REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 42 OF 2019

FELIX KILONZO KIETI.....APPELLANT

-VERSUS-

KELVIN MUTUKU KATUKU.....RESPONDENT

(Being an appeal from the whole Judgement and Decree of Chief Magistrate's Court at Machakos

delivered on 12th November, 2018 by the Senior Principal Magistrate Hon A. Lorot

in CMCC No. 379 of 2015)

~BETWEEN~

KELVIN MUTUKU KATUKU.....PLAINTIFF

~VERSUS~

FELIX KILONZO KIETI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 9th June, 2015, the Respondent herein instituted a suit against the Appellant for damages arising from road traffic accident which allegedly occurred on 6th December, 2014 when the plaintiff who was a rider of motor cycle registration no. KMDE 511Q along Machakos-Wote road was involved in an accident involving motor vehicle registration no. KBJ 271Y. According to the Respondent the said vehicle was registered in the name of the Appellant and at the time of the said accident, it was being managed by the Appellant, his driver, servant and/or agent. It was the Respondent's case that what caused the said accident was the negligence and carelessness of the Appellant, his driver, servant and/or agent particulars of which the Respondent outlined. As a result of the same, the side vehicle was permitted to lose control, veer off its rightful lane and hit the said motor cycle as a result of which the Respondent was occasioned severe bodily life threatening and suffered loss and damage. The said injuries were particularised in the plaint as well as the special damages.

2. After hearing the case the learned trial magistrate found that the Appellant was 100% to blame. He proceeded to award the Respondent Kshs 1,000,000.00 in general damages, Kshs 6,830/= special damages, Kshs 200,000/= for future medical expenses totalling Kshs 1,206,830.00 with interests and costs.

3. In this appeal, the Appellant's grounds of appeal are:

> **1) The learned trial Magistrate award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the respondent**
>
> **2) The learned trial magistrate award of future medical expenses is manifestly excessive as to amount to an erroneous estimate of future medical expenses.**

4. In other words, the Appellant is only challenging the quantum of damages.

5. According to the Respondent, he was injured on the right little finger which was amputated, he broke his right leg and lost 4 phalanges. As a result, a metal implant was placed which was still in situ and he was admitted at Machakos Level 5 Hospital for a month and a few days. He produced the treatment documents as well as the receipts. He also produced a medical report prepared by **Dr Judith Kimuyu** as well as another one by **Dr Wambugu** which was prepared at the instance of the defence. While he was cross-examined on how the accident occurred, he was not questioned regarding the injuries he sustained.

6. According to the medical report of **Dr Kimuyu**, the Respondent sustained crush injury to his right little finger leading to the loss of the said finger, crush injury on the right foot leading to loss of 4 lateral toes, fracture of proximal phalanx of 5th finger and fracture of the right tibia and fibula. He assessed he Respondent's permanent incapacity at 50% and formed an opinion that the Respondent could benefit from reconstructive surgery in order to straighten the right leg at tibia region and at foot region at an estimated cost of Kshs 400,000/= in a private setting.

7. On his part **Dr Wambugu** found that the Respondent sustained crush injury to the right finger resulting in amputation and fractures of right tibia and fibula. He assessed the degree of permanent incapacity at 4% and formed an opinion that the metal implants may be electively removed at an estimated cost of Kshs 60,000/= at Kenyatta National Hospital. According to him, the right foot post-burns contractures deformity was unrelated to the accident.

8. In this appeal the appellant submitted that the award of Kshs. 1,000,000/- as general damages and loss of amenities is excessive bearing in mind the Appellant's advocate's submissions proposing an award of Kshs 8,000,000/=. It was submitted that the Respondent relied on Nanyuki HCCA No. 6 of 2015 – **Lucy Gatundu vs. Miriam Nyambura Mwangi [2017] eKLR** where the Respondent was awarded Kshs 2,000,000.00for injuries which in the Appellant's view were more serious than the Respondent's in the instant case.

9. The Appellant was of the view that the cases relevant to the Respondent's injuries were Machakos HCCCA No. 6 of 2007 – **Thomas Muendo Kimilu vs. Anne Maina & 2 Others eKLR** and Nyeri HCCA No. 102 of 2011 – **Florence Njoki Mwangi vs. Peter Chege Mbitiru [2014] eKLR** where the Court awarded Kshs 700,000/= for comparable injuries to those sustained by the Respondent herein. Based on the said decisions the Court was urged to set aside the general damages awarded herein and substitute therefor with a lower assessment.

10. Regarding the award for future medical expenses, it was submitted that the award of Kshs 200,000/= thereunder was manifestly excessive and amounts to erroneous estimate since the said sum is still for private setting and ought to be reduced.

11. On behalf of the Respondent, it was submitted that the learned trial magistrate did not error in law and in fact in awarding the respondent a sum of Kshs. 1,000,000.00 as general damages compared to the seriousness of the injuries sustained by the respondent which injuries as pleaded, by the plaintiff/respondent were also confirmed by **Doctor Kimuyu J.M** in her medical report. It was submitted that the report by **Doctor Kimuyu J.M** confirmed that the plaintiff/respondent herein had not fully recovered and had suffered permanent disability estimated at 50%.

12. It was submitted that as per the nature of injuries sustained by the respondent as pleaded and proved during the hearing, the respondent sustained very serious life threatening injuries which have left him with physical permanent disability and has also affected him both psychologically and emotionally and he continues to suffer now and in the future and thus the award of Kshs. 1,000,000/= as general damages cannot be said to be excessive at all and in any case this being the first appellate court which has power to re-evaluate the evidence and make the just determination, it was urged to consider the injuries sustained by the respondent and revise the award upwards.

13. According to the Respondent, his initial proposal for the award of Kshs. 3,000,000/= as general damages were and are reasonable compensation in this case for pain, suffering and loss of amenities based on the authority he had relied in his submission before the trial magistrate.

14. Regarding the appeal against the award of future medical expenses, it was submitted that the respondent had also pleaded for future treatment expenses which he proved as per the opinion of **Dr. Kimuyu J.M** who had made an estimate of Kshs. 400,000/= considering the injuries sustained by the respondent, hence award by the trial magistrate of Kshs 200,000/= as future medical expenses is too way below the proposed payment suggested by the medical expert hence the 2nd ground of appeal must also fail.

15. In conclusion, it was submitted that the appellant has not proved his grounds of appeal on a balance of probabilities as required under the law and the court was urged to dismiss this appeal with costs to the respondent and proceed to review and /or revise judgment in favour of the respondent as proposed.

Determination

16. I have considered the foregoing. As indicated the appeal only challenges the award of damages. The general law is that 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 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 far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.**

17. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

18. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** 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…"

19. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"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."

20. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** 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."

21. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. 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."

22. In this case according to the medical report of **Dr Kimuyu**, the Respondent's injuries were crush injury right little finger, loss of right little finger, crush injury right foot, loss of 4 (four) lateral toes, fracture of proximal phalarix of 5th finger and fracture of right tibia-fibula. He assessed he Respondent's permanent incapacity at 50% and formed an opinion that the Respondent could benefit from reconstructive surgery in order to straighten the right leg at tibia region and at foot region at an estimated cost of Kshs 400,000/= in a private setting. On the other hand, **Dr Wambugu's** medical opinion was that the Respondent sustained crush injury to the right finger resulting in amputation and fractures of right tibia and fibula. He assessed the degree of permanent incapacity at 4% and formed an opinion that the metal implants may be electively removed at an estimated cost of Kshs 60,000/= at Kenyatta National Hospital. According to him, the right foot post-burns contractures deformity were unrelated to the accident.

23. In his judgement, the learned trial magistrate seemed to have relied only on **Dr Kimuyu's** medical report. He did not mention the report of **Dr Wambugu** at all. It would have been prudent for the learned trial magistrate to have considered **Dr Wambugu's** medical report and given reasons why he preferred **Dr Kimuyu's** Report to that other report. However, this being a first appeal, this Court is obliged and empowered to re-evaluate the evidence and arrive at its own conclusions of case taken into account the laid down precautions. In this case, the Court itself observed that the Respondent's toe nails were missing except the big toe. **Dr Wamuyu** indicated that the Respondent had a crush injury of the right foot leading to loss of 4 lateral toes. **Dr Wambugu** attributed these particular injuries to old pre-existing burns. He did not however disclose the source of that information. In absence of such explanation, it would have been prudent for the defence to call him to shed light as regards that view. I agree with the sentiments of **Byamugisha, J** in **Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987**. In that case the learned judge held, citing ***Sarkar on Evidence*** 12th ED pp 506.R., that:

> **"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."**

24. I cannot therefore fault the learned trial magistrate for relying on the medical report of **Dr Wamuyu** as opposed to **Dr Wambugu**. Having considered the authorities cited by the parties, it is my view that those of the Appellant disclosed injuries which were more comparable to the ones sustained by the Respondent herein. However, **Wakiaga, J's** decision was delivered on 11th July, 2014 while that of **Lenaola, J** (as he then was) was delivered on 9th July, 2008. The judgement the subject of this appeal was delivered on 12th November, 2018. While sitting as the trial court, it may well be that this Court would have arrived at a different figure, considering the lapse of years and the inflationary tendencies, I am unable to find that the award of Kshs 1,000,000.00 as opposed to the proposed Kshs 700,000.00 was so inordinately high as to represent an entirely erroneous estimate.

25. As regards the award for future medical expenses, authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. **Ringera, J** (as he then was) in **Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002** held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993,** held that cost of future medical operation is special damages, which must be pleaded. See also **Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246.**

26. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> **"The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."**

27. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> **"In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages…General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."**

28. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the

circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269**, **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

29. It was therefore held by the Court of Appeal in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** that:

> **"The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."**

30. Similarly, in **Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716**, the Court of Appeal held as follows;

> **"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."**

31. That was the position in **Woodruff vs. Dupont [1964] EA 404** where it was held by the East African Court of Appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them…The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

32. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. In this case, **Dr Kimuyu** in her medical report stated that the Appellant would require further medical treatment at an estimated cost of Kshs 400,000/= in a private setting. The Court reduced this by half. While there was no basis for doing so, there was similarly no evidence from the Appellants regarding the cost of such procedures in a public medical facility.

33. It is therefore my view that since the cost of future medical expenses as awarded fell within the range suggested by the doctor, this court ought not to substitute its opinion for that of the trial court.

34. The Respondent has urged this Court to enhance both the general damages and the award for future medical expenses based on this Court's first appellate tribunal's jurisdiction. While this Court has power to re-evaluate the evidence and arrive at own conclusion, that power is only exercisable when the Court is hearing an appeal. Absence an appeal such power cannot be exercised *suo moto* in a vacuum. The only matter before this Court is an appeal by the appellant. There is no appeal or cross-appeal by the Respondent. In those circumstances, this Court cannot invoke its first appellate powers to in effect purport to entertain an appeal by a Respondent who is not aggrieved by the trial court's decision.

35. In the premises, I find no merit in this appeal which I hereby dismiss with costs to the Respondent.

36. It is so ordered.

37. This Judgement has been delivered online to the parties' counsel's respective email addresses, the said counsel having concurred on that mode of delivery due to the restrictions occasioned by the COVID19 pandemic.

Judgement read, signed and delivered online at Machakos this 2nd day of June, 2020.

G V ODUNGA

JUDGE

Delivered the presence of:

CA Geoffrey