China Road & Bridge Corporation (K) Ltd v Muthuva (Civil Appeal 192 of 2021) [2023] KEHC 23772 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23772 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 192 OF 2021

OA SEWE, J

SEPTEMBER 20, 2023

BETWEEN

CHINA ROAD & BRIDGE CORPORATION (K) LTD ..... APPELLANT

AND

JOSHUA MUTUKU MWELU MUTHUVA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Lesootia Saitabau, Principal Magistrate, delivered on 12th October 2021 in Mombasa CMCC No. 2505 of 2018)

JUDGMENT

1. The respondent herein, Joshua Mutuku Mwelu Muthuva, was the plaintiff in Mombasa Chief Magistrate's Civil Case No. 2505 of 2018:Joshua Mutuku Mwelu Mathuva v China Road & Bridge Corporation. The respondent's cause of action was that, on or about the 12th July 2018 at 11.00 hours at Kenya Ports Authority along Kilindini Road, while he was lawfully riding Motor Cycle Registration No. KMEG 126M Boxer, the appellant's driver, servant, agent or employee drove and managed Motor Vehicle Registration No. KCC 392Q, Sino Truck, so recklessly that it lost control and rammed into Motor Cycle Registration No. KMEG 126M, thereby causing him severe injuries. Thus, the respondent filed the lower court suit claiming general and special damages together with costs and interest.

2. The appellant resisted the claim vide its Written Statement of Defence dated 2nd May 2019. Other than admitting that there was an accident involving Motor Vehicle Registration No. KCC 392Q, Sino Truck, and Motor Cycle Registration No. KMEG 126M Boxer, as pleaded in paragraph 4 of the Plaint, the defendant denied all the other allegations, including the allegations of negligence, injuries and special damages. On a without prejudice basis, the appellant pleaded that the accident was solely caused by or substantially contributed to by the negligence of the respondent in riding, managing and controlling his Motor Cycle Registration No. KMEG 126M.

3. Upon hearing the respondent and his witnesses, the learned magistrate found in favour of the respondent, noting that the defendant opted to adduce no evidence. Thus, at paragraphs 12 of his judgment dated 12th October 2021, Hon. Lesootia Satabau came to the conclusion that:

> " ...the Plaintiff has discharged his burden and established that the accident was solely caused by negligence on the part of the Defendant's driver, I thus hold the Defendant's driver 100% liable and by vicarious liability the Defendant is equally held 100% liable for the negligence."

4. And, at paragraphs 14, 15 and 16 of his judgment, the magistrate handled the issue of quantum thus:

> 14. There is no dispute that the Plaintiff sustained injuries that lead [sic] to an amputation of the left thumb, fracture of the 2nd, 3rd and 4th metacarpal hand bones. Deep cut on the left hand and multiple lacerations sustained at the left knee.
>
> 15. In his detailed medical report Dr. Adede summaries the Plaintiff's injuries and assessed partial permanent disability at 23%. In his report Dr. Udayan Sheth confirmed the injuries and is in concurrence with Dr. Adede that the Plaintiff sustained partial permanent disability of 23%.
>
> 16. Having gone through the authorities cited and considering the gravity of the injuries sustained and the degree of permanent disability and guided by the decision of the court in *Kenya Wildlife Service v Godfrey Kirimi Mwiti* [2018] eKLR where the court awarded Kshs. 2,000,000 for injuries that caused total all round incapacity of 23%. I thus award general damages in the sum of Kshs. 1,000,000 only..."

5. Being dissatisfied with the lower court's judgment and decree, the appellant filed this appeal on the following grounds:

   (a) That the Principal Magistrate erred in awarding a sum of Kshs. 1,000,000 to the respondent as general damages on the basis of 100% liability.

   (b) The learned Principal Magistrate failed to give any or any adequate reasons of how he arrived at the figure of Kshs. 1,000,000/= general damages which he awarded to the respondent on the basis of 100% liability.

   (c) That the said award of Kshs. 1,000,000/= is in all the circumstances of this case so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the respondent considering the injuries suffered by him and the opinion of Dr. Ajoni Adede in his medical report dated 1st August 2018 and the opinion of Dr. Udayan Sheth in his medical report dated 17th May 2019.

   (d) That the said award of Kshs. 1,000,000/= is altogether disproportionate to the injuries sustained by the respondent and is not keeping with other comparable awards made in respect of similar injuries.

   (e) That the learned Principal Magistrate erred in failing:

      (i) to appreciate the significance of the various facts that emerged from Dr. Ajoni Adede's medical report dated 1st August 2018 and Dr. Udayan Sheth's medical report dated 17th May 2019;

      (ii) to consider or properly consider all the evidence before him;

(iii) to make any or any proper findings on the aspect of quantum of damages on the evidence before him.

