HKK (Minor suing through next friend and father CKK) v Faith Homes of Kenya (Civil Appeal E002 of 2021) [2023] KEHC 19535 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CIVIL APPEAL E002 OF 2021

AC MRIMA, J

JULY 6, 2023

BETWEEN

HKK (MINOR SUING THROUGH NEXT FRIEND AND FATHER CKK) ..... APPELLANT

AND

FAITH HOMES OF KENYA ..... RESPONDENT

(Being an appeal arising out of the judgment and decree of Hon. M. M. Nafula (Principal Magistrate) in Kapenguria Senior Principal Magistrate's Court Civil Case No. 27 of 2019 delivered on 19th May, 2021)

JUDGMENT

1. The appeal subject of this judgment is only against the quantum of damages. It arose from the judgment and decree in Kapenguria Senior Principal Magistrate's Court Civil Case No. 27 of 2019 HKK (Minor suing through next friend and father CKK) (hereinafter referred to as 'the suit') which was delivered on 19th May, 2021.

2. Liability was agreed at 15%: 85% in favour of the Appellant in this appeal, HKK (Minor suing through next friend and father CKK), who was the Plaintiff in the suit.

3. Various exhibits were admitted by the consent of the parties and written submissions were subsequently filed.

4. The trial Court in its judgment rendered itself as follows: -

    a. Liability 85%

    b. General damages Kshs. 500,000/=;

    c. Special damages Kshs. 6,000/=

Total Kshs. 506,000/=

Less 15% contributory negligence the net comes to Kshs. 430,000/=

I also award the plaintiff costs of the suit and interest at normal court rates .....

5. Being dissatisfied with the above decision, the Appellant herein, preferred an appeal vide a Memorandum of Appeal dated and evenly filed on 11th June, 2021.

6. The Appellant mainly contended that the trial Court erred in failing to consider the evidence adduced. As a result, he opined that the trial Court arrived at a grossly low award on general damages and wrongly dismissed the claim for future medical expenses which it was claimed had been properly pleaded and proved.

7. The Appellant then prayed that this Court re-assesses the award on general damages and to also allow the claim on future medical expenses. He also sought for the costs of the appeal.

8. The Respondent opposed the appeal. It stood with the finding of the trial Court.

9. Parties canvassed the appeal by way of written submissions. They buttressed their rival positions and referred to some decisions in persuading this Court to find in each other's favour.

10. The Court has carefully considered the appeal in toto. It has read and understood the gist of the appeal, the pleadings, the proceedings, the impugned judgment, the submissions and the judicial authorities referred to by the parties.

11. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)

12. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

13. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.

14. Having laid down the law guiding the determination of this appeal, this Court will now deal with the twin issues raised by the Appellant.

15. On the issue of the award on general damages at Kshs. 500,000/=, this Court cannot find fault on it.

16. The trial Court considered the matter as a whole and arrived at its decision. It noted the injuries suffered by the Appellant and as captured in the exhibits produced. It also considered the decisions relied upon by the parties and demonstrated its concurrence or otherwise with the said decisions.

17. As the Appellant challenged the exercise of the Court's discretion, he had to prove that '.... the Magistrate, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage....'

18. Whereas the Appellant contended that the award on general damages was inordinately low, that seems not to be case. The Appellant did not sustain any fracture and fairly recovered save for the issue of future treatment.

19. Having said so, this Court finds no fault on the assessment of the general damages by the trial Court. Therefore, the appeal on this limb fails.

20. The next issue is the rejection of the claim on future medical expenses at trial.

21. The basis of the trial Court's refusal to award the claim was that it was not pleaded. That position seems not to be in tandem with the pleadings. Whereas the Appellant did not make any reference to future treatment expenses in the original Plaint filed, he, nevertheless, amended the Plaint and added paragraph 7A which reads as follows: -

> The Plaintiff shall require future treatment to correct weakness of the limb and stress syndrome at an estimated cost of Kshs. 200,0000/= which he claims from the defendant as future medical expenses.

22. Since the aspect of future medical expenses was properly pleaded, then this Court is duty bound to ascertain if the claim ought to have been allowed.

23. Courts have settled the award of future medical expenses. In general, future medical expenses are regarded as special damages within the larger rubric of general damages. As such, the expenses must be specifically pleaded and proved to justify any award.

24. The Court of Appeal in *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR extensively discussed this award and held as follows: -

> ...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 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...

25. Drawing from the above, it is of paramount importance that a Plaintiff must specifically plead for the award of future medical expenses in the pleadings. The same need not be specifically captured in terms of the exact costing, but there must, at least be, an approximate amount pleaded and evidence led.

26. In this matter, the need for future medical intervention on the Appellant was severally affirmed. The P3 Form noted a cerebral injury in the nature of diffuse axonal injury. The Discharge Summary from Mediheal Hospital which was produced as Plaintiff's Exhibit 5b also referred to the injury and noted that although there was an improvement on the healing process, the injury had caused certain behavioral changes. That was on 15th July, 2019 when the Appellant was discharged from hospital.

27. The Appellant was later examined by Dr. Joseph C. Sokobe on 2nd September, 2019. The Doctor also confirmed the injury and formed an opinion that the Appellant had '...developed post traumatic stress syndrome from which he requires future treatment at an estimated cost of Kshs. 200,000....'

28. All the Appellant's exhibits were produced by the consent of the parties. There was no challenge to the contents of any of the medical exhibits including the report by Dr. Sokobe.

29. If the Respondent was still doubtful as to whether there was need for future treatment on the Appellant, then it ought to have objected to the production of the medical report by the witness. In doing so, the Doctor would have attended Court and the Respondent would have accordingly examined him on the veracity of the contents of the report.

30. Whereas this Court is alive to the legal position that production of an exhibit is not ipso facto proof of its contents and that in some instances evidence ought to issue to ascertain the document's overall probative value, the position in this case needed no further proof since the basis of the future treatment costs was well demonstrated in the P3 Form, the Discharge Summary and the Medical Report.

31. In buttressing the foregoing, the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR rightly so held as follows: -

> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record. (emphasis added).

32. As said, the need for and the cost of the future medical treatment were well pleaded and proved in this matter. In such a case, the claim ought to have been granted.

33. It is on the basis of the above that this Court finds that the Learned trial Magistrate, with tremendous respect, erred in disallowing the claim.

34. The upshot is that the appeal on this limb succeeds.

35. In this appeal, whereas the Appellant was not successful in overturning the award on general damages, he triumphed on the award on future medical expenses.

36. In the end, the final determination of the appeal is as follows: -

    a. Liability is apportioned at the ratio of 15%: 85% in favour of the Appellant as against the Respondent.

    b. General damages for pain, suffering and loss of amenities awarded in the sum of Kshs. 500,000/=.

    c. Special damages awarded at Kshs. 6,000/=.

    d. Future Medical expenses awarded at Kshs. 200,000/=.

    e. The Appellant shall have the costs of the suit and the appeal together with interest at Court rates.

    f. For avoidance of doubt, the sums awarded are subject to the liability apportionment.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Miss. Warigi, Learned Counsel for the Appellant.

Mr. Omwenga, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.