Tindi v Mumias Sugar (2021) Limited (Civil Appeal 106 of 2024)
[2025] KEHC 3976 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 106 OF 2024

AC BETT, J

MARCH 27, 2025

BETWEEN

JOSEPH KUTOTO TINDI ..... APPELLANT

AND

MUMIAS SUGAR (2021) LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. T.A. Obutu delivered on 23rd May 2024 in Mumias SPMCC No. E036 of 2023)

JUDGMENT

1. The Appellant herein had filed a suit against the Respondent vide a plaint dated 13th February 2023 seeking general and special damages for injuries sustained due to a road traffic accident.

2. According to the Appellant, on or about 11th January 2023, in the Mang'ang'a area, the Respondent's driver, agent, and/or servant lost control of the Appellant's motor vehicle registration number KTCC 350 F/ZE 8995 belonging to the Respondent and knocked down the Appellant, who was a pedestrian. The Appellant sustained several bodily injuries for which he held the Respondent liable. The Respondent denied liability, and the matter proceeded to hearing.

3. In his judgment, the trial magistrate found that the Appellant was hit by the tractor belonging to the Respondent and that the Appellant equally had a duty of care, which he failed to discharge since he had to keep a safe distance while loading the tractor, and apportioned liability of 30% to the Appellant and 70% to the Respondent.

4. On quantum, the trial court referred to the medical report and the doctor's report, indicating that the Appellant would require further medical treatment at an estimated cost of Kshs. 200,000/=. He stated that the claim for future medical expenses was not pleaded nor proven. He therefore awarded the Appellant compensation of Kshs. 350,000/= as general damages and Kshs. 15,400/= for special damages, which was subject to 30% contribution.

5. The Appellant, being dissatisfied with the said judgment and decree, filed this appeal on the following grounds:-

    a. The learned Trial Magistrate erred in law and fact in apportioning hefty contributory negligence against the appellant without sufficient evidence.

    b. The learned Trial Magistrate erred in law and fact in exercising his judicial discretion on the assessment of damages as to amount to abuse and wrong application on award/ assessment of damages.

    c. The learned trial magistrate erred in law and fact in awarding damages that were inordinately low as to amount to gross underestimation of the injuries sustained by the appellant.

    d. The learned trial magistrate erred in law and fact in finding and holding that the appellant did not plead and or prove the claim for costs of future medical expenses.

    e. The learned trial magistrate erred in law and fact in diminishing the appellant's claim for future medical expenses.

    f. The learned trial magistrate erred in law and fact in arriving at a decision that was not supported by the pleadings, evidence and submissions.

6. The Appellant prays that the appeal be allowed and that the lower court's judgment be set aside and the court substitute with a judgment on liability at 100% against the Respondent.

7. The Honourable Court is also urged to reassess the general damages due and payable to the Appellant and reconsider the award for future medical expenses.

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

Appellant's Submissions

9. In his submissions, the Appellant disputed the trial court decision on liability and quantum.

10. It was the Appellant's testimony that he was loading sugar cane onto the tractor when the tractor driver suddenly hit him and ran over his leg. He claimed that he was an innocent pedestrian when the driver, without care, drove the tractor and hit him and that there was no negligence on his part. He claimed that the Respondent could escape liability only by showing that there was no negligence on their part and that the accident occurred owing to factors beyond their control.

11. He contends that there was evidence on a balance of probabilities that the accident was caused by the tractor driver's negligence. He submits that the Respondent failed to give its version of how the accident occurred, therefore they are 100% liable for the accident. The Appellant relies on the case of Kimatu Mbuvi vs. Benson Nguli [2010]KEHC 3405(KLR), where Lenaola J (as he then was) stated that liability cannot be challenged when a party calls no evidence to rebut allegations of negligence and hardly challenges the circumstances of the accident.

12. The Appellant submits that the trial court erred in finding the Appellate liable since the accident was unavoidable from his direction.

13. On the issue of quantum, he relies on the medical report by Dr. Sokobe, which states that he was unable to use his right lower limb and submits that the award of Kshs. 350,000/= in general damages was inordinately low. He relies on precedents with comparable injuries, such as the case of Kisumu HCCA No. 41 of 2020 SAMCO Traders Ltd. & Anor. vs. Alfred Ayanga Opaka, where the court

awarded Kshs. 600,000/= in 2021, and Embu HCCA No. E006 of 2022 Morison Nyaga Ndwiga & Anor. Ezekiel Khatete Mukimba, in which the court awarded Kshs. 500,000/=.

14. The Appellant asserts that the award by the trial magistrate was inordinately low and prays that this court re-assesses the damages and substitutes the same with Kshs. 600,000/=.

15. On the claim of future medical expenses which the trial magistrate dismissed, the Appellant maintains that he had pleaded for costs of future medical expenses of Kshs. 200,000 in paragraph 7 of the plaint and proved through the medical report.

16. Relying on the case of Nairobi Civil Appeal No. 96 of 2011 Maqsooda Begun Sroya Vs. Sunmatt Ltd, the Appellant urges the court to find that the trial court erred in dismissing his prayer for future medical expenses.

17. He prays that the decision of the trial court be set aside, and judgment be entered in his favour for Kshs. 200,000/= for his claim for future medical expenses.

Respondent's Submissions

18. The Respondent summarized his submissions to three issues. On the first ground, it asserts that the court did not err in apportioning liability and relying on the principle of he who alleges must prove, quotes the case of Gideon K. Kemboi vs. Nyayo Tea Zone Development Corporation (2015) eKLR. It contends that the Appellant failed to prove that the accident was solely based on the Respondent's negligence.

19. The Respondent highlighted the Appellant's contradictions in that while in his statement he claimed that he was hit while standing on the side of the road in the Mang'ang'a area, during cross-examination, he claimed that he was a casual labourer, and the accident occurred when he was loading canes. The Respondent contends that the Appellant's testimony was his assertion never corroborated, and he never produced any evidence to support his claim that he worked for the Respondent as a casual worker.

20. The Respondent further submits that the Appellant failed to establish negligence on the part of the Respondent and maintains that the Appellant was equally at fault as he did nothing to avoid the accident, and hence the court was correct in apportioning the liability.

21. On the quantum, the Respondent refers to the medical report and the Appellant’s admission that although he had sustained a fracture on the right tibia, during cross-examination, he confirmed that he could now walk. The Respondent asserts that the award of Kshs. 350,000/= subject to contribution was sufficient for general damages, and the same ought to be maintained.

22. On the claim of future medical expenses which the trial court held ought to be pleaded and proven, the Respondent agreed with the trial court and submits that the same are special damages that ought to have been pleaded and proved, and since the Appellant failed to plead them in the plaint nor provide any invoice or quotation in proof of the same, then the court was righting in dismissing the claim. The Respondent relies on the Court of Appeal case of Guardian Coach Ltd vs. Kiptoo (Civil Appeal 34 of 2020 and Hassan Mohammed Adan (2009) eKLR.

23. The Respondent prays that the appeal be dismissed with costs.

Analysis and Determination

24. The duty of the court in a first appeal is as was stated by the Court of Appeal in Abok. James Odera T/a A. J. Odera Associates v. John Patrick Machira T/a Machira & Co. Advocates (2013) eKLR that:-

> " On the first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it, and draw its conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on evidence on record and not introduce extraneous matter not dealt with by the parties in the evidence."

25. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or a misapprehension of the evidence, or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v. Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v. Kiruga & Another (1988) KLR 348.

26. I have carefully perused the proceedings, the evidence adduced before the trial court, the judgment, and the record of appeal as a whole, including the parties' submissions.

27. The main issues for determination are

    a) Whether the trial court erred in apportioning contributory negligence of 30% against the Appellant.

    b) Whether the damages awarded by the learned trial magistrate were inordinately low.

    c) Whether the trial magistrate erred in law and in fact in finding and holding that the appellant had not pleaded and proven the claim for costs of future medical expenses.

28. A finding and apportionment of liability by a trial court calls for the exercise of judicial discretion based on the evaluation of the evidence adduced. The appellate court can only interfere if the finding is not supported by the evidence on record.

29. In Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981, it was held that apportionment of blame is an exercise of discretion with which the appellate court will interfere only when it is wrong, or based on no evidence or the application of a wrong principle.

30. In Stapley v. Gypsum Mines Limited (2) (1953) A.C. 663 at P. 681, Lord Reid reasoned that:

> " To determine what causes an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it. The question must be determined by applying common sense to the facts of each particular case.
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> One may find that in a matter of history, several people have been at fault and that if any of them had acted properly, the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults that must be discarded as being too remote and those that must not. Sometimes, it is proper to discard all but one and to regard that one as the

sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can apply generally."

31. In this case, the learned trial magistrate concluded that the accident was a result of acts of negligence by both parties. He held that the Appellant had a duty of care by ensuring that he was at a distance when he was loading the cane on the tractor to avoid being knocked, hence was liable for contributory negligence.

32. No independent eyewitness was called by either side to shed light on what transpired. In such a case, it was impossible to apportion liability between the two sides.

33. The Appellant argues that he was the only witness at the scene that the Respondent did not prove any negligence on his part and that the court ought to hold the Respondent 100% liable for the accident.

34. The Respondent, on the other hand, contends that the Appellant had a duty to prove that the Respondent was 100% liable for the accident since the Appellant stood in front of the tractor and did nothing to avoid the accident, hence, the trial court was correct in apportioning liability at 70:30.

35. I have considered the rival evidence adduced in court by the parties. In his judgment, the learned trial magistrate found that the Appellant had a duty of care for which he failed to discharge since he ought to have kept a distance when he heard the tractor starting and ought to have shouldered some responsibility.