(f) That the learned Principal Magistrate erred in failing to adequately consider the written submissions filed by counsel for the appellant.

6. Accordingly, the appellants prayed that the appeal be allowed with costs; that the judgment of the learned Principal Magistrate delivered on 12th October 2021 be set aside or varied as appears proper and just; and that an order for costs be made in respect of the appeal and the proceedings in the court below.

7. The appeal was canvassed by way of written submissions, upon directions being given in that regard on 26th May 2022. Accordingly, written submissions were filed on behalf of the appellant by Mr. Adede on 12th September 2022. He relied on *Henry Hidaya Ilanga v Manyema Manyoka* [1961] 1 EA 705 and *Cecilia W. Mwangi & Another v Ruth Mwangi* [1977] eKLR as to the applicable principles in an appeal against the award of damages and urged the Court to find that the learned magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the appellant and consequently made an inordinately high award.

8. Mr.Adede posited that a sum of Kshs. 250,000/= as general damages for pain and suffering would suffice for the respondent's injuries. He relied on the medical reports exhibited before the lower court (at pages 57 and 60 of the Record of Appeal) and the cases of *Eastern Produce (K) Ltd v Allan Okisai Wasike* [2014] eKLR and *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR in which Kshs. 200,000/= was awarded for pain, suffering and loss of amenities. He was therefore of the posturing that the lower court's award of Kshs. 1,000,000/= is manifestly excessive and should therefore be set aside.

9. On behalf of the respondent, written submissions dated 27th October 2022 were filed herein by Mr. Bosire in which he proposed the following issues for determination:

(a) Whether the learned magistrate erred in awarding the respondent general damages of Kshs. 1,000,000/=;

(b) Whether the grounds of appeal are merited; and,

(c) Who should bear the costs of the appeal.

10. Mr. Bosire made reference to Kenya Bus Services Limited v Jane Karambu Gituma, Civil Appeal No. 241 of 2000; Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] 2 KLR and Southern Engineering Company Limited v Musingi Mutia [1985] KLR 730, among other authorities, as to the circumstances under which an appellate court can interfere with an award of damages. He further submitted that the lower court took into consideration the extent of the injuries suffered by the respondent and applied the principle of similar damages for comparable injuries and the degree of permanent disability sustained; and therefore that no error of principle was committed to warrant this Court's interference.

11. Mr. Bosire pointed out that the authorities referred to by counsel for the appellant entailed less serious injuries and therefore are distinguishable from the facts of this case. On the authority of Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR, Mr. Bosire pointed out that no two cases are exactly alike and therefore the award by the lower court cannot be faulted. He also raised the issue of inflation and its effect on the Kenya Shilling and submitted that the respective ages of the authorities cited by counsel for the appellant ought to be looked at in that light. Thus, Mr. Bosire concluded his submissions by urging for the dismissal of the appeal with costs.

12. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses. (see Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123)

13. Accordingly, I have perused and considered the evidence adduced before the lower court. The respondent testified on 3rd September 2020 as PW1 and adopted his witness statement 4th October 2018. He stated that he was driving Motor Cycle Registration No. KMEG 126M along Kilindini road when Motor Vehicle Registration No. KCC 392Q suddenly turned to his lane from the opposite direction, thereby hitting his motor cycle's front tyre. He further stated that he sustained injuries on his left thumb, left hand and the left knee and was, consequently, taken to Coast General Hospital for treatment.

14. The respondent further testified that the accident was reported to Kilindini Police Station and that police officers visited the scene. He later ascertained that Motor Vehicle KCC 392Q belonged to the appellant and accordingly sued the appellant for damages arising from his pain and suffering. In support of his case, the appellant produced several documents, including a P3 Form, Police Abstract and medical notes among others.

15. In support of his case, the respondent called Dr. Ajoni Adede as his PW2. Dr. Adede confirmed that he examined the respondent and prepared a medical report dated 1st August 2018 in respect of injuries sustained in a road traffic accident. He further confirmed that the respondent suffered 23% permanent partial disability as a result of his injuries, namely, amputation of the left thumb, fractures of the left 2nd, 3rd and 4th metacarpal hand bones and a deep cut on the left hand. He produced his medical report as well as a receipt for Kshs. 2,000/= paid by the respondent for his services, as exhibits before the lower court.

