Karisa v Motrex Limited & another (Civil Appeal E010 of 2024)
[2025] KEHC 753 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 753 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E010 OF 2024

M THANDE, J

JANUARY 31, 2025

BETWEEN

CHARO KARISA .... APPELLANT

AND

MOTREX LIMITED .... 1ST RESPONDENT

PATRICK MIGOT .... 2ND RESPONDENT

(An Appeal from the judgment of Hon. Ritah Amwayi S. R. M. delivered on 31.1.24 in Kaloleni SRMCC No. 2 of 2023)

JUDGMENT

1. The Appellant herein instituted a suit in the trial court by way of a plaint dated 9.1.23 against the Respondents claiming both general and special damages arising from injuries sustained in a road traffic accident. The Appellant's case is that he was on 8.2.21 lawfully travelling as a passenger in motor vehicle registration no. KZM 763 along Kilifi-Kaloleni road when the 1st Respondent's authorized driver carelessly, recklessly and negligently drove motor vehicle registration no. KBR 942Q/ZD 8853 causing it to veer off its lane thereby causing it to collide with motor vehicle registration no. KZM 763. As a result, the Appellant sustained multiple serious injuries.

2. The Respondents opposed the plaint vide their statements of defence dated 13.2.23 and 17.3.23 respectively in which they denied the claims by the Appellant.

3. Following a hearing, the trial Magistrate entered judgment in favour of the Appellant in the following sums:

   Liability against the 1st and 2nd Respondents 50 per cent each

   General damages for pain and suffering Kshs. 800,000/=

Loss of earning capacity Kshs. 300,000/=

Future medical expenses Kshs. 320,000/=

Special damages Kshs. 127,000/=

Total Kshs. 1,547,000/=

4. Being aggrieved by the decision of the trial Magistrate, the Appellant preferred the Appeal herein. The summarized grounds are that the trial Magistrate erred in fact and in law by:

    1. awarding the sum of Kshs. 800,000/= as general damages for pain and suffering, which amount is not commensurate to the injuries sustained by the Appellant.

    2. holding that the Appellant is entitled to Kshs. 320,000/= as future medical expenses ignoring the medical opinion on record suggesting that he was entitled to Kshs. 620,000/=.

5. The Appellant prayed that the Appeal be allowed and that the judgment of the trial court be set aside in respect of the said awards. He also prayed for costs.

6. I have re-examined the entire record and given due consideration to the parties' respective submissions. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd. & Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> 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 made due allowance in this respect.

7. On the award for pain and suffering, the Appellant submitted that the trial magistrate failed to take into account the serious nature of the injuries he sustained. The Appellant relied on the opinion of Dr. Darius Wambua Kiema who assessed the disability as 65 per cent permanent disability given that the fracture of the radius and ulna rendered the limb useless and equivalent to an amputation. Further, that no contrary medical report was filed to controvert that of Dr. Kiema, which concluded that the Appellant has lost capacity to work and undertake activities of daily living compounded by a lifetime of post traumatic pain in the left hand. The Appellant thus asserted that the award of Kshs. 800,000/ = was extremely low and not commensurate to the injuries sustained.

8. The 1st Respondent submitted that the injuries are not an amputation and that there is in fact hope for recovery of the use of the arm with surgery and physiotherapy. Further, that the trial Magistrate relied on several authorities to support the assessment of damages. Additionally, that in all the authorities cited by the Appellant there was amputation and that the same should be disregarded.

9. For the 2nd Respondent, it was submitted that the award of Kshs. 800,000/= against his proposal of Kshs. 600,000/=, was adequate.

10. In her judgment, the trial Magistrate stated that she was guided by the decision in Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja [1986] eKLR where the Court of Appeal set out the guiding principles in the award for damages as follows:

> The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.
>
> 1. Each case depends on its own facts;
> 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
> 3. comparable injuries should attract comparable awards.
> 4. inflation should be taken into account; and
> 5. unless the bruises, abrasions cuts and lacerations on the left cheek, award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

11. The compensation that the Appellant complains of, is the award of damages relating to the injuries to his left forearm. The injuries are described in the plaint as compound comminuted and segmental fracture of left distal radius/ulna bones; devolving injury left forearm and 65 per cent permanent disability due to post traumatic deformity/disfigurement arthritis and stiff wrist joint with loss of grip left hand and pronosupination movement left wrist/forearm rendering the left forearm/hand practically useless equivalent to an amputation.

12. In urging this Court to set aside the award of kshs. 800,000/= under this head, the Appellant relied on the case of Umoja Rubber Products Limited v Bobson Rimba Lewa [2015] eKLR where this Court affirmed the award of Kshs. 2,200,000/= for elbow amputation of left forearm where incapacity was assessed at 60 per cent. The Appellant further relied on the case of Koru Holy Family Mission Hospital v Koech (Civil Appeal E003 of 2021) [2022] KEHC 3082 (KLR) (17 June 2022) (Judgment) in which Ongeri, J. awarded the victim Kshs. 2,200,000/= for a below the knee amputation and a 50-70 per cent degree of disability. Also cited by the Appellant is the case of Kurawa Industries Limited v Dama Kiti & another [2017] eKLR where an award of Kshs. 2,000,000/= was made for a below the knee amputation and a 50 per cent disability.

13. In assessing damages, the general rule is that comparable injuries should as far as possible be compensated by comparable awards. It must however be recalled that no 2 cases will be exactly similar. In Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal observed:

> Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

14. See also Simon Taveta v Mercy Mutitu Njeru [2014] eKLR and Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR.

15. The Court is aware that assessment of damages is a matter of discretion of the trial court. This was stated by the Court of Appeal in Catholic Diocese of Kisumu v Tete [2004] eKLR as follows:

> 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 difference 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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470).

16. In making her award, the trial Magistrate stated:

> Guided by authorities cited, the principles enunciated above and the nature of injuries sustained, I find an award of Kshs. 800,000/= fair and reasonable under general damages for pain and suffering.

17. Although the trial magistrate cited several authorities she did not make any specific finding as to which of them was relevant to the matter. She did not also indicate how she applied the enunciated principles, and even why she rejected the sums proposed by the Appellant and the Respondents.

18. I have considered the injuries sustained as well as the authorities relied upon. In all the cases cited by the Appellant, there was amputation, which is not the case herein. This notwithstanding, in his report, Dr. Kiema indicated that the limb has been rendered practically useless and equivalent to an amputation. He assessed the Appellant's partial permanent incapacity/disability at 65 per cent. My view is that the most relevant authority is the 2015 Umoja Rubber Products (supra) where this Court affirmed an award of Kshs. 2,200,000/= for elbow amputation of left forearm where incapacity was assessed at 60 per cent. I accordingly, find that the award of Kshs. 800,000/= is manifestly low and not commensurate to the serious injuries sustained by the Appellant. The award thus invites this Court to right the injustice occassioned. Considering the time lapse between the time when the said decision was rendered as well as the inflation, it is my view that an award of Kshs 2,000,000/= would be reasonable.

19. I now turn to the award for future medical expenses. The Appellant submitted that in arriving at the figure of Kshs. 320,000/=, the trial magistrate erred by applying the charges at Coast General Hospital instead of Kshs. 620,000/= charged at a private hospital. He contended that the trial Magistrate ought to have taken into consideration inflation and award the amount charged by private hospital.

20. On this ground, the 1st Respondent submitted that the Appellant has not given any reasons why he wishes to have surgery at a private hospital and that it was not true that private hospitals offer better treatment than public hospitals.

21. On his part, the 2nd Respondent submitted that the Appellant cannot demand future medical treatment at a private hospital yet his previous treatment was done in a public hospital. Further that there was nothing in the evidence to show that treatment in a public hospital was not at par.

22. It is not disputed that the Appellant requires future medical care. The cost of medication and physiotherapy being Kshs. 72,000/= and 48,000/= respectively is also not disputed. What is in dispute is whether provision should be made for osteotomy, reconstruction, reduction and fixation of the left

forearm fractures and post traumatic therapy in a public or private facility which Dr. Kiema estimated to cost Kshs. 200,000/= and Kshs. 500,000/= respectively.

23. The Appellant's complaint is that the trial magistrate awarded the amount to be charged in a public facility rather than a private facility. He seeks that the Court awards the higher amount.

24. It is well settled that the purpose of damages is to compensate an injured party for the loss suffered, rather than punishing the breaching party. In Wanyiri Kihoro vs. The Attorney General Civil Appeal No.151 of 1987, Kwach JA, stated:

> The purpose of damages is not to punish a defendant but to afford a plaintiff a reasonable compensation or the loss or injury he has suffered."

25. The record shows that when the accident in question occurred, the Appellant was initially treated at Mewa Hospital and later at Kilifi County Hospital. Having been treated in a public hospital earlier, it was not unreasonable that the trial Magistrate would award the amount that would be charged by a public hospital. In any event, the Appellant has not given any reasons why he would not want the future procedure to be done at a public hospital. I accordingly find no merit in this ground.

26. The upshot is that the Appeal partially succeeds. The trial Magistrate's award on general damages for pain and suffering is set aside and the Court substitutes therefor, an award of Kshs. 2,000,000/=. All other awards remain unchanged. Each party shall bear own costs.

DATED AND DELIVERED IN MALINDI THIS 31ST DAY OF JANUARY 2025

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M. THANDE

JUDGE