Owade & another v Njoroge (Civil Appeal E005 of 2022)
[2023] KEHC 18567 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18567 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E005 OF 2022

FN MUCHEMI, J

JUNE 15, 2023

BETWEEN

SAMWEL ODHIAMBO OWADE ..... 1ST APPELLANT

KENYA POWER & LIGHTING COMPANY ..... 2ND APPELLANT

AND

LITTLE JOHN MURAGE NJOROGE ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. K. M. Njalale (PM) delivered on 12th January 2022 in Karatina SPMCC No. 59 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Karatina Principal Magistrate in SPMCC No. 59 of 2020 whereby liability was apportioned at the ratio of 30:70 with the appellants bearing 70%. The respondent was awarded damages of Kshs. 1,651,672/- for injuries sustained in a road traffic accident along Karatina Nyeri road at Giagatika junction.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 7 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in finding the respondent proved his case on a balance of probability and apportioned liability at 30:70.

    b. The learned trial magistrate erred in law and misdirected herself as to the extent and nature of the respondent's injuries and thereby erred in law in her assessment of damages which were excessive;

c. The learned trial magistrate erred in law and in fact in awarding future medical expenses to the respondent without any evidence from the record to support such a finding and thus took into account extraneous matters.

3. Parties put in written submissions to dispose of the appeal.

Appellants' Submissions

4. The appellants submit that the court below erred in apportioning liability at 30:70 for the respondent did not prove his case on a balance of probability. The appellants rely on the case of *Cook v Lewis* [1951] SCR 830 and submit that the 1st appellant and the respondent testified that there was no zebra crossing at the point at which the respondent crossed the road. Further, the appellants submit that the court acknowledged that at the time of crossing the road, the respondent was conversing with other people and thus was distracted. Thus, the appellants submit that the respondent was not keen as he was crossing the road and that he further crossed the road at an undesignated area and therefore it was erroneous for the trial court to apportion liability at 30:70. The appellants submit that they are not liable for the accident and if the honourable court is persuaded otherwise, they submit that liability ought to have been apportioned at 50:50 as the respondent did not establish a prima facie case as he did not call evidence of an eye witness despite the accident having happened in broad daylight.

5. It was further submitted that in making assessing on general damages and future medical expenses, the magistrate solely relied on the testimony of the respondent and did not take into account the testimony of Dr. Wokabi, an expert witness. Consequently, the magistrate awarded damages excessive to the respondent which ought to be reduced. The appellant relies on the cases of *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR and *Charles Oriwo Odeyo v Apollo Justus Andabwa & Another* [2017] eKLR and submit that the magistrate made an award of damages which was too high and thus unjustified as she did not use comparable decisions. On the issue of special damages, the appellants submit that the award was inordinately high as the respondent did not prove any monetary loss yet he confirmed that an unspecified portion of his hospital bill was not paid by him but by his insurer, National Hospital Insurance Fund (NHIF).

The Respondent's Submissions

6. The respondent submits that he had crossed the road at the time of the accident and was talking to a motorcycle rider. The respondent states that it is a notorious fact that motorcycle riders park at the side of the road. The respondent further submits that the appellants did not see him and they testified that the accident occurred in a flash. The 1st appellant did not testify that he took any measures to avoid the accident. As such, the respondent submits that the finding on liability should not be disturbed.

7. The respondent argues that the decision of *Cook v Lewis* (1951) SCR 830 cited by the appellants is irrelevant in the current matter as it envisages a scenario where the two parties were accused of causing an accident and were both found jointly and severally liable. The respondent argues that the appellant have not brought any third party proceedings seeking contribution and indemnity in the causation of the accident.

8. The respondent relies on the case of *Hashim Mohamed Said & Another v Lawrence Kibor Tuwei* (2018) eKLR and submits that an appellate court can only interfere with an award of damages if the court finds that the trial court made an error of principle or did not consider relevant factors. As such, the respondent contends that the appellants have failed to bring any proof of alleged misdirection in awarding quantum for Kshs. 1,200,000/- as general damages. On the issue of special damages, the respondent submits that the same were particularized in the plaint dated 19th May 2021 and supporting

documents were produced. The respondent further submits that although he made a claim of Kshs. 451,308.35, the trial court awarded Kshs. 264,172 as having been proved.

