Easy Coach Limited & another v Omondi (Civil Appeal E284 of 2023)
[2025] KEHC 888 (KLR) (Civ) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E284 OF 2023

TW OUYA, J

JANUARY 30, 2025

BETWEEN

EASY COACH LIMITED ..... 1ST APPELLANT

ROBERT OMWENGA NYAGAKA ..... 2ND APPELLANT

AND

BEATRICE ACHIENG OMONDI ..... RESPONDENT

(Being an appeal from the Judgement and decree of Hon. H. M. Nyaga (Chief Magistrate) in Milimani CMCC No. 1915 of 2013 by delivered on 28th March 2023)

JUDGMENT

Background

1. This appeal was instituted by the 1st and 2nd Appellants after being dissatisfied by the Judgement and decree by the Chief Magistrate delivered on 28th March 2023.

2. The suit was initiated by Beatrice Omondi Plaintiff/Respondent vide plaint dated 7th February 2013 against Easy Coach Limited and Robert Omwenga Nyagaka 1st and 2nd Defendants/ 1st and 2nd Appellants herein. The Respondent was a passenger in motor vehicle registration KBN 374F which was involved in an accident on or about 9th September 2011 along Nandi Hills-Chemelil Road, being driven by the 2nd Appellant and owned by the 1st Appellant during which the Respondent sustained injuries.

3. The matter went for full trial and the trial court found in favor of the Respondent and awarding kshs.9,520,821 in damages broken down as:

    a. General damages Ksh. 2,000,000

b. Special damages Ksh. 4,820,821

c. Future medical expenses of Ksh. 1,700,000

d. Loss of future earnings Ksh. 1,000,000

4. The Appellant being dissatisfied with the above outcome filed the instant appeal based on the following grounds:

a. That the learned magistrate misdirected himself and erred in law and in fact by holding the Appellants 100% liable for the accident against the weight of evidence on record and thus arrived at an erroneous finding on liability.

b. That the learned magistrate misdirected himself and erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis avis the injuries sustained by the Respondent.

c. That the learned magistrate misdirected himself and erred in both law and fact by awarding general damages for pain and suffering that are so manifestly excessive and not in line with current awards for similar injuries.

d. That the learned magistrate misdirected himself and erred in law and in fact in failing to consider the medical Reports on record and hence arrived at an award that was not supported by the doctor's findings and hence arrived at an erroneous award that is so manifestly excessive as to be erroneous.

e. That the learned magistrate misdirected himself and erred both in law and in fact by not properly considering the severity of the Respondent's injuries and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.

f. That the learned trial magistrate misdirected himself and erred in law and in fact by awarding damages for "future Medical Expenses", without basis, while no such claim was specifically properly pleaded in the body of the plaint, and indeed none were addressed or proved by the respondent at trial, hence no damages for "future Medical Expenses" should have been awarded.

g. That the learned trial Magistrate misdirected himself and erred in law and fact by awarding damages for "Loss of future earnings", without basis, while no such claim was specifically properly pleaded in the body of the plaint, and indeed none were addressed or proved by the Respondent at trial, hence no damages for "Loss of future earnings" should have been awarded.

h. That the learned trial magistrate misdirected himself and erred in law and in fact by awarding special damages that were not strictly proved to the required standard.

i. That the learned magistrate misdirected himself and erred in law and in fact by awarding special damages to the Respondent whereas the amount was paid by other persons not party to the suit thus unjustly enriching the Respondent.

j. That the learned magistrate misdirected himself and erred in law and in fact by awarding special damages to the Respondent and relied on irrelevant precedent for amounts paid by strangers to the suit.

k. That the learned magistrate misdirected himself and erred in law and in fact by awarding special damages to the respondent and relying on supporting documents that were severally repeated by the respondent in her bundles of documents thus unjustly enriching the Respondent.

l. That the learned magistrate misdirected himself and erred in law and in fact by admitting a medical report that was neither produced as an exhibit or as a document and was only introduced in the Respondent's submissions.

m. That the learned magistrate misdirected himself erred and erred in law and in fact by ignoring precedent and trite law that only what is specifically pleaded in the plaint and strictly proved can be awarded.

n. That the learned magistrate misdirected himself and erred in law and in fact by considering extraneous matters and going out of the ambit of the proceedings and evidence tendered before him and hence arrived at an erroneous decision.

o. That the learned magistrate misdirected himself and erred in law and in fact by totally failing to consider the defendant's submissions on record thus arrived at an erroneous finding on quantum that is so manifestly excessive.

p. That the learned magistrate misdirected himself and erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis in asserting quantum.

q. That the whole of the judgement is against the weight of evidence tendered during trial.

