Anyumba & 2 others v Towett (Civil Appeal 6 of 2020)
[2023] KEHC 24458 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24458 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 6 OF 2020

RL KORIR, J

OCTOBER 17, 2023

BETWEEN

BENARD OCHIENG ANYUMBA ..... 1ST APPELLANT

ESTHER C. KENDUIYO ..... 2ND APPELLANT

JOHANA K. LANGAT ..... 3RD APPELLANT

AND

NELLY CHERONO TOWETT ..... RESPONDENT

(Being an Appeal from the Judgment of Honourable E. Muleka (PM) dated 23rd April 2020 in the Principal Magistrate's Court at Sotik, Civil Suit Number 181 of 2018)

JUDGMENT

1. The Plaintiff (now Respondent) sued the Defendants (now Appellants) for General and Special Damages arising out of an accident that occurred on 7th July 2018 between Motor Vehicle Registration Number KAB 845Z driven by the 1st Appellant and co-owned by the 2nd and 3rd Appellant and Motor Cycle Registration Number KMDG 442K in which she was a pillion passenger.

2. In its Judgement delivered on 23rd April 2020, the trial court awarded the Plaintiff (now Respondent) Kshs 1,207,600/= plus costs and interest of the suit.

3. Being dissatisfied with the Judgment of the trial court, the Defendants/Appellants appealed to this court through the Memorandum of Appeal dated 3rd July 2020 and raised the following grounds:-

    I. The learned trial Magistrate erred in law and in fact in relying on extraneous evidence and thereby arriving at an erroneous conclusion condemning the Defendant to general damages of Kshs 1,500,000/= which was manifestly excessive in the circumstances.

II. The learned trial Magistrate erred in law and in fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to special damages of Kshs 7,600/= without concrete documentary evidence.

III. The learned trial Magistrate erred in law and in fact in failing to appreciate the impeccable defence of the Defendant thereby arriving at a wrong and erroneous conclusion condemning the Defendant to net damages of Kshs 1,207,600/=.

IV. The learned trial Magistrate erred in law and in 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.

V. The learned trial Magistrate erred in law and in fact in failing to appreciate as follows:-

i. That the plaintiff's pleadings and evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

VI. The learned trial Magistrate erred in law and in fact in entering Judgment in favour of the Plaintiff against the Defendant inspite of the Plaintiff's miserable failure to establish his case more especially on quantum.

VII. The learned trial Magistrate erred in law and in fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.

4. The Appellant prayed that this court set aside the trial court's Judgment and the appeal be allowed with costs.

5. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The Court of Appeal for East Africa in Peters vs Sunday Post Limited (1958) EA 424 stated as follows:-

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.
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> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not

> hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

The Plaintiff's/Respondent's Case

6. Through a Plaint dated 15th October 2018, the Plaintiff/Respondent stated that she was involved in a road accident on 7th July 2018 between Motor Cycle Registration Number KMDG 442K where she was a pillion passenger and Motor Vehicle Registration Number KAB 845Z which was driven by the 1st Appellant.

7. It was the Respondent's case that the 1st Appellant was negligent in causing the accident. The particulars of the negligence were set out in paragraph 6 of the Plaint.

8. That as a result of the accident, she suffered the following injuries: -

    a. Fracture of the right acetabulum bone.

    b. Severe soft tissue injuries to the pelvis.

9. The Respondent prayed for Special and General Damages against the Appellants.

The Defendants/Appellants' Case

10. Through their joint Statement of Defence dated 19th November 2018, the Defendants (now Appellants) denied the occurrence of the accident on 7th July 2018 involving Motor Cycle Registration Number KMDG 442K and Motor Vehicle Registration Number KAB 845Z. The Appellants further denied being respectively the driver and owners of Motor Vehicle Registration Number KAB 845Z.

11. It was the Appellants' case that if the accident occurred then it was caused by the negligence and carelessness of the Respondent. The particulars of negligence of the Respondent were contained in paragraph 5 of the Defence.

12. The Appellants stated that the Respondent did not suffer any injuries and was therefore not entitled to any damages, whether general or special.

13. Following this court's directions on 12th October 2022, the Appeal was canvassed through written submissions.

The Appellants' Written Submissions

14. In their written submissions dated 14th December 2022, the Appellants submitted that they had agreed liability to be in the ratio of 80:20 in favour of the Plaintiff (now Respondent).

15. It was the Appellants' submission that the medical report relied upon by the Respondent revealed that the Respondent suffered a fracture to the right acetabulum bone and severe soft tissue injuries with permanent disability assessed at 20%. It was their further submission that when the Respondent

underwent a second medical exam, the second medical report indicated that she had suffered a fracture to the right acetabulum bone and severe soft tissue injuries to the right knee with permanent disability assessed at 20%.

16. The Appellants submitted that the award of Kshs 1,500,000/= as general damages and Kshs 7,600/= was inordinately high with respect to the injuries suffered by the Respondent. That an award of Kshs 350,000/= would suffice in their opinion. The Appellants further submitted that the Respondent suffered soft tissue injuries and the fractures that she suffered were manageable. They relied on David Momanyi Matonda vs Baharini Consultants (2019) eKLR, Gladys Lyaka Mwombe vs Francis Namatsi & 2 others (2019) eKLR and Naom Momanyi vs G4S Security Services Kenya Ltd (2018) eKLR.

17. It was the Appellants' submission that an award for damages was not meant to enrich the victim but was meant to compensate him for the injuries suffered. It was their further submission that the award should be as near as possible to awards given in cases with similar injuries.

18. With regard to special damages, the Appellants submitted that they needed to be specifically pleaded and strictly proved. They urged the court to only award what had been proved by production of receipts.

The Respondent's Written Submissions.

19. In her written submissions dated 24th April 2023, the Respondent submitted that the trial Magistrate's finding on quantum was reasonable, just, fair, adequate, commensurate and comparable to similar injuries taking into consideration that the Respondent had suffered permanent disability of 20% as assessed by both doctors. She further submitted that in assessing general damages, courts are usually guided by compensation in similar injuries. She relied on John Kipkemboi & Another vs Morris Kedolo (2019) eKLR.

20. It was the Respondent's submission that a court could interfere with an award of damages if it was convinced that the trial court acted upon some wrong principles of law or took into account an irrelevant factor or left out a relevant factor. She relied on Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and Olive Lubia (1982-88) 1KAR 727 and Gicheru vs Morton and Another (2005) 2 KLR 333.

21. The Respondent submitted that after suffering the injuries stated in the Plaint, she went to Tenwek Hospital where she was admitted for seven days, where x-rays were done and a metal plate was inserted to her leg. That she produced treatment notes, a P3 form and a Medical Report dated 11th September 2018 as evidence. The Respondent further submitted that they recorded a consent on liability in the ratio of 80:20 in her favour. That all the evidence adduced in court left no doubt as to the extent and degree of the Respondent's injuries which caused her pain, suffering and consequently led to the loss of earning capacity.

22. It was the Respondent's submission that the award of Kshs 1,500,000/= for the injuries she suffered was just, fair, adequate and commensurate. She relied on Patrick Kinyanjui Njama vs Evans Juma Mukweyi (2017) eKLR and Yobesh Makori vs Elmerick Mobisa Bota.

23. Regarding special damages, she submitted that she produced receipts to prove payment of the Kshs 7,600/= she claimed as special damages.

24. I have considered the Record of Appeal dated 10th August 2020, the Supplementary Record of Appeal dated 15th February 2022 the Appellants' Written Submissions dated 14th December 2022, the Respondent's Written Submissions dated 24th April 2023 and I find that the only issue for my determination was whether the award of Kshs 1,207,600/= was excessive.

25. This is one of the sister Appeals brought before this court for determination. They are the present Appeal, Bomet High Court Civil Appeal No. 5 of 2020 and Bomet High Court Civil Appeal No. 7 of 2020. They arose from sister civil suits at the Principal Magistrate's Court in Sotik being Sotik Principal Magistrate's Court, Civil Suit Number 180 of 2018 – Joshua Kiplangat Towett vs Benard Ochieng Anyumba and 2 others, Sotik Principal Magistrate's Court, Civil Suit Number 181 of 2018 – Nelly Cherono Towett vs Benard Ochieng Anyumba and 2 others and Sotik Principal Magistrate's Court, Civil Suit Number 182 of 2018 – Geofrey Chepkwony vs Benard Ochieng Anyumba and 2 others.

26. For the present Appeal, on 18th February 2020, parties entered into a consent on liability in the ratio of 80:20 in favour of the Respondent and the same was adopted as an order of the court. What is left for this court's determination therefore is quantum only.

General Damages

27. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 of the *Evidence Act* provide as follows:-

    (1) 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.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

28. It is trite that the burden of proof in civil cases is on the balance of probabilities. The Court of Appeal in the case Mbuthia Macharia v Annah Mutua & Another (2017) eKLR discussed the burden of proof and stated thus: -

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

29. In determining the general damages awardable to the Respondent, the court has to examine the extent and gravity of the injuries suffered by the Respondent. The Respondent stated that she had suffered compound a fracture to the right acetabulum bone and sever soft tissue injuries on the pelvis. The Medical Report by Dr. Obed Omuyoma dated 11th September 2018 was produced by consent and was marked as P.Exh 8. The Respondent was examined and x-rayed on 11th September 2018 and her pelvis showed a fracture on the right acetabulum bone.

30. The Respondent underwent a second medical examination. The Medical Report by Dr. James Obondi Otieno dated 22nd May 2019 was produced by consent and was marked as D.Exh 1. The Medical Report confirmed that the Respondent had suffered a fracture of the right acetabulum bone.

31. In the case of Kigaragari vs. Aya (1982 - 1988) I KAR 768, it was stated:-

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

32. In the persuasive case of Boniface Waiti & Another vs Michael Kariuki Kamau (2007) eKLR, Nambuye J. (as she then was) listed some principles to guide the court in awarding damages thus:-

> " .....Having established liability the court proceeds to assess quantum. In doing so it has to bear in mind the following principles.
>
> i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
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> ii. The award should be commensurate to the injuries suffered.
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> iii. Awards in decided cases are mere guides and each case should be treated on its an facts and merit.
>
> iv. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration."
>
> v. Awards should not be inordinately too high or too low.

33. The two Medical Reports are in agreement that the Respondent suffered a fracture to the right acetabulum bone of the right hip and soft tissue injuries to the right. I have found the following cases quite helpful in terms of comparison:-

I. In Peter Gakere Ndiangui vs Sarah Wangari Maina (2021) eKLR the court made an award of Kshs 500,000/= for a pelvic fracture, soft tissue injury to the right thigh and chest.

II. Joseph Njeru Luke & 3 others vs Stellah Muki Kioko (2020) eKLR the court awarded Kshs 750,000/= for pelvic fractures and soft tissue injuries.

III. Daneva Heavy Trucks & another vs Chrispine Otieno (2022) eKLR the court awarded Kshs 800,000/= for a fracture of the pelvis and fracture of tibia and fibula.

34. In re-assessing the damages, I am guided by the case of Fredrick Masaghwe Mukasa vs Director of Public Prosecutions & 3 others (2019) eKLR, where the Court of Appeal held:-

> " In doing so, we shall be guided by the well-established principles as set out in Mbogo & another -v- Shah (1968) EA 93, where the predecessor of this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
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> In order for this appeal to succeed, the appellant must bring himself within the ambit of the principles set out in Mbogo Vs Shah (supra). He must demonstrate to the satisfaction of this Court that the trial court exercised its discretion wrongly in making the conclusions that it did."

35. Guided by the case law above and the injuries suffered by the Respondent, I find that the Kshs 1,500,000/= awarded as General Damages by the trial court as excessive and not commensurate with the injuries suffered. Consequently, the award of Kshs 1,700,000/= is set aside and I substitute it with an award of Kshs 800,000/= which I find appropriate.

36. With regards to special; damages, it is trite law that Special Damages ought to be specifically pleaded. The Court of Appeal in Hahn vs Singh (1985) KLR 716 held that:-

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

37. The Respondent particularized the Special Damages as follows: -

Medical Report Kshs 3,000/=

Motor Vehicle Search Kshs 550/=

Medical Expenses Kshs 4,050/=

Future Medical Expenses

38. The Respondent produced a receipt marked as P.Exh 4 (b) which indicated that he had paid Kshs 3,000/= for the Medical Report and a receipt marked as P.Exh 7(b) which indicated that he had paid Kshs 550/= for the Motor Vehicle Search. The Respondent also attached a bundle of receipts marked as P.Exh 8 to support her claim for medical expenses. The cumulative sum of the money contained in the receipts is Kshs 2,810/= and not Kshs 4,050/= as claimed. Therefore, the cumulative sum for special damages is Kshs 6,360/=.

39. The Respondent had also prayed for future medical expenses. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of Tracom Limited & another vs Hassan Mohamed Adan (2009) eKLR, the Court of Appeal 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 vs. 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..."

40. In the present case, the Respondent pleaded but was not specific with the amount of money she needed for the future expense. Additionally, she did not lead any evidence to suggest or indicate the amount needed. This prayer therefore fails as this particular expense was neither specifically pleaded nor proved.

41. The General Damages of Kshs 800,000 less 20% contribution by the Respondent comes to Kshs 640,000/=.

42. The summation of the Special Damages is Kshs 6,360/=

43. In the final calculation, the summation of the General and Special Damages awarded is Kshs 646,360/=.

44. In the end, the Memorandum of Appeal dated 3rd July 2020 succeeds as the Damages awarded to the Respondent are reduced from Kshs 1,207,600/= to six hundred and forty six thousand, three hundred and sixty shillings (Kshs 646,360/=.)

45. The Appellant is awarded 50% of the costs of the Appeal while the Respondent shall have costs of the suit and interest thereof as awarded by the trial court.

46. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 17TH DAY OF OCTOBER , 2023

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absences of Mose & Mose for the Appellant, Kebongo & Co. for the Respondent. Siele (Court Assistant)