9. The respondent submits that as per the medical report by Dr. Muriuki dated 24th May 2019, the removal of the metal implant is voluntary and since it is uncomfortable and ought to be removed at a cost. The respondent thus contends that the sum of Kshs. 187,500/- is reasonable and the trial magistrate did not misdirect herself in the award.

10. The respondent argues that the appeal is frivolous and ought to be dismissed. The appellants have not proved how the trial court misdirected itself and which wrong principles were considered. Additionally, the appellants have not shown that the award of damages for the serious injuries was manifestly excessive. Moreover, the respondent submits that the trial court relied on the authorities cited by him which were comparable to the injuries sustained. Thus all the relevant factors were considered in the award of damages in this matter.

Issues for determination

11. The issues for determination are as follows:-

    a. Whether the trial magistrate erred in apportioning liability at 30%:70% against the appellants.

    b. Whether the learned magistrate awarded excessive general damages.

    c. Whether the claim for special damages was specifically pleaded and proved.

    d. Whether the claim for future medical expenses was proved.

The Law

12. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1 EA 123:

> "... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

13. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] KLR 348, observed that:-

> "An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

15. Therefore this Court is under a duty to analyse and revisit the facts as presented in the court below. analyse the same, evaluate them and arrive at its own independent conclusions, and remembering that the trial court had the advantage of hearing the parties.

Whether the trial magistrate erred in law and in fact in apportioning liability at 30:70 against the appellants.

16. The appellants argued that the trial court erred by finding that the respondent had proved his case against them and thus arrived at apportioning liability at 30:70 against them. According to the appellants, the respondent ought to be solely blamed for the accident, as he did not call any witness to testify on his behalf, he was distracted as he was crossing the road and that he crossed at an undesignated area. The respondent argues that he had already crossed the road and was talking to a motorcycle rider who was parked at the side of the road. He blames the appellants for causing the accident as the 1st appellant, who was the driver of motor vehicle registration number KBY 486H, testified that the accident occurred in a flash and that he did not take any measures to avoid causing the accident.

17. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that:-

> 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.

18.. Therefore, a party who seeks for judgment or declaration of any legal right dependent on a particular fact or set of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.

19. The respondent testified that on the material day he was walking from Tumutumu Hospital towards Giagatika junction. Upon reaching the said junction, he crossed the road to board a matatu and just as he was about to complete his last steps crossing the road, motor vehicle registration number KBY 486H suddenly appeared and knocked him down. He further testified that the said motor vehicle was speeding at the time of the accident.

20. The 1st appellant, the driver of motor vehicle registration number KBY 486H testified that he was driving from Marsabit driving towards Nairobi when he reached Tumutumu junction and the accident occurred. According to him, the accident occurred in a flash as the respondent appeared from nowhere. The 1st appellant further testified that he tried to swerve to avoid hitting him. It is not disputed that an accident did occur and whereas the respondent was hit by appellant's motor vehicle registration number KBY 486H. The issue in dispute is how the accident occurred and who is to blame for the accident. The court found that both parties were to blame for the occurrence of the accident as the respondent crossed at an undesignated area and stopped to talk to a motorcycle rider whereas the 1st appellant failed to take due care and/or attention and neither did he brake nor did he see the respondent. It is trite law that where a court has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal unless in exceptional cases. This was illustrated in the decision of *Khambi and Another v Mahithi and Another* [1968] EA 70 where the court held:-

> It is well settled that where a trial judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

21. The evidence of both the respondent and the 1st appellant, in my view demonstrate that both parties contributed to the occurrence of the accident. The respondent crossed the road at a place where there was no pedestrian crossing and was hit by the appellant's vehicle almost at the edge of the road. There was no evidence from the appellant that he tried to avoid the accident by either breaking or hooting. Furthermore, the 1st appellant testified that the accident happened in a flash which shows that he was probably over speeding and did not take due care as he drove on the road. Had he done so, he would have noticed the respondent as he started crossing the road and avoided the accident. The respondent on the other hand did not look left and right of the road before crossing.

22. It is my considered view that the trial court apportionment of liability was based on the evidence on record and ought not to be interfered with. The appellants have not demonstrated that the court below erred or that the apportionment was manifestly erroneous.

Whether the learned magistrate awarded excessive damages in view of the injuries sustained.

23. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

24. Similarly in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

25. The doctor's report showed that the respondent suffered the following injuries:-

    a. Open tibia and fibula fracture;

    b. Swelling with exposed bone on the right leg;

    c. Bruises over the head and back;

    d. Right leg shortening and internally rotated bone.

26. The trial magistrate awarded a sum of Kshs. 1,200,000/- for general damages for pain and suffering. The appellants submit that the said award is excessive and is not justifiable in comparison to the injuries

sustained by the respondent. The court was urged to award a sum between Kshs. 350,000/- and Kshs. 360,000/-. The respondent relies on the case of *George William Awuor v Beryl Awuor Ochieng* (2020) eKLR and submits that the sum of Kshs. 1,200,000/- is adequate compensation for the injuries he sustained. He further submitted that the injuries were not disputed and were confirmed by the medical reports of the parties by Dr. Z.Githui and Dr. Wokabi.

27. In the court below, the appellants relied on the case of *Waroi Elly v Catherine Mueni Mwangangi* [2020] eKLR where the plaintiff sustained a fracture of the right femur, soft tissue injuries to the head and bruises of the right knee with a permanent incapacitation of 20%. The Court of Appeal reduced an award of Kshs. 700,000/- to Kshs. 350,000/-. The appellants also relied on the case of *Ben Kiptum Ego v Joseph Karanja* [2009] eKLR where disability was assessed at 6% and the Court of Appeal upheld the amount of Kshs. 360,000/- awarded by the trial court. The respondent relies on the case of *George William Awuor v Beryl Awuor Ochieng* (2020) eKLR and submits that on appeal, the Judge awarded a sum of Kshs. 1,200,000/- for similar injuries. He further relied on the case of *Francis Ndungu Wambui & 2 Others v VK (A minor suing through next friend and mother MCWK)* (2019) eKLR where the plaintiff sustained a compound fracture of tibia fibula, soft tissue injuries and loss of consciousness and the court on appeal awarded Kshs. 1,000,000/-. In the case of *Ndathi Mwangi & 2 Others v Benson Lumumba Ndivi* (2018) eKLR, the court awarded a sum of Kshs. 1,250,000/- for similar injuries. The respondent further relied on the case of *James Gathirwa Ngugi v Multiple Hauliers EA Ltd & Another* HCCC No. 658 of 2009 where the court awarded a sum of Kshs. 1,500,000/- for a compound comminuted fracture of the right tibia, compound comminuted fracture of fibula and other soft tissue injuries.

28. The learned trial magistrate indicated that she took into account the nature of the injuries, the authorities cited, her dutiful research and the current inflation rate before making the award of Kshs. 1,200,000/-. It is my considered view that the learned magistrate ought to have also taken into consideration the fact that the injuries suffered by the respondent were not comparable to the ones in the decisions cited by the respondent. The injuries cited by the respondent were more serious than those suffered by him. This is a factor that the magistrate ought to have addressed in her judgement. I am convinced that this is a suitable case for the exercise of discretion of this court to interfere with the award of general damages for the reason that the quantum awarded was manifestly excessive as to warrant being addressed. Due to inflation factors, I am of the view that a reasonable and adequate award that would suffice for general damages for pain and suffering is Kshs.1,000,000/- which I hereby award. The earlier award of Kshs.1,200,000/- is hereby set aside.

Whether the claim for special damages was specifically pleaded and proved.

