



REPUBLIC OF KENYA



KENYA LAW
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**Kiriha v Matiamo (Civil Appeal E012 of 2021)
[2023] KEHC 3856 (KLR) (Civ) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E012 OF 2021

JN MULWA, J

MAY 3, 2023

BETWEEN

GEOFFREY KIMANI KIRIHA APPELLANT

AND

FLORENCE AWUOR MATIAMA RESPONDENT

(Being an appeal against the judgment and decree at the Chief Magistrates Court at Milimani in CMCC No. 42 of 2019 delivered by Hon. G. A. Mmasi (SPM) on 18th December 2020)

JUDGMENT

1. This is an appeal against quantum. Vide an amended Complaint dated 9th May 2019, the Respondent instituted Milimani CMCC No. 42 of 2019 against the Appellant and sought for general and special damages arising from a road traffic accident that occurred on 19th February 2017 along North Airport Road. The accident involved motor vehicle registration number KCC 291J in which the Respondent was travelling as a passenger and motor vehicle registration number KCF 793A belonging to the Appellant. It was pleaded that on the material day, motor vehicle registration number KCF 793A was so negligently driven and managed that it lost control and violently hit motor vehicle registration number KCC 291J causing it to veer off the road into a ditch. As a result, the Respondent sustained severe bodily injuries for which she sought compensation from the Appellant.
2. The Appellant denied the Respondent's claim and contended that if at all the accident occurred then it resulted from the negligence of the Respondent and the driver of motor vehicle registration number KCC 291J.
3. Upon trial, the lower court held the Appellant wholly liable for the accident and entered judgment for the Respondent as follows: general damages at Kshs 700,000/-, cost of future medical expenses at Kshs 200,000/-, special damages at Kshs 398,079.13 and costs of the suit. Aggrieved by the said decision,



the Appellant lodged the instant appeal vide a Memorandum of Appeal dated 14th January 2021 on the following grounds:

1. The Learned Magistrate erred in law and in fact in awarding excessive damages not commensurate with the injuries pleaded;
2. The Learned Magistrate erred in law and in fact by awarding future medical expenses that were not pleaded.
3. The Learned Magistrate erred in law and in fact by not considering the facts, evidence, submissions and case law cited by the Appellant.
4. The appeal was canvassed through written submissions which this court has duly considered alongside the grounds and Record of Appeal. The issues that arise for determination are two fold thus:
 - a. Whether the learned magistrate's award of Kshs 700,000/- for general damages was erroneous and highly excessive.
 - b. Whether the learned magistrate erred by awarding future medical expenses.

Whether the learned magistrate's award of Kshs 700,000/- for general damages was erroneous and highly excessive.

5. The Appellant faulted the learned magistrate for making an award that was not commensurate with the injuries sustained and for using wrong principles to arrive at the award. He submitted that there were two medical reports on record but the learned magistrate considered the report by Cyprianus Okoth Okere and ignored that of Dr. W. M. Wokabi, which was more recent and controverted the former's assessment of the disability percentage suffered by the Respondent. The Appellant also contended that the trial court failed to consider his proposal of an award of Kshs 100,000/- for of general damages and the comparable decisions cited in his submissions filed therein. He now proposes that the award of Kshs 700,000/- be reduced to a range between Kshs 300,000/- to Kshs 400,000/-.
6. The Respondent on the other hand submitted that it has not been shown that the assessment by the trial magistrate was founded on the wrong principles of law. She submitted that the Appellant's proposal in the lower court for an award of Kshs 100,000/- on general damages was based on a much older authority that relates to an accident that occurred way back in 2014. Further, it was her submission that courts are not bound by submissions and authorities cited therein but by the pleadings filed in court and the law. In her view therefore, the learned trial magistrate's award under this head was reasonable taking into account the injuries sustained and comparable authorities adjusted to the current inflation trends.
7. It is well settled that an award of damages is an exercise of discretion by the trial court and thus an appellate court will not interfere with such discretion unless there are good grounds to do so. In *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, the Court of Appeal stated thus:

“An appellate court will not disturb an award for general 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...”



8. Further, an award of damages for personal bodily injuries should be commensurate to the injuries suffered and comparable to those made in past similar cases. In Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR, Majanja J. stated thus:
- “The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”
9. At paragraph 6 of the Amended Complaint, the Respondent particularized his injuries as compound fracture of the left tibia as swelling on the left leg. During trial, PW1 Florence Owuor Matiyama, the Respondent herein, testified that she fractured her left foot as a result of the accident and sustained bruises. She was treated at Nairobi Women Hospital where she was admitted for a period of eight days between 19th February 2017 to 27th February 2017 and had a minor surgery whereupon a metal was placed in her foot but was removed in March 2020.
10. The injuries were confirmed by the P3 form dated 19th February 2017 and two medical reports which were produced by consent of parties without calling the makers. The first medical report of Dr. Okere dated 28/09/2017 was not included in the Record and Supplementary Record of Appeal filed herein. However, what is clear from the judgment of the trial magistrate who saw the report is that the two reports were similar as to the injuries suffered (compound fracture of the left tibia and fibula) and the fact that a metal k-nail was fixed to help unite the fracture. The point of departure was on the doctor’s assessment of the degree of permanent incapacity suffered by the Respondent and costs for removal of the metal implant.
11. Dr. Okere assessed the degree of permanent incapacity at 20% while the second medical report of Dr. Wokabi dated 19/10/2019 assessed the same at 6%. Upon examination, Dr. Wokabi observed that the Respondent had no deformity on the left leg and the most recent x-rays showed progressive bone union of the fracture, and that the bone had clinically united in good position and the leg was reasonably rehabilitated. He stated that once the K-nail which was very close to knee joint is removed, the Respondent would be able to kneel and squat. He opined that the earlier assessment of 20% by Dr. Okere had been overstated for a fracture which was expected to unite well. It was also his opinion that the Respondent would need to have the metal implant removed at Kshs 100,000/- in a medium cost hospital or nursing home like Nairobi Women’s Hospital. He opined that the estimation of Kshs 250,000/- for the same by Dr. Okere was overstated.
12. In making her award on general damages, the learned magistrate considered the authorities cited by the parties duly took note of the injuries sustained by the Respondent as well as the divergent expert opinion on the assessment of permanent incapacity. Was that award excessive in the circumstances?
13. In a recent case of Samuel Nene Njihia & another v Godfrey Alela Alucho – High Court Civil Appeal No. E089 of 2021 (Unreported), the Respondent suffered compound fractures of the right tibia and fibula with a permanent disability of 8%. This court set aside the trial court award of Kshs 1,200,000/- for general damages and substituted it with a sum of Kshs 700,000/-. In Aloise Mwangi Kabari v Martin Muiya & another [2020] eKLR, the plaintiff had sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg. The appellate court reviewed the trial court’s award of Kshs 300,000/- for general damages upwards to Kshs 500,000/- in 2020. In Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR, the plaintiff sustained compound fractures of the tibia/fibula bones on the right leg in addition to deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury and soft tissue injury on the left lower



limb involving the high and ankle region. The appellate court set aside the trial court award of Kshs 600,000/- and substituted it with an award of Kshs 400,000/- in 2020.

14. In view of the above authorities, I find that the trial court's award of Kshs 700,000/- was not inordinately excessive but a reasonable compensation for the injuries suffered. The court will not therefore interfere with the trial court's discretion in this regard.

Whether the learned magistrate erred by awarding future medical expenses.

15. As regards the costs of future medical expenses, the Appellant took issues with the fact that this expense was awarded yet the Respondent had neither pleaded nor particularized as a special damage, arguing that a prayer for future medical expenses cannot be introduced by way of the medical reports submitted by the parties during the hearing. To support his submissions on this, reliance was placed on the case of *Bush Hauliers Limited v Peter Mulwa Ngulu* (2020) eKLR and *Noel Israel Owiti v Joseph Magero & another* [2020] eKLR.
16. The Respondent admitted that in order to be granted, future medical expenses ought to be pleaded and proved. However, relying on the case of *Pascal IbaGarama v Jackson Njeru Njoka* [2019] eKLR, submitted that even if not pleaded, future medical expenses can still be awarded if medical reports prove that the same is necessary. She noted that in her case, the medical report by of Dr. Okere dated 28th September 2017 recommended future medical expenses at a cost of Kshs 250,000/- and thus the award was properly founded.
17. It is not in dispute that the Respondent did not specifically plead for future medical expenses in her Amended Plaintiff. The law is very clear that future medical expenses must be pleaded and proved. The Court of Appeal in the case of *Tracom Limited & Another v Hasssan Mohamed Adan* [2009] eKLR 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:

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“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.”

18. The court has carefully perused the Amended Plaintiff dated 9th May 2019. This only came up in the two medical reports adduced in evidence. There was therefore no basis for the trial court to award future



medical expenses. Indeed, even in the case of *Pascal IbaGarama v Jackson Njeru Njoka* (*supra*) cited by the Respondent, the Appellant therein had specifically pleaded and proved future medical expenses.

19. The court therefore finds that the trial court erred by awarding the Respondent future medical expenses and the same must be set aside.

Disposition

20. The court finds that the appeal is partly merited and succeeds as follows:
- a. The trial court's award of Kshs 200,000/- for future medical expenses is hereby set aside.
 - b. The awards of Kshs 700,000/- for general damages, Kshs 398,079.13 /- for special damages are affirmed.
 - c. The amount payable to the Respondent in damages shall now be a total of Kshs 1,098,079.13.
 - d. There shall be no orders as to costs of the appeal.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA

JUDGE.