16. The respondent's last witness was PC Hassan Adam from Port Police Station. He testified on 24th September 2020 and confirmed that an accident did happen involving Motor Cycle Registration No. KMEG 126M and the defendant's Motor Vehicle Registration No. KCC 392Q, then being driven along Kilindini Road by Stephen Muli from KPA towards Gate No. 1. PW3 stated that he was the investigating officer in the matter; and that he ascertained that the defendant's driver was at fault in that, on reaching KRA junction, he made an abrupt turn and thereby collided with the motorcyclist.

17. PW3 further told the lower court that he visited the scene and noted that the motor cycle was damaged. He thereafter carried out his investigations and caused the respondent's driver to be charged with careless driving. He added that the driver was fined Kshs. 30,000/=, in default to serve 1 year's imprisonment; and that the respondent who had sustained bodily injuries for which he was taken to hospital for treatment, was issued with a P3 Form as well as a Police Abstract of the accident report. He produced the Police Abstract as the Plaintiff's Exhibit 1 before the lower court.

18. The appellant opted to call no witness and instead had the medical report prepared by Dr. Udayan Sheth produced by consent as the Defendant's Exhibit No. 1. The lower court then gave the parties an opportunity to prepare and file their written submissions.

19. In the premises, there is no dispute that an accident occurred on the 12th July 2018 involving the respondent's Motor Cycle Registration No. KMEG 126M and the appellant's Motor Vehicle Registration No. KCC 392Q; or that the respondent sustained injuries in the said accident. The respondent adduced credible evidence in this regard on the basis of which the lower court fixed vicarious liability on the respondent at 100%. Indeed, it was the evidence of PW3 that the appellant's

driver was charged with the offence of careless driving and was, upon conviction fined to pay Kshs. 30,000/= in default to serve 1 year's imprisonment.

20. While it is settled that conviction for the traffic offence of careless driving does not, per se, impute 100% liability on the part of that driver, it is significant that in this case, the evidence of the respondent was entirely uncontroverted. Hence, in Robinson v Oluoch [1971] EA 376, it was held that:

> " Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent, but that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

21. In this case, although the appellant filed a Defence contending that the subject accident was solely caused and/or substantially contributed to by the negligence of the respondent in riding, managing and controlling Motor Cycle Registration No. KMEG 126M no evidence was adduced in support of those allegations. Indeed, the appeal has nothing to do with liability. All the 6 grounds set out in the appellant's Memorandum of Appeal are confined to the issue of quantum. Accordingly, the single issue for determination in this appeal is whether the award of general damages of Kshs. 1,000,000.00/= by the lower court in favour of the respondent herein was erroneously made.

22. Needless to say that the legal burden of proof was on the respondent, for, Section 107(1)of the *Evidence Act*,Chapter 80 of the Laws of Kenya, is explicit 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.

23. The particulars of the respondent's injuries were set out in the Amended Plaint thus:

    (a) Amputation of the left thumb

    (b) Fractures of the left 2nd, 3rd and 4th metacarpal hand bones

    (c) Deep cut on the left hand

    (d) Multiple lacerations sustained at the left knee

24. It is significant therefore that the respondent availed credible evidence before the lower court by way of treatment notes from Coast General Teaching & Referral Hospital and a P3 Form to back up his evidence. The nature of the fracture injuries sustained by the respondent as pleaded was corroborated by the x-ray reports dated 31st July 2018 from Bahari X-ray Centre Ltd and Jamu Imaging Centre Ltd. In addition, Dr. Adede offered further corroboration of the respondent's evidence and produced his medical report dated 1st August 2018 before the lower court as the Plaintiff's Exhibit 7. In his opinion, the respondent suffered 23% disability, taking into account the following factors:

    (a) Total amputation (disarticulation) of the left thumb

    (b) Multiple left-hand bone fractures

(c) Defective lower power grip

(d) Absence of left-hand precision grip

(e) The left-hand bone fractures remain weak points for life and can re-fracture

(f) Diminished dexterity of the left hand

25. I have likewise given consideration to the appellant's own medical report dated 17th May 2019 prepared by Dr. Udayan Sheth. The report acknowledges that the respondent sustained crush injuries to the left thumb, fracture of the 2nd, 3rd and 4th metacarpals of the left hand and was admitted for one day at Coast Provincial General Hospital whereby disarticulation through metacarpophalangeal joint of the left thumb was done. Dr. Sheth's report further confirms that the respondent lost his left thumb; and that he still had permanent incapacity of 23% almost one year later. It is plain therefore that both parties were in agreement as to the nature of the respondent's injuries and the degree of incapacity entailed thereby.

