Kamundi v Bedan (Civil Appeal E006 of 2023)
[2023] KEHC 19639 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E006 OF 2023

LM NJUGUNA, J

JULY 3, 2023

BETWEEN

FREDRICK NJERU KAMUNDI ..... APPELLANT

AND

JAMES NJIRU BEDAN ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon T. K. Kwambai S.R.M delivered on the 18.01.2023 Embu CMCC No. E021 of 2021.)

JUDGMENT

1. The appellant herein lodged the appeal before this court wherein he challenged the judgment of the trial court. The appellant sought to have the said judgment set aside and his prayers as enumerated in this appeal be granted. His memorandum of appeal enumerated the following grounds that:
    i. The learned trial magistrate erred in law and fact in failing to consider and find that the appellant had proved prima facie case with a high probability of success.
    ii. The learned trial magistrate erred in law and fact in failing to consider and find that the minor allegedly slipped and fell resulting in reinjury to the healing of the left femur fracture.
    iii. The learned trial magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that of comparable awards.
    iv. The learned trial magistrate erred in law and fact by failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury he has caused.
2. Reasons wherefore the appellant prayed that this appeal be allowed and judgment delivered on January 18, 2022 be set aside.

3. At the hearing of the suit, the respondent's evidence was that on September 29, 2020, he was travelling as a pillion passenger on motor cycle registration number KMEU 083U along the Embu – Kiritiri Road; when the appellant and/or his driver/employee/servant and/or agent so negligently drove/ managed and/or controlled motor vehicle KCQ 100M that he caused an accident thereby occasioning serious bodily injuries to the respondent herein.

4. The particulars of negligence were itemized in paragraph five (5) of the plaint and wherein the appellant sought for orders as enumerated thereon.

5. The appellant herein filed a defence in which he denied liability and further claimed that without prejudice, if the alleged accident occurred which was denied, then the same was to be entirely blamed on the respondent and the rider of motor cycle registration number KMEU 083U. Further that, the doctrine of res ipsa loquitir was inapplicable and the appellant thus was put to strict proof.

6. The respondent filed a reply to defence wherein he reiterated all the contents of the plaint in its ordinary and natural meaning and proceeded to put the appellant to strict proof thereof. Further, he went on to deny any negligence on his part and urged this court to grant the prayers in the plaint.

7. The trial court after considering the facts and evidence of the case, by a judgment delivered on January 18, 2023, reached a determination that the appellant was 100% liable against the respondent and awarded general damages of KES 700,000/=; future medical expenses of KES 550,000/=; special damages of KES 161,950/= and costs of the suit and interest from the date of the judgment.

8. It is the said judgment by the trial court that is subject of the appeal herein.

9. At the hearing of the appeal, directions were taken that the appeal be canvassed by way of submissions and both parties complied with the said directions.

10. The appellant merged his grounds of appeal by raising only one issue of determination to wit that the damages awarded under future medical expenses were not entitled.

11. It was stated that the respondent did not produce any evidence that the metal implant used to correct the minor's leg ought to be removed. That as a matter of fact, the report by Dr Ndirangu Karomo dated November 9, 2020, only indicated that due to the complexity of the fracture, the minor may require surgery to correct any deformity or malunion.It was argued that based on the report, the surgery was deemed necessary on condition that there was a deformity or malunion; that there was nowhere where it was mentioned that the metal plate placed in the minor's leg would need to be removed. Further, in reference to the medical report carried out after a period of one year by the appellant's doctor one Dr Nathan Khamala, the report dated December 30, 2021, the doctor did not recommend the removal of the metal plate and neither did he state whether its removal was necessary in the future. That for this reason, the award for future medical expenses was not necessary as there was no proof that the metal implant was to be removed at any given point in time.

12. In the same breadth, it was also argued that the deformity currently faced by the minor was as a result of the mismanagement of the fractured site following the fall of the minor. That the deformity was not a direct result of the injuries sustained by the minor during the accident but rather due to the mismanagement of his injury after the fall and therefore, the appellant should not be held liable for the damages that occurred during the injury which rendered the award for future medical expenses a misconception. Reliance was placed on the case of *Elijah ole Kool vs George Ikonya Thuo* [2001] eKLR and *Obwogi vs Aburi* [1995 – 1998] EA 255. That in reference to Dr Ndirangu's report, future medical intervention was only necessary in the event of a deformity which in the case herein, the same was not a direct result of the appellant's actions or omissions as the chain of causation was broken.

13. On costs, section 27(1) was brought into focus that the same follows the event and therefore. It was prayed that the appeal to be allowed with costs to the appellant.

14. The respondent on the other hand submitted that the finding by the trial court in terms of damages was not excessive and the court considered all the relevant evidence, submissions and authorities. That both doctors confirmed that the injuries and the treatment required a surgical intervention to correct the deformity caused by the malunion of the femur fracture. It was argued that the injuries sustained by the respondent as a result of the accident are not disputed but from the said reports, a future medical intervention was noted to be necessary. In the end, the respondent prayed that the appeal herein be dismissed for want of merit.

15. I have carefully considered the appeal, the evidence on record. I have also read the judgment by the trial court and I find that the main issue for determination revolves around the question whether the claim for damages for future medical expenses was proved.

16. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 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."

17. The appellant faulted the trial court and averred that it erred in reaching a determination that was never supported by the weight of evidence adduced.

18. The law on future medical expenses is well settled. The Court of Appeal in the case of *Tracom Limited & another vs 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 v 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..."

19. The respondent herein in his amended plaint amended on January 19, 2022 pleaded as follows:

    a. 'General damages for pain and suffering and loss of amenities, and future medical expenses'.

    b. Special damages.

