New Nairobi United Services Ltd & another v Kiiru (Civil Appeal E051 of 2021) [2023] KEHC 22149 (KLR) (12 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E051 OF 2021

GL NZIOKA, J

SEPTEMBER 12, 2023

BETWEEN

NEW NAIROBI UNITED SERVICES LTD ..... 1ST APPELLANT

STEPHEN NJUGUNA ..... 2ND APPELLANT

AND

SIMON MBURU KIIRU ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Y.M Barasa, Senior Resident Magistrate Naivasha vide Chief Magistrate Case No. 190 Of 2020, delivered on 2nd September, 2021)

JUDGMENT

1. The plaintiff (herein "the respondent"), filed a suit against the defendants (herein "the appellants") arising from injuries he sustained in a road traffic accident on; 7th March, 2020, along Kenyatta avenue in Naivasha.

2. He averred that he was travelling as a lawful passenger in a motor vehicle registration number KCF 310N which was involved in an accident with motor vehicle number KCH 640E. That the accident was caused by the negligence of the driver of the motor vehicle number KCH 640E, to which his master is vicariously liable.

3. That as a result thereof he suffered the following injuries: -

    a. Fracture of the right tibia,

    b. Soft tissue injuries to the right leg,

    c. Deep cut wound on the forehead leading to soft tissue injuries; and

    d. Blunt injury to the neck leading to soft tissue injuries.

4. Consequently, he sought for the following prayers: -

    a. General damages;

    b. Kshs 83, 729.00

    c. Future medical expenses, Kshs 200,000

    d. Costs of the suit

    e. Interest on the above at court rates from date of judgment until payment in full.

5. At the conclusion of the trial the learned trial Magistrate entered judgment in favour of the respondent as against the appellants' jointly and severally as follows: -

    a. The defendants are held 100% liable for the accident.

    b. The plaintiff is awarded general damages of Kshs.600,000.

    c. The plaintiff is awarded future medical expense of Kshs.200,000.

    d. The plaintiff is awarded special damages of Kshs.83,729.

    e. The plaintiff is awarded costs of the suit plus interest.

6. However, the appellants being dissatisfied with the judgment appeals against it on the following grounds: -

    a. That the learned trial Magistrate erred in law in making a finding of damages against the defendants;

    b. That the learned trial Magistrate erred in law and fact in holding that the defendants were 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same;

    c. That the learned trial Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to general damages of KShs.600,000 without any tangible proof of the same;

    d. The learned trial Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to future medical expenses of KShs.200,000 without any tangible proof of the same;

    e. That the learned trial Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of KShs.83,729, allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence;

    f. That the learned trial Magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong

and erroneous conclusion condemning the defendants to excess quantum and special damages without concrete documentary evidence.

g. That the learned trial Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages;

h. That the learned trial Magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages;

i. That the learned trial Magistrate erred in law and fact in entering judgment in favour of the plaintiffs against the defendants in spite of the plaintiff's miserable failure to establish her case more especially on quantum;

j. That the learned trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice;

k. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellant.

l. That the learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;

7. The appellants thus seek for the following orders:

a. That this appeal be allowed.

b. That the whole Judgment of the Honourable Senior Resident Magistrate Y.M Barasa in Naivasha CMCC No. 190 of 2020 be set aside and that both quantum and liability be assessed afresh.

c. That the costs of this appeal be awarded to the appellant.

d. That such further orders may be made by this Honourable Court may deem fit to grant.

8. The appeal was disposed of by filing of submissions. The appellant submitted that, the police abstract indicated that, the case was pending under investigation and since it was not clear as to who between the respondent and the appellants was responsible for the accident, liability should have been apportioned at an equal ratio of 50:50%.

9. The appellant relied on the case of: Lakhamshi Vs Attorney General, (1971) E A 118, 120 (as quoted in the case of; Calistus Juma Makhanu vs Mumias Sugar Co. Ltd & another [2021] eKLR), where Spry VP stated that: -

> " It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame..."

10. The appellant further relied on the case of; Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR (as quoted in Michael Okello v Priscilla Atieno (2021) eKLR where the Court held that, the method of assessing damages is that, comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

11. Furthermore, in the case of; Kigaraari vs Aya (1982-88) 1 KAR 768, as quoted in Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR the court stated that: -

> " Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

12. The appellants urged the court to interfere with the award of damages of "Kshs. 200,000" as general damages as the same is so high as to be an erroneous estimate because the respondent sustained soft tissue injuries.