5. The Appellants pray for orders that:

i. The appeal be allowed

ii. The whole of the judgement delivered on 28th March 2023 against the Appellant's on liability be set aside.

iii. The Respondent's suit in the lower Court be dismissed with costs to the Appellants.

iv. Without prejudice to the foregoing, liability be apportioned equally between the Appellants and the Respondent.

v. Without prejudice to the foregoing the whole of the judgement delivered on 28th day of March 2023 against the Appellants on quantum be set aside and this Honourable Court does assess the proper damages payable to the respondent.

vi. The whole of the Judgement delivered on 28th March 2023 on 'Loss of Future Earnings' be set aside.

vii. The whole of the judgement delivered on 28th March 2023 special damages be set aside.

viii. The costs of this appeal be awarded to the Appellants in any event.

ix. Such other and/or further relief as this Honourable Court may deem just to grant.

Submissions

6. This appeal was canvassed by way of written submissions by the counsel for both parties. The court will therefore rely on the original pleadings, record of appeal and the submissions by the parties plus the authorities cited.

7. The Appellant through Counsel has raised four issues the first of which is an invitation for this appellate court to determine whether the Respondent proved liability beyond a balance of probabilities while the other three dwell on the award of damages.

8. The appellants submit that the award of kshs.2,000,000 was excessive and inordinately high considering the nature of injuries that the Respondent sustained in comparison with contemporary cases. They urge this court to find that the injuries suffered by the respondent were a fracture of the proximal femur and soft tissue injuries of a blunt nature. He refers the court to the Court of Appeal decision in Odinga Jacktone Ouma v Maureen Achieng Odera (2016) eklr that "comparable injuries should attract comparable awards", Kericho HCCC No. 56 of 2004 James Nyamboga Masogo v Kipkebe Ltd (2007)eklr where the court observed that the award of damages by a court of law is not meant to put the plaintiff in a better position that he would have been had he not been injured but to compensate him for the injuries he had sustained.

9. The Appellants have also quoted authorities where the courts awarded reasonable damages for similar injuries: In Pestiny limited and Another V Samuel Itonye Kagoko (2022) eklr the court reduced an award of kshs.1,400,000 to kshs 800,000 where the respondent sustained fracture of the of the mid-shaft left femur and soft issue injuries. In Jitan Nagra v Abidnego Nyandusi (2018) eklr the court reduced an award of ksks.1,000,000 to kshs. 450,000 for a respondent who had sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and where a permanent disability was anticipated. In Civicon Limited v Rihard Omwancha & 2 others (2019) eklr the High Court awarded kshs. 500,0000 to the 3rd party who sustained a fracture of four upper teeth, cut wound on the upper and lower lip, swollen and tender upper lip, bruises on the chin, dislocation of the shoulder, bruises on the right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability. The Appellants submit that an award of kshs.700,000 would have been reasonable in the Respondent's circumstances.

10. The Appellants submit that the trial magistrate erred in law and in fact in awarding the prayer for future medical expenses since the same was not specifically pleaded and strictly proved. They cite the case of Tracom Ltd & Another v Hassan Mohamed Dam Distributors (2009) eklr (CA Nakuru) cited in Benard Musuu John vs. Jesman Distributors Limited & Another where the court stated inter alia, that:

> " .... the need for future medical care is itself a special damage a fact that must be pleaded if evidence therefore is to be led and the court is to make an award in respect thereof....."

They submit that the medical report which is the basis for the claim was not specifically pleaded or produced as evidence in court for interrogation but has been attached to the Respondent's submissions. They urge the court to find that the award of Kshs.1,700,000 for future medical expenses was erroneous and should not be awarded.