29. The cardinal legal principle is that special damages must not only be specifically pleaded, but must be specifically proved. This principle was enunciated in the Court of Appeal case in *Hahn v. Singh* Civil Appeal No. 42 of 1983 [1985] KLR 716, where it was held:-

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequences 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."

30. It is evident that special damages were pleaded in the Amended plaint to the extent of Kshs. 451,308.35/-. The appellants argue that the respondent did not incur monetary loss as he testified that an unspecified portion of his hospital bill was paid by NHIF. The respondent submits that although he specifically pleaded for Kshs. 451,308.35/- as special damages and produced supporting documents,

the trial court awarded Kshs. 264,172/-. I have perused the court record and noted that the expenses which were specifically pleaded in the plaint were proved through documentary evidence as follows:-

a. Dr. Z. G. Muriuki attendance Kshs. 5,000/-

b. Taxi costs Kshs. 57,000/-

c. Medical expenses Kshs. 54,329.05/-

d. Medical expenses Kshs. 135,979.30/-

e. P3 Form Tumutumu Kshs. 5,000/-

f. Monks walking frames and cclutches Kshs. 5,800/-

g. Total Kshs. 263,108.35/-

In my considered view, the special damage of Kshs.264,172/- awarded were pleaded and proved. the figure of Kshs.264,172/- and of Kshs263,108.35/- have a negligible difference that would not justify interference with the award by this court.

Whether the claim for future medical expenses was proved.

31. It is trite law that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. Ringera J (as he then was) in *Jackson Wanyoike v Kenya Bus Services Ltd & Another* Nairobi (Milimani) HCCC No. 297 of 2002 held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of appeal in *Sheikh Omar Dahman t/a Malindi Bus v Dennis Jones Kisomo* Civil Appeal No. 154 of 1993 held that cost of future medical operation is special damages, which must be pleaded.

32. Similarly in the Court of Appeal case of *Tracom Limited and Another vs Hassan Mohammed Adan* [2009] eKLR in the following words:-

> " 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 Limited 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 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 specifically 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."

33. The respondent specifically pleaded for future medical expenses although he did not quote a specific amount. However, the evidence of Dr. Zachary Githui Muriuki was that the cost of future medical expenses would be Kshs. 150,000/-. This included the removal of the metal implant, Kshs. 24,000/-, physiotherapy, quadruped walking frames at Kshs. 7,500/- and follow up orthopedic clinics at Kshs. 6,000/-. He further testified that the removal of the implant was on a voluntary basis and he recommended that the respondent remove the implant as he was complaining of numbness and weakness. To support his contentions, the doctor produced his medical report in court. Dr. Wokabi gave a contrary view and testified that the respondent did not need future medical attention. He further testified that it was not necessary to remove the implant as the respondent's complaints were not because of the implant. He estimated the cost of the surgery to Kshs. 80,000 – 100,000/-and costs of physiotherapy per session to 1000 to 2000 per session.

34. The respondent testified that the metal implant caused him numbness in the lag and that his walking gait was poor and awkward. He further stated that due to the implant, he felt cold when it was cold and it got heated when it was hot. Dr. Muriuki recommended removal of the implant and it is the right of the respondent to have it done to alleviate pain and live in optimum health. As such, it is my considered opinion that the sum of Kshs.187,500/- as future medical expenses was pleaded and proved through medical evidence. The cost of future medical expenses awarded by the court fell within the range assessed by the Dr. Zachary Muriuki. It was in order for the magistrate to award the medical expenses for future procedures. The removal of the implant was necessary and cannot be referred to as voluntary.

35. I find this appeal partly successful and compute the award as follows:-

    a. General damages 1,000,000/-

    b. Special damages 264,172/-

    c. Future medical expenses 187,500/-

    Total 1,451,672/-

    The total figure is subject the ratio of apportionment of 30:70% ratio.

36. Each party will meet its own costs of this appeal.

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JUNE, 2023.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 15TH DAY OF JUNE 2023.