20. Thus the Respondent pleaded for the future medical expenses.

21. On proof, I have perused the record of Appeal and found the two Medical Reports by Dr Ndirangu Karomo and Dr Nathan Khamala where both reports confirmed that the respondent will require future medical expenses and surgical intervention to correct the deformity caused by malunion of the femur fracture respectively. Therefore, I do find that under this head, the respondent pleaded his claim for Future Medical Expenses.

22. It is noted that the appellant's main contention is whether the removal of the said plate in future was necessary but of importance to note is the fact that both doctors were in agreement that the respondent will need a future medical intervention at an estimated amount of KES 550,000.00 and /or surgical intervention to correct the deformity caused by malunion of the femur fracture.

23. In the same breadth, the appellant argued that due to the respondent's fall, the deformity currently faced by the minor was as a result of the mismanagement of the fractured site following the fall of the minor. That the deformity was not a direct result of the injuries sustained by the minor during the accident but rather due to the mismanagement of his injury after the fall and therefore, the appellant should not be held liable for the damages that occurred during the injury which renders the award for future medical expenses a misconception.

24. For negligence to arise there must have been a breach of duty and breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event produces injury and without which injury would not have occurred.

25. The Learned Authors of Volume 28 of *Halsburys Laws Of England* (3rd Edition) say as follows at page 28:

> " Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability fallows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen."

26. In other words, causation is a matter of fact to be determined by common sense principles. Lord Wright said as follows in *Yorkshire Dale S.S. Co. Ltd. vs Minister of War Transport* [1942] AC 691, HL at p 706:-

> " .....the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.

27. As Lord Denning said in *Davies vs Swan Motor Co. (Swansea) Ltd*. [1949] 2 KB 291 at p 321;

> "the efficiency of causes does not depend on their proximity in point of time."

It is enough that the cause forms part of a chain of events which has in fact led to the injury. What cause will be effective? The Learned Authors of *Halsburys supra* at p 28 say as follows:-

> " In the absence of intervention by voluntary human action the original act is to be regarded as a cause of the injury, provided that its effect is still actively continuing and has not been superseded by some independent natural cause....If in fact the defendant's neglect of a proper precaution has caused the injury, the court will not enter into hypothetical inquiry to establish whether the Plaintiff's injury must necessarily have happened with or without the defendant's negligence."

28. In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff's injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence. In the *Oropesa* case [1943] 1 All ER 211 at 213 Lord Wright said as follows:-

> " Certain well -known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other."

29. In the case herein, the report by Dr Nathan Khamala well noted that the accidental fall that Emmanuel suffered in December 2020 caused the failure of the metal implant (plates and screws), resulting in refracture and angulation of the healing left femur fracture. That the same was not corrected despite Emmanuel presenting himself to a health facility.

30. In my considered view, can the fall by Emanuel and thereafter the alleged mishandling by the health facility be considered as actus novus actus interveniens? The fact that the health facility was condemned to have not corrected the resultant refracture and angulation of the healing left femur fracture, in my view the same was simply an allegation that was not tested nor proved; in short, it was just the view of Dr Nathan Khamala. No tangible interrogation of the said view was tested and therefore, I would be reluctant to rely on the same in coming up with a conclusive finding. [See sections 107,109 and 112 of the *Evidence Act* and the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another* [2005] 1 EA 334].

31. In a general sense, the defendant remains liable for all consequences which follow in the ordinary cause of things of which reasonable human conduct by those sustaining the injury is a part. It remains upon the appellant to show that some other action or omission other than his own caused the injury.

32. Having determined the Defendant's liability, it therefore follows that the circumstances under which this court can upset such a determination have been previously laid down by the Court of Appeal in the case of *Mbogo & another vs Shah* [1968] EA where it was held that:

> '.....that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

33. Similarly, Madan JA (as he then was) in *United India Insurance Co. Ltd Vs East African Underwriters (Kenya) Ltd* [1985] E.A held that;

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

34. In the case herein, the respondent suffered the following injuries:

    i. Closed lower third femur fracture.

    ii. Bruises on the right leg and both anus.

    iii. Mild head injury resulting in a concussion.

35. In the case of *Patrick Kamuya & another vs Asaph Gatundu Wanjiku* [2016] eKLR where the court upheld an award of Kshs 500,000/=. The respondent in that case had sustained a closed fracture; lost the 1st and 2nd incisor teeth on the lower right jaw and broke the 1st and 2nd incisor teeth on the upper left jaw. The court maintained that the award was not excessive or based upon wrong principles of law.

36. In the case of *Ibrahim Kalema Lewa vs Esteel Company Limited* NBI HCCA No 475 of 2012 [2016] eKLR the High Court upheld an award of Kshs 300,000/- on appeal in 2016 where the plaintiff sustained an inter trochanteric fracture of the left femur.

37. *Kenyatta University vs Isaac Karumba Nyuthe* NRB HCCA No 193 of 2012[2014] eKLR was awarded Kshs 350,000/- in 2014 for sustaining a fracture of the right femur, soft tissue injuries to the head and bruises on the right knee.

38. In the case of *TAM (a minor suing through her father next friend JOM) v Richard Kirimi Kinoti & another* NRB HCCA No 82 of 2008 [2015] eKLR where the plaintiff sustained a fracture of the left femur, lacerations on the left temple and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded Kshs 250,000/- in the year 2015.

39. In the foregoing therefore, I hold the view that the finding by the trial magistrate was not only sound but also supported by the law.

40. As a consequence of the above, it is my considered view that:

    i. The appeal herein is in want of merit and as such, the same is dismissed with no orders as to costs.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent