Jimmy & 2 others v Wakulwa (Civil Appeal 88 of 2023)
[2025] KEHC 2316 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 88 OF 2023

MW MUIGAI, J

FEBRUARY 28, 2025

BETWEEN

REAGAN WAITA JIMMY ..... 1ST APPELLANT

DANIEL OKOTH OKELLO ..... 2ND APPELLANT

JUBILEE INSURANCE COMPANY LIMITED ..... 3RD APPELLANT

AND

SILAS SYLVESTER WAKULWA ..... RESPONDENT

(Being an Appeal from the judgment and decree delivered on 4th April 2023 by Hon M.Opanga in Kangundo CMCC no E20 of 2021)

JUDGMENT

Plaint

1. Vide a plaint dated 21.12.2020, the Plaintiff averred that on or about 16.01.2019 along the Machakos-Nairobi road via Kangundo at Kwa kuku area at about 1330 hours he was lawfully driving his motor vehicle registration number KBH 469 Premio, when the 1st Defendant, a driver , servant and/or agent of the 2nd and 3rd Defendant negligently, carelessly and/or recklessly drove, managed and/or controlled motor vehicle registration number KBY 774W Honda Airwave in such a manner that he caused the same to collide with the Plaintiff's said Motor vehicle thereby occasioning extensive injury damage and loss to the Plaintiff and his motor vehicle.

2. The injuries were particularized as fracture in the right foot (1st and 2nd Metatarsals), right side foot tarsal metatarsal dislocation, right femur segmental fractures, pelvic fracture, left leg comminuted fracture tibia, subluxation of left knee joint, soft tissue injuries, loss of blood and pain.

3. The Plaintiff prayed for general damages for pain and suffering and loss of amenities, future medical expenses, special damages, costs of the suit and interest.

4. The Defendants filed a joint statement of defence dated 4.10.2021 wherein they denied the contents of the Plaint and stated that if the accident occurred then it was caused by the negligence of the Plaintiff. They urged the court to dismiss the suit with costs.

Hearing

5. The advocates for both parties filed a consent dated 13.01.2023 in the following terms;

    a. Judgment on liability be entered 90:10 in favour of the Plaintiff against the Defendant.

    b. The Plaintiff list of documents dated 8.02.2021 and the Defendant's list of documents dated 2.12.2021 be admitted in evidence without calling the makers and be produced and attached to each parties submissions.

    c. The Plaintiff's witness statement dated 21.12.2021 be adopted as his testimony before court.

    d. Parties to file written submission on quantum to enable the court assess damages and costs of the suit.

Trial Court Judgment.

6. The Trial court in a judgement delivered on 4.04.2023, the court entered judgment for the plaintiff against the defendants as follows;

    a. Liability apportioned in the ratio of 90: 10 in favour of the plaintiff against the Defendant.

    b. General damages awarded at Kshs 2,500,000

    c. Costs of future medical expenses at Kshs 850,000

    d. Loss of earning and earning capacity not proven

    e. Special damages of Kshs 2,488,556.30

    f. Costs and interest.

    Total award less 10% contribution Kshs 5,254,700.67

The Appeal

7. Dissatisfied by this judgment, the Appellants filed a memorandum of Appeal on 26.04.2023 seeking to have the award set aside and the same re assessed on the grounds that;

    a. The learned Trial Magistatre misdirected and ignored the applicable tenets deviated from relevant authorities cited in the Appellants submissions thus disregarded the well- founded principles of judicial precedent.

    b. The Trial Magistrate erred in law and in fact by awarding Kshs 2,500,000 as general damages which was manifestly high and entirely erroneous in the circumstances.

    c. The Trial Magistrate erred in law and in fact in making assessment of special damages for medical expenses at Kshs 1,996,748.30 when the said figure was not specifically pleaded and proved by evidence leading to a wrong exercise of discretion in the circumstances.

    d. The Trial Magistrate erred in law and in fact by awarding the Respondent the sum of Kshs 491,808 motor repair charges when the same was not strictly proved by way of evidence thereby arrived at a wrong decision that occasioned miscarriage of justice.

e. The Trial Magistrate erred in specifically validating the evidence tendered before the court on future medical expenses thereby arriving a wrong exorbitant award of Kshs 850,000

8. The Appeal was canvassed by way of written submissions.

Appellant's Submissions Dated 29.08.2024

9. The appellant submitted on three issues. Firstly, It was submitted that the Trial Court erred in awarding special damages which were not specifically proved. While relying on the cases of Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, it was submitted that the Respondent only filed voluminous final statements and invoices that were not stamped or verified from Kenyatta National Hospital. That as a general rule, the respondent has a duty to prove that the said statements were from KNH and present receipts of the invoices.

