Farmland Aviation Limited v Kiptoo (Civil Appeal 45 of 2020)
[2024] KECA 1792 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1792 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 45 OF 2020

MA WARSAME, FA OCHIENG & JM MATIVO, JJA

DECEMBER 6, 2024

BETWEEN

FARMLAND AVIATION LIMITED ..... APPELLANT

AND

ISAAC NJUGUNA KIPTOO ..... RESPONDENT

(An Appeal from the judgment of the Employment & Labour Relations Court at Nakuru (M. Mbaru, J.) dated 6th December 2018 in ELRC Cause No. 219 of 2018)

JUDGMENT

1. The appeal herein arises from a claim before the Employment & Labour Relations Court at Nakuru, in which the respondent sued the appellant for breach of duty to provide a safe workspace. After the matter had been heard, judgment was delivered on 10th November 2011.

2. Being dissatisfied with the judgment, the appellant appealed to this Court in Civil Appeal No. 269 of 2012. By the judgment dated 14th March 2018, this Court found the appellant to be 100% liable for breach of duty and remitted back to the trial court for the assessment and award of damages.

3. When the matter came up before the learned Judge, the court invited parties to address court on the issue of quantum.

4. The respondent's case was that the suit was filed on 15th October 2010, and the court should take cognizance of the change in economic realities when making the award, bearing in mind that 8 years had passed and that he was only 34 years old. The respondent pointed out that whereas an award of Kshs.5,000,000 was a lot in 2011, the same should be raised to Kshs.10,000,000 as the respondent requires the money to support himself.

5. In the medical report, by Dr. Malik produced in court, it was noted that the respondent's injury to the eye was progressive. At the time, progression was at 30% but at the time of the hearing, it had progressed to 100% as the respondent was totally blind. He now required the support of another person.

6. The respondent pleaded special damages of Kshs.300,000. He also pleaded future medical expenses at Kshs.4,000 monthly.

7. The respondent invoked the power of the court to award damages under Section 12(3) of the Employment & Labour Relations Court Act. The respondent was paid Kshs.242,500 as compensation under the *Work Injury Benefits Act*.

8. In opposing the claim, the appellant stated that the respondent had already been paid under the Workmen Compensation Act and that such amount was adequate compensation.

9. The learned Judge noted that the respondent had sustained the following injuries;

    a. Severe generalized complications of the skin and its appendages,

    b. Scarification on the lid margins and conjunctiva,

    c. Lashes touching the cornea (entropion and trichialis),

    d. Tear deficiency,

    e. Growth of vessels on the right eye,

    f. Complete vascularization of the left eye, an opacity of the cornea (total blindness),

    g. Loss of hair and itching of the scalp,

    h. Injuries to the lungs and nose.

10. The learned Judge held that the jurisdiction of the court in awarding general damages under Section 12(3) of the Employment & Labour Relations Court Act was limited. However, the learned Judge found that the award under the Workmen Compensation Act and the *Work Injury Benefits Act* was not a bar to any claimant injured while at work from claiming an award of damages available under any other law.

11. The learned Judge in awarding damages referred to the following cases;

    1. Nickson Muthoka Mutavi v KARI [2016] eKLR where the claimant was awarded Kshs.3,000,000 after an electric shock which resulted in the loss of memory, burns to the head, on the abdomen, on the left foot, and on the right leg which was later amputated below the knee. In granting the amount, the learned Judge stated thus; "The decision that I find comparable in terms of the nature of the injury suffered and timing of the accident is that of Charles Kimani Nganga vs Kenya Power & Lighting Company (2006) eKLR. A sum of Kshs.2,500,000 was awarded to the Plaintiff therein as general damages in February 2006, after he suffered burns and blisters on both legs, wounds, and scars on both hands and the left leg and loss of memory and concentration".

    2. Patrick M. Were v Kenya Power & Lighting Co. Limited [2014] eKLR where the claimant's disability was 70% and the court awarded him Kshs.3,000,000 for loss of amenities, and Kshs.2,000,000 for future medical expenses.

3. Leah Wambui Githuthu v Attorney General & Another [2005] eKLR where the claimant suffered 100% visual incapacity and the court awarded her Kshs.2,000,000 as general damages for pain and suffering.

12. The learned Judge held that at the time of the injury, the respondent was 32 years old, it had been 14 years since, and the respondent had sustained a permanent disability with the possibility of future medical attention. The learned Judge awarded the respondent Kshs.4,000,000 as general damages and Kshs.2,000,000 for future medical expenses. As special damages were proved through receipts, the learned Judge awarded the same Kshs.300,000 together with the costs of the suit.

13. Being dissatisfied with the judgment of the Court, the appellant lodged this appeal. He raised 10 grounds of appeal to wit that:

a. The learned Judge erred in assessing damages under common law while being limited in jurisdiction by the Employment & Labour Relations Court Act.

b. The learned Judge erred in failing to appreciate the guiding principles in awarding damages under the Employment & Labour Relations Court Act.

c. The learned Judge's exercise of discretion was capricious and unwarranted in law and in fact.

d. The learned Judge erred in failing to properly evaluate the evidence adduced by the parties.

e. The learned Judge erred in adopting the respondent's submissions in substance on the assessment of disability.

f. The learned Judge erred in awarding costs of future medical expenses in the absence of conclusive evidence.

g. The learned Judge erred in assessing damages that were excessive and incomparable to the current judicial awards for analogous injuries.

h. The learned Judge erred in failing to factor in the amounts already paid to the respondent in the award.

i. The judgment was erroneous in principle and legally untenable.

j. The judgment was against the weight of the evidence and not in accordance with legal principles.

14. When the appeal came up for hearing on 22nd May 2024, Mr.Mwenda, learned counsel appeared for the appellant whereas Mr. Muriithi, learned counsel appeared for the respondent. Counsel relied on their written submissions and opted not to highlight the same.

15. In their written submissions dated 20th May 2024, the appellant denied that the injuries sustained by the respondent were caused by their negligence or breach of statutory duty. In any event, the injuries were contributed to or caused by the negligence of the respondent.

16. The appellant heavily submitted on the issue of liability and it is worth noting that at this juncture that liability was not in issue. The Court of Appeal had determined 100% liability against the appellant and the matter was taken back to the trial court for assessment of damages.

17. Opposing the appeal, the respondent while citing the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, SC Application No. 2 of 2011, Article 162(2) & (3) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* submitted that the

jurisdiction of the ELRC to award damages is not limited to awards under the *Employment and Labour Relations Court Act*. The respondent submitted that the ELRC is vested with jurisdiction to award damages under common law. The said jurisdiction is of general competence unlimited with regard to civil and criminal matters.

18. The respondent submitted that the list under Section 12(1) with respect to matters falling under the jurisdiction of the Court should not be read as an exhaustive checklist of the matters to be determined by the court since the drafters of the provision used the word "including". The respondent relied on the case of Paramount Bank Limited v Vaqvi Syed Qamara & Another, Civil Appeal No. 37 of 2016 in support of this submission.

19. The respondent further submitted that the jurisdiction of the ELRC to award damages under common law, in this case, was because the dispute involved a tortious claim under common law and the breach of statutory duty owed to the respondent as an employee of the appellant.

20. The respondent in answer to the appellant's allegation that the learned Judge failed to apply the guiding principles in awarding damages, submitted that the court took into consideration the medical reports by Dr. Owen Ogony dated 27th April 2007 and that of Dr. Joseph Aluoch dated 7th November 2008 which detailed the effects of chemical burns sustained by the respondent.

21. The respondent submitted that the trial court referred to various comparative authorities before arriving at the award. He further submitted that the court took into account the nature of the injuries sustained by the respondent by examining the medical reports by Dr. Malik. He submitted that the award was not manifestly high as the court considered that the respondent was 32 years and 14 years had since lapsed from the time of the accident.

22. The respondent urged us not to interfere with the discretion of the learned Judge in awarding damages as the appellant did not make a case as to why the award should be disturbed. He relied on the cases of *Butt v Khan, Civil Appeal 40 of 1977* and Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Lubia & Another (No 2) [1987] KLR 30 to buttress this submission.

23. The respondent submitted that the learned Judge considered the submissions by both parties and the nature of the injuries suffered by the respondent in the impugned judgment, thereby properly evaluating the facts and evidence on record.

24. The respondent further submitted that the learned Judge awarded costs of future medical expenses based on the evidence of PW2 who stated that the respondent would require Kshs.4,000 per month to manage his condition and he may require a cornea transplant of the eye that could see but the blind eye could not be salvaged. Dr. Aluoch noted in his report that the respondent would require frequent medical monitoring at considerable cost as the respondent was incapacitated at 30% in the right eye and 25% in the left eye at the time.

25. The respondent pointed out that the learned Judge in awarding future medical expenses took into account the permanent disability suffered by the respondent and the possibility of future medical attention due to the continued loss of vision in the left eye.

26. Finally, the respondent submitted that the learned Judge was not misdirected in failing to factor in the amount already paid to the respondent in the assessment of the damages as the Workman Compensation Act and the Work Injury Benefit Act did not bar him from claiming damages under any other written law. He urged us to dismiss the appeal with costs.

27. This is a first appeal on the assessment of damages. It is now well-settled law that the duty of the first appellate court is to re- evaluate the evidence in the trial court both on points of law and facts and come

up with its own findings and conclusions. In Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, this Court held that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

28. Rule 31(1) of the Court of Appeal Rules provides that:

> "On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
>
> a. to re-appraise the evidence and to draw inferences of fact; and
>
> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court."