13. The appellants further relied on the following authorities as quoted in; Michael Okello vs Priscilla Atieno [2021] eKLR: -

    a. George Mugo & Another vs AKM (minor suing through next friend and mother of A.N.K [2018] where the court awarded Kshs. 90,000. for soft tissue injuries.

    b. George Kinyanjui T/A Climax Coaches & Another vs Hussein Mahad Kuyala [2016] eKLR where the respondent sustained injuries on his chest, neck, knees and lost two teeth and the High Court on appeal reduced an award of; Kshs. 650,000 to Kshs. 109,890. upon a finding that the loss of teeth was unrelated to the accident in question, as the respondent had sustained soft tissue injuries.

    c. Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR where the court reduced general damages for soft tissue injuries from Kshs. 300,000 to Kshs. 100,000.

14. Further reference was made to the case of; PF (Suing as next friend and father of SK (Minor) vs Victor Kamadi & another [2018] eKLR, where the lower court awarded the plaintiff Kshs. 50,000 for sustaining; cut wound to the forehead, multiple small abrasions to the face, blunt injury to the head leading to loss of consciousness for some time, abrasions to the back, abrasion wounds to the dorsum of the right hand and a cut wound to the right leg. However, the award was substituted with a sum of Kshs. 100,000 after the appeal was successful.

15. The appellants also invited the court to consider the following authorities for comparable awards: -

    a. Godwin Ireri vs Franklin Gitonga (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs. 300,000 was reduced to Kshs. 90,000 on appeal.

    b. Lamu Bus services & Anor vs Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, deep cut wound on the left thigh and blunt injury to the

left thigh. That an award of Kshs. 200,000. was reduced to Kshs. 130,000. on appeal.

16. Furthermore, the appellant relied on the case of; Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730 (as quoted in Michael Okello v Priscilla Atieno [2021] eKLR), that case Kneller J.A, (as he then was) stated that the Court has the power to intervene in the award herein, and observed that:

> "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. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."

17. Finally, the appellant relied on the following decision where the plaintiff allegedly sustained more serious injuries than herein: -

a. Mwangi Njeru v Jospeh Wachira Kanoga, Nyeri HCCA No. 9 of 2012 (as quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR), the plaintiff sustained comminuted fracture of the tibia and fibula and the court set aside an award of; Kshs. 800,000 and substituted it with an award of Kshs. 400,000.

b. Harun Muyoma Boge vs Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012 (as quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR), the plaintiff sustained multiple injuries and fracture of right tibia and fibula and the appellate court set aside an award of Kshs. 150,000. and substituted it with an award of Kshs. 300,000.

c. Naomi Momanyi vs. G4S Security Services Kenya Limited [2018] eKLR (as quoted in Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR), the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000.

d. Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR, the appellant had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The injuries reflected in the plaint were extracted from medical records in the trial court's file. The injuries reflected in the P3 form, and filled by the doctor were a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibia fibular. It was reflected that the appellant had suffered head injury and lower limb fractures. She was hospitalized for nine days. The injuries detailed in the report were head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. X-rays and CT scans were done, together with an operation to fix a plate

on the tibia fracture. The soft tissue injuries were cleaned and dressed and she was put on antibiotics, analgesics and sedatives for the head injury. She was left with scars on the face and on both lower limbs, and mild headaches from the head injury.

The soft tissues were said to have had fully healed. Ultimately, an award of Kshs. 300,000 was made and High Court declined to enhance upon appeal citing;

> " From the review of the recent decisions on the comparable injuries, it would appear to me that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend is to award general damages in the range of Kshs 300, 000.00 to Kshs. 500, 000. I am not persuaded that I should interfere with the outcome at the trial court. As a consequence of the above, the appeal herein fails, and it is hereby dismissed. Each party shall bear their own costs."

18. The appellant reiterated that, the injuries suffered by the respondent are soft tissue in nature with no permanent incapacity assessed, hence an award of Kshs. 600,000 is inordinately high and unjustified in the event especially seeing as the awards closest to what the current respondent was awarded are reflective of far more serious injuries.

19. That the learned trial Magistrate did not consider that comparable injuries should be compensated by similar awards of general damages. That a maximum award of; Kshs. 400,000 is sufficient as general damages in the matter given the nature of injuries suffered.

20. Further as regards future medical expenses, the court should revise the same downwards to Kshs. 80,000 on the strength of the medical report dated; 10th August 2020 as Kshs. 200,000 is inordinately high and is unjustified.

21. The appellants submitted that costs of this appeal be awarded to them based on Section 27(1) of the *Civil Procedure Act*.

22. However, the respondent submitted in response that, the appellants have not demonstrated why and how the amount awarded is excessive or an erroneous estimate and/or how the court applied wrong principles or took into account any irrelevant factor or misapprehended the law.

23. That the learned trial Magistrate took into account the appellants' submissions in arriving at the said assessment in favour of the respondent. Further the trial court considered the appellant suggestion that, the respondent be awarded Kshs 150,000 and the case in support which was about eight (8) years old.

24. Furthermore, the trial court considered and was properly guided by the case of; Clement Gitau vs. GKK (2016) e KLR where an award of Ksh 600,000 was made on appeal and opted to be guided by the recent awards due to the inflation factor and awarded the respondent Kshs 600,000 As such the trial Court can't be faulted as the trend is that comparable injuries should be compensated by comparable awards.

25. The respondent further argued that, the authority cited by the appellants, were decided over nine (9) years ago, and cannot be said to be comparable or based on recent awards for being old and irrelevant. Further the injuries thereon were completely different from the injuries sustained by the respondent herein.

26. That an appellate court cannot interfere with the assessment of damages by a trial court unless it is satisfied that the trial court acted on wrong principles of law or took into account an irrelevant factor or that it left out a relevant factor or has misapprehended the facts or that due to any of the above reasons or any other reasons awarded damages that were so in-ordinately high or so inordinately low as to represent a wholly erroneous estimate of the damage suffered.

27. Further, it is trite law that the assessment of general damages is a discretion that is exercised by the trial court and an appellate court is not justified to substitute a figure awarded simply because it would have awarded a different figure if it had tried the matter in the first instance.

28. That as stated by Lord Morris in the English case of; West (H) & Son Ltd vs. Shepherd [1964] A.C. 326 at 345; the process of comparison is key to the proper assessment of general damages because:-

> "...Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be an endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore. it is eminently desirable that so for as possible comparable injuries should be compensated by comparable awards ..."

29. The respondent invited the court to consider the following persuasive cases with near similar injuries sustained by the respondent herein.

    a. Peter Karoka aka Ngige vs Mbaluka Mai-Onu Aka Eric & 2 Other [2018] eKLR where on 2nd November 2018, the court reduced the award of Kshs 900,000 to Kshs 800,000 for similar injuries.

    b. Nairobi HCCA No 269 of 2017 Daniel Oduor Shieuda versus Christopher Wambugu where the court awarded a sum of Kshs 800,000 for fracture of tibia fibula in the year 2021.

    c. Kiambu HCCA No. 30 of 2016 Gitau Peris versus Gerald Njoroge Chege, where the respondent sustained compound fracture right tibia and fibula and where awarded a sum of Ksh 800,000 as general damages

30. The respondent submitted that, the threshold for this court to interfere with the award of general damages for being too high has simply not been reached by the appellants in this case.

31. Furthermore, the plaintiff claim for future medical expenses was properly pleaded in the plaint as proved on a balance of probability. That both doctors were in agreement that the metal implant on the plaintiff leg needed to be removed. What differed was the cost of the removal.

32. That, the medical report of Dr Obed Omuyoma laid a foundation for the award of future medical expenses of Ksh 200,000. Further the Doctor who testified in the trial court justified the figure of; Kshs 200,000 being the cost of removal of the metal implant at North Kinangop hospital where the respondentwas admitted and ORIF done. To the contrary Dr Kahuthu did not testify in court and as such did not justify her opinion of future medical expenses.

33. That, the appellants did not offer any contradictory evidence showing that such future operation was not necessary or that the cost of the removal of the metal implant at North Kinangop hospital was less than the Ksh 200,000 claimed by the respondent. That in the given case, this appeal has no merit and the court should dismiss it with costs to the respondent.

34. I have considered the appeal in the light of the materials placed before the court and I find that the parties have correctly laid down the principles upon which the appellate court will interfere with the decision of the trial court and in particular on quantum. Further, the principles of inter alia; comparable awards for similar injuries are well articulated by the parties is considered and I need not rehearse them.

35. Furthermore, it is settled law that the role of the 1st appellant court is to re-evaluate the evidence adduced in the lower court, save to acknowledge that it did not benefit from the demeanour of the witnesses and draw its own conclusion.

36. To revert back to the matter herein I find that, as regards liability, it is the respondent's case that, on 7th March 2020, he was travelling in the motor vehicle registration No. KCF 310N and when it reached Guest Inn area on Kenyatta avenue in Naivasha town it collided head on with an oncoming motor vehicle No. KCH 640E, which was coming from Naivasha direction and being driven on the wrong side of the road. That he was seated on the front seat having fastened his seat belt. He blamed the driver of motor vehicle No. KCH 640E for causing the accident by driving on the wrong side of the road.

37. Furthermore, PW2 Police constable Rodgers Wafula attached at Naivasha police station traffic confirmed that the police received a report of the subject accident on the material date along Kenyatta road at Guest inn involving motor vehicles No.(s) KCH 640E Toyota Matatu and KCF 310N Nissan Vennette.

38. That the vehicle registration number KCH 640E Toyota Matatu was being driven by the 2nd appellant who tried to overtake another motor vehicle and collided with motor vehicle No. KCF 310N that was coming from the opposite direction wherein the driver motor vehicle No. KCF 310N and his passengers including the respondent sustained bodily injuries.

39. PW2 produced the police abstract and further stated that he visited the scene and investigated the case and that the driver of motor vehicle No. KCH 640E was charged and convicted.

40. In the light of the aforesaid evidence, it is clear that, the respondent was a passenger in the motor vehicle number, KCF 310N. He was an eye witness to the occurrence of the accident. Indeed, he was not a driver of the motor vehicle number, KCF 310N which was involved in the accident, for him to shoulder any liability and neither did the appellants adduce any evidence to prove any negligence on his part

41. The fact that the police abstract indicates that the matter is still pending under investigation does not shift blame to the respondent. Therefore, the argument that liability should have been apportioned at 50%:50% is neither here or there. I uphold the finding on liability, more so by virtue of the fact that the appellants did not adduce any evidence on the occurrence of the accident to rebut the respondent's evidence.

42. As regards the damages and in particular the general damages, PW3 Dr. Obed Omuyoma produced a medical report he prepared after examining the respondent and testified that the respondent sustained a fracture of the right tibia and fibula, severe soft tissue of the right leg, deep cut wound on the forehead and a blunt injury to the neck. That, he formed the opinion that the plaintiff suffered permanent disability of 20%, and would require future medical expense of; Kshs.200,000.

43. He stated that he examined the respondent about two (2) months after the accident and relied on the discharge summary and the P3 form. That the respondent was in a fair state of condition, the injuries were not visible and healed 80%. Finally, the he was paid Kshs. 30,000 to attend court.

44. In considering the grounds of appeal on the subject issue and submissions advanced by the appellants, I note that, the authorities quoted by the appellants in the trial court were mainly in relation to soft tissue injuries, whereas herein the respondent sustained a fracture of the tibia and fibula.

45. Furthermore, those decisions were decided in the years; 2012, 2016, 2018 and 2019, and range in the sum of; Kshs 90,000 t0 150,000. Taking into account that the subject decision herein was decided in the year 2021, it is not tenable to argue that, five (5) years later an award of; Kshs 150, 000 is just and fair.

46. Even then, the comparable authorities cited by the appellants were decided in the years; 2018, and 2019 with awards ranging between Kshs 300,000 to 400,000. The victims in those cases sustained inter alia a fracture of the tibia and fibula. Therefore, taking into account the injuries the respondent suffered the damages cannot be too far from those in comparable authorities cited by the appellants.

47. The respondent on its part cited comparable authorities which were decided in the years: 2016, 2018 and 2021 with awards ranging from Kshs 600,000 to 800,000.

48. In the instant matter, the trial court in awarding Kshs 600,000 relied on the authority of; Clement Gitau vs G K K (2016) eKLR unfortunately the trial court did not tabulate the injuries therein in that matter to demonstrate the injuries therein and herein are comparable.

49. However, I have considered the injuries in that matter; Clement Gitau vs G K K and note that the medical report by Dr. Ogando Zoga, enumerated the injuries sustained by the respondent as follows;

    a. Facial bruises,

    b. Tenderness on the anterior chest wall,

    c. Fracture of the left humerus bone mid 1/3; and

    d. Fracture of the left tibia/fibula.

50. As can be observed, the respondent in the case the trial court relied on, suffered fractures on the left humerus bone mid 1/3 left tibia/fibula. Whereas in the instant case, the respondent sustained a fracture of the right tibia and fibula. Therefore, the injuries were not similar in all aspects to justify the sum of Kshs 600,000.

51. However, the medical report herein indicates the respondent has a permanent disability of 20%. In that case some provision had to be made for that disability.

52. Be that as it were, the assessment of damages should be considered in totality, and an award for general damages must take into account the amount awarded as special damages and the cost of future treatment, if any.

53. The court in assessing damages must note that the same should be reasonable and modest as no amount of monetary compensation can restore or replace human body parts or frame.

54. As regards the award of Kshs 200,000 for future medical expenses, I find the same justified as no evidence was adduced to rebut the medical report produced and substantiated in evidence and neither was Kshs. 83,729 pleaded and proved as special damages, rebutted by any evidence.

55. In summation, I find that, going by the comparable decision cited by the parties and comparable injuries and/or taking into account the disability indicated in the medical report, I find that a sum of Kshs 450,000 is sufficient as general damages.

56. I therefore allow the appeal only in so far as the amount of Kshs 600,000 awarded as general damages is set aside and substituted with a sum of Kshs 450,000. The rest of the judgment is upheld. The interest is payable from the date of judgment in the trial court.

57. It is so ordered. Right of appeal in 14 days explained

DATED, DELIVERED AND SIGNED ON THIS 12TH SEPTEMBER, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Ongwenyi for the appellant

Mr B. G. Wanaina for the respondent

Ms Ogutu: Court Assistant