11. The Appellants hold that the trial court ought not to have awarded the Respondent for loss of future earning being that the same was not pleaded, based on the principle of parties are bound by their pleadings. They add that the Respondent's age was not supported by documentary evidence, and that there was no proof that she was earning kshs.20,000 per month neither is the disability assessed at 100%. They cite the case of Mumias Sugar Company Ltd. v Francis Wanalo (2007) eklr where the court awarded kshs. 500,000 for a 20-year-old. They submit that the award of kshs.1,000,000 was excessive and that kshs.500,000 would suffice.

12. The Appellants submit that the award of special damages was manifestly excessive and erroneous. While emphasizing that it is the law that special damages must be specifically pleaded and strictly proved, the Appellants hold that the Respondent produced numerous invoices in an attempt to prove special damages but the same cannot amount to proof of payment. They cite the authority of Great Lakes Authority (2009) eklr Civil Appeal No. 106 of 2005 (at page 6 Paragraph *2*) where the court rejected an invoice as not proof of payment. They urge this court to find that the trial court misdirected itself in holding that the invoices once issued were proof of payment. The Appellants have made reference to documents produced by the Respondent in the trial court in batches dated 7.2.2013, 30.5.2016 and 17.3. 2018, which they argue were not proof of payment and ought not to be awarded in special damages. They urge the court to find that the same were not pleaded and/or strictly proved.

13. The Respondent through her Counsel has first submitted on the principle of non-interference by the Appellate courts citing the authority of Peters v Sunday Post Limited (1958) EA 424 and Gitobu Imanyara & 2 Others v Attorney General (2016) eklr where the court of appeal stated:

> " ...It is firmly established that this Court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum."

14. In response to the raised by the Appellants for determination, the Respondent submits that the Respondent discharged the burden of proving that the accident leading to her injuries was as a result of the 2nd Appellant's negligence and that the 1st Appellant was vicariously liable and that it was on that basis that trial magistrate awarded 100% liability. He urges that the finding on liability should be upheld.

15. On the award of general damages, counsel submits that the respondent sustained left proximal femur fracture with lacerations and abrasions on her limbs and face. He holds that the proximal femur is also known as the thigh bone and described in the Collins English Dictionary and Thesaurus as the longest thickest bone of the human skeleton with the pelvis above and knee below and includes the femoral head, neck and the 5cm distal to the lessor trochanter. He argues that it is an injury of a serious nature requiring hip replacement surgery, physical therapy and stem cell surgery in India estimated at the cost of 1.2 to 1.5 million. That the respondent has developed numerous complications since the accident and has been in and out of hospital.

16. Counsel proceeds to cite authorities by courts in comparable injuries. In Devna Pandit v Kennedy Otieno Obara & Another (2016) eklr, the plaintiff sustained fracture dislocation left hip with fracture head femur, fracture left tibia comminuted and fracture right face/maxilla and the high court at Nairobi awarded general damages in the sum of kshs.2,000,000. In Deepak Pandit v. Kennedy Otieno Obara & Another (2016) eklr the plaintiff sustained a fracture dislocation of the left hip; fracture of the left humerus and radial nerve palsy left side and was awarded kshs. 2,000,000 as general damages for pain and suffering. In the case of Rosemary Wanjiru Kungu v Elija Macharia Githinji & Another (2014) eklr the plaintiff sustained a fracture of the spine and the High Court awarded general damages for kshs.3,000,000. Counsel submits that the awards in the three cases above are much higher than what was awarded to the respondent in the instant case.

17. Regarding the award for future medical expenses, counsel submits that the same were pleaded in the Respondent's amended plaint dated 12th August 2016 and supported by medical reports, particularly by Dr. S. Owenga in her Further List of Documents which indicated that she was going to require further surgeries. He cites the authority of Ibrahim Ndungu Gikonyo v Geoffrey Nyamweya Omae (2021) eklr where the court quoted the case of Kenya Bus Services v Gatuma and stated inter alia that

there was no need for the Respondent to plead the amount for future medical expenses. In Geoffrey Kamuki & Another v RKN (2020) eklr Matheka J stated inter alia that:

> " ...it is not always clear at the time of filing the case what these future costs may be. The prognosis could change or the better or for the worse..."

Counsel urges this court to find that the award for future medical expense was specifically pleaded and should not be disturbed.

18. On the award of loss of earning capacity counsel stated that although the same was not specifically pleaded, the respondent stated in examination in chief during trial that she once worked as a secretary before the accident. In her submissions in the trial court, she stated that she was 47 years old, a secretary with Medicins Sans Frontiers earning a salary of Ksh. 20,000 per month and would have worked for another 13 years. Counsel cites the authority of MNM v DNMK & 13 Others (2017) eklr where the court appreciated that:

> " A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at the trial it appears that the unpleaded issue has been left for the court to decide."

19. Counsel urges the court to hold that the issue of loss of future capacity arose in the course of the trial but had been left out in the pleadings and should therefore be determined by the court. He cites the holding in Butler v Butler (1984) as was quoted in Nguku v Kiria-ini Farm (2022) KEHC 342(KLR) that:

> " ...Once it is in principle accepted that the victim of personal injuries who lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity....." (emphasis and italics added). Moreover, a claim under future earning capacity is in nature of general damages and is awarded at the discretion of the trial court: see Court of Appeal in SJ v Francesco Di Nello & Another (2005) eKLR.

20. Regarding the award on special damages, counsel submits that the trial court found that the invoices amounted to evidence of payment since it would be absurd to imagine that the Respondent once invoiced would have walked out of hospital without making payment. He adds that the Respondent provided receipts together with invoices which were interrogated and found to be strictly proved. He urges the court not to disturb the trial court finding.

Analysis and Determination

21. This court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.
>
> 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 allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

23. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is evident that the appeal is essentially challenging the award made by the trial court in favour of the Respondent. The court will therefore address the various heads of awards and touch on liability as issues for determination in this appeal.

24. The court will first deal with the issue of liability although alluded to by both parties in passing. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

25. This court takes cognizance of the totality of evidence adduced by the respondent that she sustained the subject injuries while aboard the 1st Appellant's vehicle which was being driven by the 2nd Appellant who was blamed for the accident. The court holds the view that the Respondent discharged her burden of proof in the trial court vide police abstract, bus ticket, oral testimony among others to prove that she was a lawful passenger in the subject motor vehicle at the material time and that the 1st Appellant bears vicarious liability for the injuries suffered by virtue of being the owner of the subject motor vehicle. The evidence on record is that the accident was self-involving and this court has not come across any evidence on the record to suggest that any other party was responsible or could have been apportioned liability. For the above reasons, this court upholds the finding of liability by the trial court.

26. On the quantum for damages, this court refers to the plaint, according to which, the respondent sustained left proximal femur fracture and soft tissue injuries on the right left shoulder, left hand and right knee. In the instant case the trial court awarded kshs.2,000,000 while the appellants propose that a figure of kshs.700,000 would have been reasonable. The award of damages is discretionary and is made with due regard to facts, evidence and guiding authorities. In the case Kenya Power Lightning

Company Limited M another v Zakayo Saitoti Naingola M another (2008) eKLR cited in the case of Jennifer Mathenge v Patrick Muriuki v Maina (2020) eKLR. The court held;

> " On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages: -
>
> (1) Damages should not be inordinately too high or too low.
>
> (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
>
> (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
>
> (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment."

27. This court will thus consider contemporary cases with injuries of similar nature. In the case of Antony Mutai Njuguna v Emmanuel Adayo HCCA No.338 Of 2021 the Court upheld an award of Kshs.800,000 being general damages for similar injuries. In Obare & 2 Others v Ochieng (Civil Appeal E215 of 2023) [2024] KEHC 1077 (KLR) where the court reviewed an award of kshs. 1,500,000 to kshs. 800,000 general damages where the respondent had sustained injuries of fracture of the proximal femur (left leg), lower limb pain and hip pain. In the case of Mwangi alias Luke *Wambugu Mwangi v Irungu (Civil Appeal 72 of 2018*) [2022] KEHC 14346 (KLR) LUka Wambugu Mwangi alias Luke Wambugu Mwangi V Justus Nguyo Irungu, the court set aside an award of kshs. 3,000,000 and substituted it with kshs. 800,000 in general damages for head injury, soft tissue injuries to the right shoulder and leg, blunt dental injury and fracture of the right humeral head and neck and left tibia-fibula. In Daneva Heavy Trucks & another v Chrispine Otieno (2022) eKLR, the respondent sustained fractures of the pelvis and left tibia and fibula. The respondent was later to walk with a limping gait support himself on crutches for another one year before full recovery. On appeal the award was reduced to Kshs. 800,000/=. In the case of David Mutembei v Maurice Ochieng Odoyo (2019) eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia. An award of Kshs. 1,600,000 was reduced on appeal to Kshs. 800, 000.

28. Upon review of the evidence and the authorities cited by both sides, I find the authorities cited by the counsel for the appellant to have involved far more serious injuries than those sustained by the respondent in the instant case. The authorities cited by the counsel for the appellant were far more relevant and in tandem with those addressed by the court above. Whereas this court finds the award of Kshs 2 million in the instant case to be excessive, the court observes that the Respondent has been in and out of hospital on account of non-union of the bone to wit; 10th September 2011, 8th November 2011, 7th September 2012, 18th July 2013,18th August 2014 and 5th June 2015. This is an indication that the respondent has undergone prolonged suffering although there is no indication of permanent incapacity. This court therefore sets aside the award of kshs. 2,000,000 and substitutes it with an award of kshs. 1,200,000.

29. The next issue for determination is the award for special damages where the trial court awarded kshs.4,920,821. This court takes note that the Respondent pleaded a total of kshs.4,920,621.31 in special damages. The Appellant's contention is that the same were not strictly proved as per the standard required by the law and that the trial court opted to adopt bills and invoices as proof of payment instead of requiring the Respondent to produce receipts as evidence of payment of the

same. The Appellant has isolated and demonstrated lists in three categories that were not specifically proved and ought not to have been honored as special damages: This court has examined the same as hereunder:

List dated 30th May, 2016 totaling

i. Ksh.450,000 mentioned in letter at page A9 respondent list dated 30.5.2016 this is a letter not a receipt and in any event the amount was raised by students and not the respondent. The cheque for the amounts in the letter is drawn by Shree C. I. Charitable Trust. The Court erred in awarding kshs.450,000/= and this amount is to unjust enrichment.

   The letter mentioned above is supported by two cheques at pages 189 and 190 of the record for kshs. 350,000 and 100,000 respectively from Shree L R Pendolia Academy showing payments to MP Shah Hospital and Central Memorial Hospital towards Beatrice Omondi medical fund. The Appellant's claim is therefore not valid.

ii. C.75- This is a service voucher not a receipt

iii. C.76-This is a service voucher not a receipt

   Whereas the documents are titled service voucher there is an indication at the bottom of each that the monies kshs. 177 and kshs.1,890 were received. This claim by the Appellant is not valid.

iv. C.92-The name of the client is A Kin-Mayfair kshs. 6,900 but the name on the receipt is the Respondent. This is not a valid claim by the Appellant.

v. C.105- This is a pro-forma invoice for kshs.1,63,085not payment.

vi. C.107-This is an invoice for kshs. 99,540 and clearly indicates that balance due is kshs.99,540

vii. C.122-This is an invoice for kshs529,429 and not payment.

viii. C.123 is a detailed bill of Kshs.107,983 and not payment and indeed it is appearing as not balance.

   The rest of the items in this category comprise of bills and others are invoices which ought not to have been admitted as evidence of payment in the award of special damages.

   List dated 17th March 2018 totaling

ix. B.4 Kshs.100,000/= has been repeated as C79. This was indeed repeated in C79 and was therefore a repeat count and should be deducted.

x. B5 Kshs.100,000 was paid by peter Omondi and not the respondent. The record indicates that peter Omondi was the Respondent's husband. The claim by the Appellant is not valid.

   B6 Kshs.396,000 marked at page 140 of the record is an In- patient deposit receipt and not a discharge voucher as claimed by the Appellant.

xii. B30- This is a pro-forma invoice for Kshs.193,086.50/= and therefore no strict proof has been discharged. This is a valid claim by the Appellant and the

amount should not have been considered as evidence of payment in the special damages award.

xiii. B32-This is again an invoice therefore does not meet the strict proof standard. This is a valid claim by the Appellant and the amount should not have been considered as evidence of payment in the special damages award.

List dated 7th February 2013 totaling

xiv. Interim invoice at page 35- It is not proof of payment for kshs. 484,308/= This is a valid claim by the Appellant and the amount should not have been considered as evidence of payment in the special damages award.

xv. Final invoice from the main Hospital at page 36 for kshs.6,374/= This is a valid claim by the Appellant and the amount should not have been considered as evidence of payment in the special damages award.

xvi. Radiology debit at page 37 for kshs.4,750/=

xvii. Physiotherapy debit at page 38 for kshs.5,400/=

xviii. Physiotherapy debit at page 39 for kshs.2,610/=

xvii. Physiotherapy debit at page 40 for kshs.1,800/=

xviii. Physiotherapy debit at page 41 for kshs.2,000/=

xix. Final invoice debit at page 42 for kshs.8,850/=

xx. Credit sales invoice at page 43 for kshs. 2,000/=

xxi. Final bill from Nairobi Hospital at page 44 to 54 for kshs. 504,950. This is not evidence of payment but a bill addressed to Alexander Forbes who was the paying client on behalf of the Respondent.

xxii. Inpatient final bill from the Nairobi Hospital from page 70 to 73 for kshs.203,055. This is not evidence of payment but a bill addressed to Alexander Forbes who was the paying client on behalf of the Respondent.

xxiii. Inpatient hospital bill from Nairobi Hospital pages 74 to 77 for kshs.1,13,717. This is not evidence of payment but a bill addressed to Alexander Forbes who was the paying client on behalf of the Respondent.

xxiv. The only amount payable is kshs.46,000 as shown receipt No.1678 supported by invoice No. 4444. This is a payment receipt found in the record at page 88 and indicates that the amount was paid.

xxv. Credit sales invoice No.5546350 at page 91 of the record for kshs. 1700 is not evidence of monies paid.

xxvi. Invoice no. 96 at page 96 for kshs. 120,000 is not evidence of money paid.

xxvii. Receipts at page 99 are two receipts for kshs. 3,000 each in the name of Peter Omondi and is evidence of payment by the respondent's husband.

30. Upon this court's evaluation, it is apparent that the trial court adopted the Respondent's claim in lump-sum without separating the items that were strictly proved from those that were not. This court

finds that out of the 28 items pointed out by the Appellant and listed above, only 6 items marked in asterix (*) passed the test of strict proof. The rest of the items totaling kshs. 3,150,177.5 comprised of bills, invoices and debits without evidence of payment. It is also notable that some of the bills were addressed to a client, Alexander Forbes which from my observation offers insurance among other services. It is possible that some of the bills were paid and receipted to the paying client. The trial court's holding in assessing special damages that "it would be absurd that to assume that the respondent simply walked out of hospital without making payment" is without any legal bearing. The legal principle for special damages was laid down in *Hahn v Singh, civil appeal no. 42 of 1983*)

> "...special damages which must be not only claimed specially but proved strictly 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 the nature of the acts themselves."

31. This court therefore finds in accordance with the legal requirement that items not strictly proved should not been awarded in special damages and should therefore be deducted from the award. In the instant case the award for special damages is hereby reviewed downwards by a total sum of kshs. 3,150,177 leaving a balance of kshs.1,770,643.

32. The trial court awarded the Respondent kshs. 1,700,000 for future medical expenses. The Appellant contests this award on the basis that the medical report relied on by the Respondent in their submissions was not produced in court. The Respondent in his submissions in the instant appeal referred to Dr. Owinga's report dated 26th March 2015. Upon perusal of the record, the same is contained at page 197 and is listed as B18 in the plaintiff's further list of documents which confirms that it was produced. The Court of Appeal in the case of Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR 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."