10. The Appellant stated the reasons the Appellant did not meet the standard of proof as follows, that;

a. The Respondent only annexed final Statements from KNH

b. The final statement annexed was neither verifiable nor corroborated as having been received from KNH

c. The final statements do not have a date of payee or person who prepared them

d. The final statements do not have an indication of whether the same were paid by NHIF or the Respondent. That if they were paid by NHIF, he is not entitled to claim that amount. This point was buttressed by placing reliance on the case of John Mwangi Munyiri & Another v Paul Wachira Njuguna [2020] e KLR

e. The final statements are not stamped by the medical facility in question.

f. No letter form the medical facility indicating that they shared the final statements herein.

g. There is no proof of 2nd medical admission on 26th June 2019 that incurred Kshs 311,899

h. Contrary, the Respondent annexed Final Statements indicating that as of 7th March, 2019, Kshs 311,899 had been incurred which means that the Respondent had already obtained Final Statements in his possession before admission on 26th June 2019

i. The Respondent only annexed secondary evidence that did not abide strictly with section 66 and 67 of the *Evidence Act* and the same ought to be expunged from the record as they were not presented in their original form. To buttress this point, the Appellants referred to the case of Re estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu [2016]e KLR

11. With regard to future medical expenses, the Appellants relied on the case of Kenya Power & Lighting Company vs AMK suing as the mother and next friend of JMK-minor [2021] KECA 52 KLR and submitted that an award of Kshs 200,000 would have been sufficient as the medical report by Dr,. Wokabi dated 10.11.2021 indicated that removal of the metal implant would cost Kshs 120,000.

12. Counsel submitted that only Kshs 15,000 was proved for repair of the motor vehicle as that was the only receipt that was produced.

13. Secondly, as regards special damages, it was contended that an award of Kshs 1,000,000 would have been sufficient. Reliance was placed on the cases of Daniel Otieno Owino & Another v Elizabeth

Atieno Owuor [2020] e KLR, Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] e KLR, Civicon Limited v Richard Njomo Omwancha & 2 others [2019] Eklr.

14. Thirdly, it was submitted that the notice of appeal dated 17.05.2024 had no merit and the same ought not be allowed. It was contended that it was filed as an after thought. It was the Appellants position that the Trial Court's determination on the issue of loss of earning capacity was based on cogent evidence together with parties submissions. While relying on the cases of Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] e KLR and Kenblest Kenya Limited vs Musyoka Kitema [2020], It was submitted that the Respondent did not provide evidence of loss of earning Kshs 180,000 as an Assistant Occupational therapist at Kenyatta Hospital.

Respondent's Submissions Dated 17.10.2024

15. The Respondent submitted on six issues. Firstly, it was submitted that the documents were produced by the consent of both parties and for the Appellant to now challenge them on appeal without setting aside the consent order dated 13.01.2023 in made faith and is ingenuine.

16. Secondly, that the award of general damages was an exercise of discretion and the trial court can only interfere with it if such discretion was not exercised judiciously and in this case, the Appellants have not demonstrated how the Trial Court improperly exercised its discretion. Reliance was placed on the cases of I&M Bank Kenya Limited versus Synergy Industrial Credit Limited & Another [2024] e KLR, John Mutuga Kamau v Kanini Haraka Enterprises Limited [2019] e KLR, Ziporrah Nangila v Eldoret Express Limited & 2 others [2016] e KLR and it was submitted that the award of the Trial court was on the lower side and modest and it cannot be faulted for exercising its discretion.

17. Thirdly, it was submitted that the award of special damages of Ks 1,996,783.30 was pleaded and proved. That NHIF only made a part payment of the medical bill. The respondent relied on the case of Boniface Nzioka Malundu v Jeremiah Kariuki Mwaniki [2020] e KLR and submitted that the Appellant was on a wild goose chase raising all manner of issue hoping that one will stick in their favour.

18. Fourthly, it was submitted that he produced documents and receipts in support of his claim of Kshs 471,308 as special damages for repair of his motor vehicle towing charges and assessor's fees and the Appellant consented to the production of the said documents.

19. Fourth, that the award of future medical expenses was pleaded and proved through the witness statement, his pleadings and the medical report by Dr. Tom Mogire, the orthopaedic Surgeon at Kenyatta National Hospital. The total cost for knee replacement is Kshs 600,000 and the cost for removal of the Femur is Kshs 250,000. Further that no reason has been given for interference with these awards.

20. Lastly, it was submitted that there was evidence that the Appellant was earning Kshs 150,000 per month and it was only fair that he be awarded Kshs 1,800,000 for loss of income for the 6 months that he was admitted in hospital as a result of the accident. The court was urged to dismiss the appeal with costs.

Determination

21. This being a first appeal, the Appellate Court has to re evaluate the evidence before the Trial Court and arrive at its own conclusion. In the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs [2001] 3 SCC 179 where the court stated as follows;

> " A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case

is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

22. I have perused the Trial court record, the Memorandum of Appeal and the submissions thereto and find that the issue of liability, costs and interest is not contested. The issues that have come up for determination are;

    a. The effect of the consent order dated 13.01.2023

    b. Whether the award of special damages should be disturbed

    c. Whether this court should re-evaluate the award of general damages

23. First, I note that the parties to this suit entered into a consent in the following terms;

    a. Judgment on liability be entered 90:10 in favour of the Plaintiff against the Defendant.

    b. The Plaintiff list of documents dated 8.02.2021 and the Defendant's list of documents dated 2.12.2021 be admitted in evidence without calling the makers and be produced and attached to each parties submissions. Further, the Plaintiff's witness statement dated 21.12.2021 be adopted as his testimony before the Honourable court.

    c. Parties to file written submissions on quantum to enable the court assess damages and costs of the suit.

24. The effect of a consent order was discussed in the case of in the case of Windsor Commercial Land Company Ltd & others v Century National Merchant Bank Trust Ltd SCCA 114/2005 where the court stated that:

> " The Court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would include mistake, misrepresentation, duress and undue influence."

25. Further, in the case of *Edward Acholla v. Sogea Satom Kenya Branch & 2 others Cause No. 1518 of 2013*; [2014] eKLR, where the Court held that :

> " Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out."

26. Further, in the court in SNI v AOF [2020] eKLR stated as follows;

> " Prudence, indeed will dictate that parties legal effect deprived from the consent orders should be deliberately be bound unless there is evidence that every material fact in their possession was invariably mistaken or misrepresented to warrant a variation or complete

setting aside the order. It is integral as the Court held in Flora N. Wasike v Destinno Wamboko {1988} eKLR that:

"It is now settled Law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out . [See the decision in J. M. Mwakio v Kenya Commercial Bank Ltd *CA No. 28 of 1982*].

.....

In the case of Frank Phipps & Pearl Phipps v Harold Morrison SCCA 86 of 2008 Harris JA stated:

"As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. Kinch v Walcott and Others [1929] A.C. 482 "The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation."]

Wildung v Sanderson {1897} 2 CL 534:

"A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose."

27. In this case, I note that the Appellant is challenging the authenticity of documents that were produced by his consent. Documents that he had seen prior by virtue or Order 11 of the Civil Procedure Rules 2010. By agreement of the parties, they decided to do away with the normal procedure of production of evidence where each party would have been able to produce each document and the opposing party been able to cross examine on the same. The procedure of hearing of suits and examination of witnesses is otherwise provided for in Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2 which provide as follows: -

1. The plaintiff shall have the right to begin unless the court otherwise orders.

2. Unless the court otherwise orders—

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.