26. It was on the basis of the aforestated injuries that the learned magistrate made an award of Kshs. 1,000,000/= in general damages and Kshs. 48,909.70/= in special damages. There is no doubt that the learned magistrate took into account the written submissions filed by the parties and the authorities relied on therein, notably Kenya Wildlife Service v Godfrey Kirimi Mwiti (supra) in which an award of Kshs. 2,000,000/= was made on the basis of 23% incapacity. This is evident at paragraph 16 of the judgment dated 12th October 2021.

27. I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Indeed, in H. West & Son Ltd vs. Shephard [1964] AC 326, it was acknowledged that:

> " ...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

28. Moreover, in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal reiterated the position that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see Butt v Khan [1981] KLR 349)

29. Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that 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."

30. Similarly, in Jane Chelagat Bor v Andrew Otieno Oduu [1988-92] 2 KAR 288; [1990-1994] EA 47, it was held: -

> "...In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency..."

31. In Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR, the principles to be considered when awarded general damages were reiterated by the Court of Appeal thus:

    (a) each case depends on its own facts;

    (b) awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politic);

    (c) comparable injuries should attract comparable awards;

    (d) inflation should be taken into account; and

    (e) unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

32. Accordingly, the practical approach taken by Hon.Wambilyanga, J. in HCCC No. 752 of 1993: Mutinda Matheka v Gulam Yusuf, which I find useful, was thus:

> "The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

33. In the light of the foregoing, I have taken into consideration the following authorities that were relied on by the parties before the lower court:

    (a) Barry Proudfoot v Coast Broadway Company Limited & Coast Bus Company [2001] eKLR where the court awarded Kshs. 800,000/= for pain and suffering. The plaintiff had suffered crushed hand, though not amputated. He was then aged 50 years and had suffered other serious injuries such as fractured ribs and a punctured lung.

(b) Transafric Timber Limited v Eunice Kerubo Momanyi [2019] eKLR, where an award of Kshs. 700,000/= for an amputation of the right index finger, fracture of the distal phalanx of the right middle finger and deep cut would of the right thumb was upheld on appeal.

(c) Eastern Produce (K) Limited v Allan Okisai Wasike [2014] eKLR, where the appellate court upheld the award of Kshs. 200,000/= in general damages for traumatic amputation of the left index finger.

(c) Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR, where the court awarded the appellant Kshs. 200,000/= for crushed injury to the left thumb with fracture of mid phalanx.

34. I have similarly given thought to the case of Kenya Wildlife Service v Godfrey Kirimi Mwiti (supra) which guided the decision of the lower court and noted that the injuries suffered in that case were far more serious and therefore not comparable to the injuries in this suit. It is noteworthy that the respondent therein had suffered fractures of the left zygomatic bone, left ethmoidal bone and maxillary fracture of the nasal septum, lower orbital floor fracture, loss of teeth, 6 on upper; 3 on the lower jaw, Distal left radius fracture resulting in 23%-25% permanent disability.

35. In this case, the respondent was 28 years old at the time of the accident. It is apparent that his work entailed riding a motor cycle, and that he has since lost grip of his left hand. Dr. Adede's prognosis was that the left hand now has diminished dexterity with the possibility of re-fracture. As has been pointed out herein above, both Dr. Adede and Dr. Udayan were in agreement that the respondent suffered 23% permanent partial disability. I therefore find the injuries suffered by the respondent in China Road and Bridge Construction v James Ponda [2020] eKLR, more comparable. In that case the respondent suffered an amputation of the left middle finger and left ring finger and was unable to use the left hand because of the deformity. His permanent disability was however assessed at 10%. He was awarded Kshs. 750,000/=. And, in Peter Kibe Waweru v Moses Maina [2022] eKLR, an award of Kshs. 600,000/= for amputation of two fingers resulting in 20% permanent disability and reduced function of the right hand was confirmed on appeal.

36. Thus, taking into account all the relevant factors including the inflationary trends now obtaining, it is my considered finding that the award by the lower court was on the higher side, and that an award of Kshs. 800,000/= would suffice in the circumstances. Indeed, as was pointed out by Chesoni Ag. JA (as he then was) in Mariga v Musila [1982 – 88] KAR 507:

> "No two cases of motor accidents are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason, past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities."

37. In the result, the appeal is partially successful in that the award of Kshs. 1,000,000/= for the general damages component is hereby reduced to Kshs. 800,000/=. Accordingly, the lower court's judgment is adjusted and affirmed as hereunder:

(a) General damages Kshs. 800,000.00

(b) Special damages Kshs. 48,909.70

(c) Interest at court rate from the date of the lower court's judgment until full payment

(d) Each party to bear own costs of the appeal

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE