Anyumba & 2 others v Towett (Civil Appeal 5 of 2020)
[2023] KEHC 24421 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 5 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

JOSHUA KIPLANGAT 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 180 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 that was under the control of the Respondent.

2. In its Judgement delivered on 23rd April 2020, the trial court awarded the Plaintiff (now Respondent) Kshs 1,534,251/= 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 1,900,000/=.

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 14,251/= 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 1,534,251/=.

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. My role as a first appellate court was succinctly set out in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, where the Court of Appeal stated that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect"

The Plaintiff's/Respondent's Case

6. Through a Plaint dated 15th October 2018, the Plaintiff/Respondent claimed that he was involved in a road accident on 7th July 2018 between Motor Cycle Registration Number KMDG 442K which he was riding 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, he suffered the following injuries: -

a. Compound fractures of the right tibia and fibula.

b. Fracture of the right femur

c. Severe soft tissue injuries of the right leg.

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 who was the rider of the Motor Cycle registration number KMDG 442K. 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 70%:30% 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 compound fractures of the right tibia and fibula, fracture of the right femur and soft tissue injuries and permanent disability was assessed at 20%. It was their further submission that when the Respondent underwent a second medical exam, the second medical report indicated that he had suffered a fracture of the right tibia, right femur and permanent disability was assessed at 10%.

16. The Appellants submitted that the award of Kshs 1,900,000/= was inordinately high with respect to the injuries suffered by the Respondent. That an award of Kshs 300,000/= would suffice in their opinion. The Appellants further submitted that the Respondent suffered soft tissue injuries and the fractures that he suffered were manageable. They relied on David Momanyi Matonda vs Baharini Consultants [2019] eKLR, Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR and Naom Momanyi v 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 to similar injuries.

18. With regards to future medical expenses, the Appellants submitted that the Respondent's medical report indicated that he would need Kshs 200,000/= for removal of the sign nail and right femur retrograde fin while their medical report indicated that the Respondent would need Kshs 120,000/= for the same procedure. It was their submission that the court award Kshs 120,000/= under this heading.

19. 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.

20. In his 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 10% to 20% as assessed by both doctors. He further submitted that in assessing general damages, courts are usually guided by compensation from similar injuries. He relied on John Kipkemboi & Another v Morris Kedolo [2019] eKLR.

21. 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. He relied on Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia [1982-88] 1KAR 727 and Gicheru v Morton and Another [2005] 2 KLR 333.

22. The Respondent submitted that after suffering the injuries stated in the Plaint, he went to Tenwek Hospital where a metal plate was inserted to his leg and the same had not been removed. That he 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 his favour. That all the evidence adduced in court left no doubt as to the extent and degree of the Respondent's injuries which caused him pain, suffering and consequently led to the loss of earning capacity.

23. It was the Respondent's submission that the award of Kshs 1,700,000/= for the injuries he suffered was just, fair, adequate and commensurate. He relied on Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR and Yobesh Makori v Elmerick Mobisa Bota.

24. Regarding future medical expenses, the Respondent submitted that the award of Kshs 200,000/= was fair and reasonable to remove the sign nail and right femur retrograde fin and he urged the court not to disturb the same. He relied on Simon Taveta vs Mercy Mutitu Njeru (2014) eKLR. The Respondent further submitted that there was justification for an award of future medical costs and the same was specifically pleaded and proved.

25. 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 1,534,251/= was fair and just.

26. Let me state from the outset that 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), Bomet High Court Civil Appeal No. 6 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.

27. For the present Appeal, on 18th February 2020, parties entered into a consent on liability in the ration of 70:30 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

28. 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.

29. The Halsbury's Laws of England, 4th Edition, Volume 17, describes such burden of proof as:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

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. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

30. 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 he had suffered compound fractures of the right tibia and fibula, fracture of the right femur and severe soft tissue injuries of the right leg. 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 on 11th September 2018 and found that he had a surgical scar on the right thigh and shin and upon conducting an x-ray, he found fractures on the right tibia and fibula and on the right femur.

31. 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 multiple fractures on the right tibia and right femur with floating knee.

32. Having noted the injuries in question, I remind myself of the applicable principles in assessing damages as were set out by the Court of Appeal in Southern Engineering Company Ltd. v Musingi Mutia [1985] KLR 730 where it was held that:-

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

33. Similarly in the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR, the Court of Appeal held that: –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

34. There is no doubt in my mind that the Respondent suffered soft tissue injuries on his leg and fractures on his right femur and right tibia and fibula. I have found the following cases quite helpful in terms of comparison:-

I. In Fred Mohinga Kipkigiya v David Agreey Zimbiru [2011] eKLR where the court reduced an award of Kshs. 800,000/= to an award of Kshs. 650,000/=. The plaintiff in that matter had sustained a fracture of the right femur and fracture of the distal femur in addition to soft tissue injuries.

II. 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.

III. Nguku Joseph & another vs Gerald Kihiu Maina [2020] eKLR awarded Kshs 500,000/= after sustaining soft tissue injuries and a fracture of the right humerus.

35. In the case of Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457, the Court of Appeal held that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own... The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

36. Guided by the case law above and the injuries suffered by the Respondent, I find that the Kshs 1,700,000/= awarded as General Damages by the trial court as excessive and not commensurate with the injuries suffered. The award of Kshs 1,700,000/= is thus vacated and substituted with an award of Kshs 1,000,000/=. In so doing, I have taken into account the inflationary trends.

37. It is trite law that Special Damages ought to be specifically pleaded. In Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR, the Court of Appeal held that:-

> " .....If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

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

Medical Report Kshs 3,000/=

Motor Vehicle Search Kshs 550/=

Medical Expenses Kshs 10,701/=

Future Medical Expenses Kshs 200,000/=

39. The Respondent produced a receipt marked as P.Exh 6 (b) which indicated that he had paid Kshs 3,000/= for the Medical Report and a receipt marked as P.Exh 5(b) which indicated that he had paid Kshs 550/= for the Motor Vehicle Search. The Respondent also attached a bundle of receipts to support his claim for medical expenses. The cumulative sum of the money that he paid to Tenwek Hospital was Kshs 10,701/=. I am therefore satisfied with the trial court's award of Kshs 14, 251/= for special damages.

40. The Respondent had also prayed for future medical expenses of Kshs 200,000/= to help him remove the sign nail and the right femur retrograde fin in the future. 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 v 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 v Gituma [2004] 1 EA 91, this Court, stated: -
>
> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be

undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require..."

41. The Respondent produced his Medical Report by DR. Obed Omuyoma (P.Exh 8) which recommended that Kshs 200,000/= would be sufficient for the procedure. On the other hand, the Appellants produced their Medical Report by Dr. James Obondi Otieno (D.Exh 1) which recommended an amount of Kshs 120,000/=. I trying to balance the interest of both sides and doing the best I can, I award the amount of Kshs 160,000/= for future medical expenses.

42. The General Damages of Kshs 1,000,000 less 30% contribution by the Respondent comes to Kshs 700,000/=.

43. The summation of the Special Damages is Kshs 174,251/=.

44. In the final calculation, the summation of the General and Special Damages awarded is Kshs 874,251/=

45. In the end, the Memorandum of Appeal dated 3rd July 2020 succeeds as the Damages awarded to the Respondent are reduced from Kshs 1,534,251/= to Eight Hundred and seventy-four thousand, two hundred and fifty-one (Kshs 874,251/=.)

46. 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.

47. Orders accordingly.

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

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R. LAGAT-KORIR

JUDGE

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