(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case;

the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

28. The train already left the station, when the parties entered into a consent on how they wanted the case to proceed. The Appellant cannot at this time challenge the nature or condition of the documents yet the order that allowed for them to be produced on an as is basis has not been set aside or challenged. As such the argument that the receipts produced are copies cannot stand. This court can only deal with arguments that were presented before the trial court. In the case of Idris & another v Lime & another (Suing as the legal representatives in the Estate of Samson Ndunde Lime (Deceased)) (Civil Appeal E20 of 2022) [2023] KEHC 18062 (KLR) where the court stated that;

> " First, I note that the receipts were all produced and admitted in evidence by what amounted to a consent. In fact, it is the appellant's counsel who moved the court to adopt such directions. Even if were not by consent, still the appellants never raised any objection at that point. The first time that the appellants brought out the issue was in their final submissions. I therefore find it mischievous for the appellant to have waited to raise such objection at the tail end of the matter. This cannot be proper practice."

29. Coupled with this, I will now move to the issue of special damages. The Court of Appeal in the case of David Bagine v Martin Bundi [1997] eKLR, cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177), where he stated that:

> " The Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness."

30. The special damages in this case was awarded under three categories; future medical expenses, motor vehicle repair costs and hospital expenses.

31. The Court of Appeal in the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR held as follows;

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.
>
> In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of.

The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi *CA No. 192 of 1992* (ur) appears in the Jivanji case:

"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded.

In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

32. As regards future medical expenses, the medical report by Dr. Mogire of Kenyatta National Hospital indicated that the Respondent requires to undergo further surgeries. He capped the total knee replacement of Kes 600,000 and removal of the right femur nail at Kes 250,000. On the other hand Dr. Wokabi found that a surgery will cost Kshs 120,000. The report was made in 2021. The Trial court awarded Kshs total knee replacement of Kes 600,000 and removal of the right femur nail at Kes 250,000. Looking at the time of the accident and the time factor, I find the amount to be reasonable. No reason or evidence has been advanced for interference with the said award.

33. The issue of earning capacity does not arise in this Appeal as the same was dismissed.

34. With regard to the hospital expenses, the Appellant has challenged the final invoices which are not verifiable. I note that there are no receipts to verify that the invoices were settled. In the case of Total Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd [2015] eKLR where the court stated in the case of

Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority [2000] eKLR 720, the court stated thus"

> " What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word "paid" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case non of the two documents would amount to a receipt."

35. The Respondent produced the following receipts;

    a. Towing charges dated 15/2/2019 of Kshs 15,000

b. Copies of receipts from Med health solutions amounting to Kshs 153,000

c. Copies of receipts being payment of Pysiotherapy amounting to Kshs 30,000 (18,000 for 9 sessions and another for 12,000 for 6 sessions)

d. NTSA is Kes 500

36. I find that Kshs 198,500 was pleaded and proved. The final invoices from Kenyatta National Hospital are not proof of payment. The Respondent ought to have attached receipts or any proof that the invoices were settled to allow for the court to reimburse the same.

37. For the cost of repair of the motor vehicle, the Respondent produced an assessment report by Pragma-Tech Auto Assessor's Limited that put the cost of repairs at Kshs 471,308. There being no receipt for proof or payment, I find that this award was not deserved and the same is set aside.

38. The third issue is that of general damages. The circumstances under which an Appellate court will interfere with the quantum of damages awarded by a Trial Court were laid out by the Court of Appeal in the case of Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the court stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

39. In the case of Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No 2) [1985] eKLR where the court rendered itself as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

40. In Butt v Khan [1982-88] KAR 1 it was held –

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".

41. The medical report dated 31.12.2020 by Dr. Tom S. Mogire indicates that the Respondent sustained the following injuries; fracture in the right foot (1st and 2nd Metatarsals), right side foot tarsal metatarsal dislocation, right femur segmental fractures, pelvic fracture, left leg comminuted fracture tibia, subluxation of left knee joint, soft tissue injuries and loss of blood. He assessed disability at 40% while Dr. Wokabi who did the 2nd assessment assessed the same at 18%. It has not been established that the

Trial Court proceeded on the wrong principles of law or into account an irrelevant factor, or left out of account a relevant one to warrant variance of the award by this court.

Disposition

42. In the end , I find as follows;

a. The appeal partly succeeds.

b. The award on general damages, future medical expenses and liability remains as awarded by the Trial court

c. The award of special damages is set aside and I award Kshs 198,500

d. Each party shall bear its own costs.

JUDGMENT DELIVERED SIGNED DATED IN OPEN

COURT IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY ON 28/2/2025.

M.W. MUIGAI

JUDGE