsel to be granted leave to withdraw from acting was filed. The same was fixed for hearing on 26th April, 2022.
5. I note from the record that the application was served upon the Appellant's Counsel but not on the Respondent. The court directed that the same be served upon the Respondent and the same be heard on 5th July, 2022.
6. Having perused the record, it appears that the said application fell by the wayside. On 19th January, 2023, the court fixed the matter for judgement and the Respondent Counsel was given liberty to file their application to cease from acting but at the time of writing this judgement, I note that the same had not been done. Similarly, the Respondent did not file any submissions in relation to the appeal. In his submissions, the Appellant relied on various decisions in support of his position in relation to the appeal.
7. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
8. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the Appellant. To be able to ascertain whether the judgement on future medical expenses ought to stand or otherwise, I will carefully revisit the record.
9. The Respondent vide a plaint dated 21st September, 2016 and filed on 7th October, 2016 sought for general and special damages from the Appellant for an accident that allegedly occurred on 10th February, 2016 along Mombasa – Malindi Road near Pirates Area occasioning the Respondent serious injuries. The suit was defended. The matter was fully heard and through a judgement delivered on 15th November, 2019.
10. The Lower Court found in favour of the Respondent. Liability was agreed at the ratio of 30:70 in relation to the Respondent. The Lower Court's judgement was thus only on quantum of damages. The Appellant being aggrieved by part of this judgement more so on the limb of future medical expenses has preferred this appeal.

Appellant's submissions

11. The Appellant while citing the case of *Herbert Hahn v Amrik Singh* [1985] eKLR submitted that the Lower Court before awarding future medical expenses as a special damage ought to have ensured that the same was pleaded with particularity before being strictly proved. Further reliance was placed in



the case of *Catherine Gatwiri v Peter Mwenda Karaai* [2018] eKLR for the principles laid down for awarding future medical expenses.

12. The case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR was cited in extenso where the Court of Appeal upheld the High Court's decision refusing to award future earnings which had not been pleaded. The Appellant therefore urged that there being no pleadings for future medical expenses pleaded specifically with particularity, the magistrate had erred thus the award ought to be set aside. He thus urged that the appeal be allowed with costs.

Respondent's submissions

13. As I noted at the onset, the Respondent despite being granted ample time to either file his submissions or the Counsel to cease from acting, the same was never done. As I deliver this judgement, I do so without the benefit of the Respondent's submissions.

Analysis and Determination

14. After considering the pleadings, proceedings, submissions and the law, I find that there is only one (1) issue for determination: -
 - a. Whether the award made by Lower Court on the head of future medical expenses was merited.
15. This appeal concerns the award of damages in accident claims. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. As was held by the Court of Appeal in *Stanley Maore v Geoffrey Mwenda* [2004] eKLR, in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
16. Based on the record as well as the Appellant's submissions, it is clear that the issue of liability is not in contest and I thus proceed to consider the quantum of damages only under the head of future medical expenses. At this juncture, it is imperative that I caution myself on the extent with which this court as an appellate court can interfere with an award on damages. It must be shown that the trial court in awarding the damages took into consideration an irrelevant factor or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage or it should be established that a wrong principle of law was applied.
17. Further, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. (See *Mary Wanjiku Gachigi v Ruth Muthoni Kamau*, Civil Appeal No. 172 of 2000, Tunoi, Bosire and Owuor JJA)
18. The issue for determination in this appeal is whether the Lower Court erred in awarding the Respondent a sum of Kshs. 250,000/= as future medical expenses. The injuries suffered by the Respondent can be summarized as follows: -
 - a. Comminuted and displaced fracture of the right femur;
19. Dr. S.K. Ndegwa in his medical report which was produced as an exhibit concluded that the injuries suffered by the Respondent were severe bone injuries and in his opinion, he recommended that the



Respondent undergoes a corrective surgery at a cost of Kshs. 250,000/= at AIC Kijabe Cure Hospital. In his judgement, the Trial Magistrate held as follows: -

“Dr. Ndegwa had recommended corrective surgery at estimated sum of Kshs. 250,000/=. There was no alternative evidence on costs of the surgery. I therefore award the Plaintiff Kshs. 250,000/= that he can undergo corrective surgery as recommended...”

20. This is the finding that culminated with this appeal. Authorities on future medical expenses is legion. It is trite that they have to be particularly pleaded and strictly proved. The Court of Appeal in *Tracom Limited & Another v Hasssan Mohamed Adan* [2009] eKLR had the following to say: -

“...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...”

21. In the same decision, the court cited its predecessor’s decision in *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91 cited by the Appellant herein where it was held as follows: -

“...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...”

22. On the above binding authorities, I have no doubt in my mind that before any award is made under the rubric of future medical expenses, a party ought to plead the same specifically and lead evidence in prove thereof. From the Lower Court’s judgement reproduced above, it is clear that there was no definitive finding on whether the said future medical expenses had been pleaded or not. This court has a duty to review the record and arrive at its own independent conclusion with the attendant caution not to substitute its own finding with that of the Trial Court had it heard the case at the first instance.

23. I have perused the plaint dated 21st September, 2016 and filed on 7th October, 2016. In prayer (c) of the Respondent’s prayers, I note that there is a prayer for damages for future medical care. To this end, I have no doubt in my mind that the prayer for future medical care was made. However, what is missing is the specific figure which ought to have been pleaded. This court’s consideration is whether at the time of filing the case, the Respondent was aware of the future medical expense required. I have perused through Dr. S.K. Ndegwa’s medical report. The same is dated 31st August, 2016.

24. The plaint was filed on 7th October, 2016, a period of more than one (1) month from the time the medical report was prepared. In the Respondent’s list of documents which was filed on the same date with the plaint, the report and the receipt in support appears as the first documents in the said list. Therefore, at the time the Respondent filed the suit, he knew the amount with certain degree of particularity. I say so because at the time the doctor prepared the report, he specifically ascertained that the Respondent would require a sum of Kshs. 250,000/= for corrective surgery.



25. In *Tracom Limited & Another v Hassan Mohamed Adan* (*supra*), the Court of Appeal held as follows:

“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...”

26. In the body of the plaint, the Respondent did not plead future medical expenses. The issue of future medical care only appeared in the prayers and the same was not particularized. I take cognizance that no two cases are the same and each has to be decided on its own peculiar circumstances and merit. Unlike in *Tracom* case above, the Respondent knew with a certain degree of exactness of how much future medical costs he would require.

27. Having not pleaded the same in line with the principles set by various decided cases, I have no doubt in holding that the Learned Trial Magistrate erred in awarding this limb. I therefore proceed and set aside the award of Kshs. 250,000/= as future medical expenses.

28. The other awards on general and special damages were not contested and I shall therefore not disturb them. Though the Appellant has succeeded, I note that the appeal was only on part of the judgement and not the entire judgement. Whereas costs follow the event, they are also in the discretion of the court and in this case, the order that best commends itself to me is that each party shall bear his own costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2023.

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F. WANGARI

JUDGE

In the presence of:

Jengo Advocate for the Appellant

Musyoki Advocate for the Respondent

Guyo, Court Assistant