29. It follows, therefore, as was held in the case of Mwangi v Wambugu [1984] KLR p.453;

> "A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding, and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

30. We have carefully considered the record, the submissions by the appellant, the authorities cited, and the applicable law. We find that the issue for determination is whether or not the assessment of damages followed due procedure.

31. It is common ground that this matter was taken back to the trial court for assessment of damages as the issue of liability had been determined at 100% against the appellant. Despite drafting a memorandum of appeal on the grounds of assessment of damages, the appellant failed to submit on the same.

32. However, it is not in contention that after the respondent sustained injuries while in the cause of duty, working for the appellant, he was paid Kshs.242,500 as compensation. It is this compensation that the appellant contends that the respondent should not have claimed further compensation under common law or the ELRC, and if the court found the need to compensate the respondent, the amount already given to the respondent should have been taken into account.

33. In the case of *Paramount Bank Limited v Vaqvi Syed Qamara & Another, Civil Appeal No. 37 of 2016*, this Court held that:

> "Among the powers of the ELRC under Section 12, the court hears and determines all disputes relating to and arising out of employment and labour relations. In the exercise of that jurisdiction, the court has the power to award compensation or damages in any circumstances contemplated under the Act or any other written law and to grant any other appropriate relief that it may deem fit."

34. In the circumstances, we find that the trial court had the jurisdiction to entertain this matter. In any event, this matter was sent back to the trial court by this Court for assessment of damages, after the trial court failed to assess the damages in the first instance.

35. Nevertheless, as the matter was specifically sent back to the trial court for the assessment of damages, we find that the only issue available for the court's determination was quantum. Therefore, the issue that ought to be determined is whether or not the learned Judge properly assessed the damages awarded to the respondent.

36. In the case of Mohamed Mahmoud Jabane v High Shine Butty Tongoi [1986] KLR Vol. 1 this Court stated as follows:

> " The correct approach in award of damages are:
>
> (1) Each case depends on its own facts.
>
> (2) Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).
>
> (3) Compensable injuries should attract comparable awards.
>
> (4) Inflation should be taken into account.
>
> (5) Loss of future earnings has to be pleaded.
>
> (6) Loss of earnings power is part of the general damages."

37. In Southern Engineering Co. Ltd v Musinga Muhia [1985] KLR 730 this Court addressed itself on the issue of quantum of damages as follows:

> "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 (In Butt v Khan [1982 – 1988] 1 KAR "It is inevitable in any system of Law that there will be a 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."

38. In the case of Mbaka Nguru & Another v James George Rakwar [1998] eKLR, this Court held that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

39. Similarly, in the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR, this Court stated that:

> " In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exact."

40. In the circumstances, we find that the learned Judge properly evaluated the injuries sustained by the respondent by referring to the medical reports adduced in evidence, and exercised her discretion in awarding damages based on comparable awards by citing some of the authorities. In addition, the

learned Judge also took into account the current value of the shilling and the economy to ensure fair compensation. In Ugenya Bus Service v Gachuki [1986] KLR 567 this Court held that:

> "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculable. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision."

41. Therefore, we find no reason to interfere with the award of general damages at Kshs.4,000,000.

42. The appellant further contended that future medical expenses were awarded without conclusive evidence. It is trite that a claim for future medical expenses must be pleaded and proved as special damages. This was this Court's finding in the case of Mbaka Nguru & Another v James George Rakwar, (supra). In this instance, the respondent pleaded future medical expenses, and PW2 testified that the respondent would require Kshs. 4,000 per month to manage his condition and he may require a cornea transplant of the eye that could see but the blind eye could not be salvaged.

43. In the case of Tracom Limited & Joseph Macharia v Hassan Mohamed Adan [2009] KECA 48 (KLR) this Court held that:

> "It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e, that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will need future medication is not in our mind in dispute. Of the two reports suggesting amounts needed, the Kenyatta Hospital report which suggests approximate figure of Ksh.100,000/= per year was prepared on 23rd December 1999. It is instructive that Dr. Shah's report made about three months later said the left hip was fusing and Osteomyelitis was settling down such that in his mind respondent was unlikely to need any further operation. Dr. Wangai's report made three years later suggested only Ksh.50,000/= for future medical expenses. Thus there was some evidence of progressive drop in the need for future medication."

44. 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..."

45. In this instance, we find that the failure to adduce evidence of the specific amount required for future medical expenses was not fatal to the respondent's claim. It is evident from the record that the respondent had since become blind in one eye and that he would require a cornea transplant.

46. In the circumstances, we find no reason to interfere with the award of Kshs.2,000,000 as future medical expenses.

47. Consequently, we find that the appeal lacks merit and it is hereby dismissed.

48. As costs follow the event. The costs of this appeal and the suit before the trial court are awarded to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.