33. This particular claim was listed in the final prayers of the amended plaint. It was indicated in the plaint that the plaintiff continues to incur costs out of continued medical treatment due to the nature and extent of her injuries. In the plaint, the Respondent sought to rely on the medical report dated 22nd May 2012 by Dr. Owinga. During the trial, the Respondent produced two items: Abstract from Nandi Hills Police Station and medical notes which included Dr.Owinga's medical report dated 26th March 2015. It is not clear what the medical notes entail but it is in order to presume that the entire plaintiff's list of documents was admitted and that is what the trial court relied upon. However, the report by Dr Niraj Krishnan dated 2nd March 2017 recommending stem cell surgery at the cost of between kshs. 1,200,000 to 1,500,000 in India which was relied upon by the trial court in making this award is not available on the record suggesting that it may not have been produced. On the other hand, the report dated 26th March 2015 by Dr. Owinga which is available on the record does not suggest stem cell surgery in India but states that:

> "She requires surgery it appears any of the above techniques are unlikely to work"

34. However, from the record at page 200, a subsequent report by Dr. Kirit Shah a consultant orthopedic surgeon dated 9th October 2015 states in part:

> "...at present patient is improving, pain has reduced and able to walk with one crutch. X-ray showed fracture is uniting. She is advised to continue physiotherapy to strengthen quadriceps and hamstring."

35. This was a review after a surgery was undertaken by Dr. Kirit Shah on the respondent on 5th June 2015 as indicated on the record. Logically, it appears that this was the further surgery referred to by Dr. Owinga in his report dated 26th March 2015 and that the patient was now doing better. There is no subsequent report to contradict the above medical opinion or to suggest that the respondent required further treatment in India or otherwise. In her testimony in August 2022, the Respondent stated that she needs surgery but it is not supported by evidence in view of Dr. Kirit's report mentioned above. For the above reasons, this court finds that the award of Ksh.1,700,000 for future medical expenses is not supported by the evidence on record and is hereby set aside.

36. The trial court awarded the respondent kshs.1,000,000 future earning capacity. The same has been contested by the Appellant on the basis that it is in the nature of general damages but was not specifically pleaded. In the case of Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) the court in addressing a similar matter held that;

> Diminished earning capacity refers to a decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.
>
> Usually, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss.
>
> However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future to get an award under that head.

37. In Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR, the court held that the issue of award of loss of earnings where a Claimant cannot prove employment;

> The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award, when a plaintiff is employed, is to compensate the plaintiff for the risk that the disability has exposed him to either losing his job in the future or case he loses the job, his diminished chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

38. The distinction therefore is that loss of future earning is an award for special damages while loss of earning capacity an award for general damages. My reading of the above is that loss of earning capacity

is based on disability that the respondent has suffered as a result of the injuries sustained as a result of the accident. On the other hand, loss of earnings looks at what has been lost as a result of the accident. In the instant case, none the medical reports available on the record has assessed the respondent as having suffered disability, permanent or otherwise. It is noteworthy though, that the Respondent in her testimony stated that she has reduced mobility and relies on her husband for movement.

39. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved. In the instant case the trial court awarded for the loss of future earning capacity based on the Respondent's former employment as a secretary earning a salary of kshs.20,000 per month and the Respondent's age at 47 years. This was neither pleaded nor strictly proved. In the circumstances, I find that the trial court misdirected itself in making that award and I hereby strike it out for lacking sufficient evidence. The same is substituted with an award of general damages for loss of amenities based on diminished earning capacity for kshs.1,000,000.

Determination

40. Based on the above findings this court orders that:

    i. General damages pain and suffering .... Kshs. 1,200,000

    ii. General damages for loss of amenities (diminished earning capacity).... .....Kshs. 1,000,000

    iii. Special damages .....Kshs. 1,770,000

    iv. Future medical expenses.....set aside

    Total 3,970,000

    V. Costs to the Appellant

    30 days stay of execution is granted.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF JANUARY, 2025

R.O.A

Hon. T. W. Ouya

JUDGE

For Appellant...Mahugu

For Respondents...Awiti H/B

Court Assistant... Martin Korir