36. The trial court held that the Appellant should bear some blame for his accident. The Respondent pleaded contributory negligence but did not testify or call any witnesses to speak on that fact. To successfully establish contributory negligence, a defendant must prove that the plaintiff, through his or her negligence, contributed to the accident.

37. The Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR cited with approval the decision in Baker V Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter alia that:-

> " Every day proof of collision is held to be sufficient to call on the dependents for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them."

38. It is my finding that the tractor driver had the responsibility to ensure that there was nobody in front of the vehicle before driving; hence he bore more responsibility. Similarly, the Appellant had the responsibility to be on the lookout while in front of a movable vehicle, he did not seem to have done anything to avoid being knocked down.

39. In the circumstances, I find that the Appellant cannot escape responsibility since he had a duty of care to avoid the accident. However, the responsibility is heavier on the driver especially when a motor vehicle has not been in motion.

40. Having reviewed the pleadings, the witness statement, and the evidence adduced by the Appellant in court, I note that there is a contradiction as to how the accident occurred. In the pleadings, the Appellant is stated to have been a pedestrian, in the witness statement, the Appellant states that he was standing by the roadside in the company of friends. In the evidence before the2court, the Appellant testified that he was loading sugar cane.

41. It is trite law that a party is bound by his pleadings. The Appellant's evidence was a manifest departure from his pleadings. Be that as it may, since the Respondent did not appeal against the finding on liability. I will not interrogate the same.

DAMAGES

42. The other issue is whether this court should interfere with the damages awarded by the trial court. It is well settled that an award of general damages will only be disturbed if the trial court takes into account an irrelevant fact or fails to take into account a relevant factor or if the award is so inordinately high that it must be a wholly erroneous estimate of the damages or that it was inordinately low.

43. The trial magistrate awarded Kshs. 350,000/= as general damages and Kshs. 15,400/= for special damages. From the records, the Appellant sustained an intercondylar fracture of the right tibia.

45. The medical report dated 6th February 2023 by Dr. Joseph C. Sokobe opined that the patient sustained a severe skeletal tissue injury from which he had not recovered and needed further treatment being open reduction and internal fixation at an estimated cost of Kshs. 200,000/=.

46. The Court of Appeal in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR reasoned that:-

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

47. As a general rule, comparable injuries should receive comparable awards, which should be within the limits set by similarly decided cases. In Kigaragari vs. Aya (1982-1988) 1 KAR 768, it was held as follows:

> " Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenyan awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance coverage or increased fees."

48. I have compared the Appellant's injuries to the injuries sustained by claimants in the following cases:

a) In Naomi Momanyi v. G4S Security Services Kenya Limited [201]) eKLR, Kshs. 300,000/= was awarded by the trial court as general damages and upheld on appeal in respect of fracture of the left-right condylar tibia, blunt injuries on the back, and multiple bruises on the left arm.

b) In Vincent Mbogholi vs. Harrison Tunje Chilyalya [2017] eKLR, the appellate court upheld an award of Kshs. 500, 000/= for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb, and bruises on the left forearm, right foot, and right big toe.

c) In the case of Simon Kimote v. Agro Solutions Limited [2021] eKLR, the court upheld an award of Kshs 350,000/= for right femoral fracture lower 1/3, tibia plateau fracture, as well as blunt head and neck injury.

d) In West Kenya Sugar Company Limited v. Andrew Chiroyi Sunguti [2021] eKLR, the plaintiff sustained two fractures on the left leg only and was awarded Kshs 500,000/- in general damages.

49. From the above authorities, it is evident that courts have awarded lesser amounts in the past even in cases where the victims sustained similar injuries.

50. I find that the trial court was properly guided by the authorities cited before him and arrived at a reasonable assessment of general damages. The learned trial magistrate cannot be faulted, as the award is neither too low nor too high in the circumstances.

51. Turning to the award of future medical expenses, 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. In the case of Kenya Bus Services Ltd vs 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 that the law does contemplate as raising 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 a 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 those future expenses will depend on several other matters, such as the place where treatment is undertaken and, if overseas, the strength of the currency, particularly the Kenyan 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 that it will be necessary to plead (if it has to be pleaded at all) the approximate sum of money that the future medical expenses will require."

52. The Respondent took issue with the non-award of what amounts to future medical expenses. However, he did not prove the same, nor did his evidence lay any factual basis for the grant of the same.

53. In Simon Taveta v. Mercy Mutitu Njeru [2014] eKLR, which placed reliance on the case of Kenya Bus Services Ltd. v. Gituma, (2004) EA 91, the 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 damages and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That flows from the general principle that all losses other than those that the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded."

54. The Appellant in this case pleaded for future medical expenses in his plaint. However, when it came to proving the claim other than the medical report by Dr. Sokobe, he never produced any evidence from a specialist doctor to confirm the severity of his injuries and the need for future medical expenses. I also note that Dr. Sokobe did not testify.

55. Without the specific evidence proving those future medical expenses, the specific pleading did not help. It is trite that special damage is specifically pleaded and specifically proved, as it was not proven specifically. Future medical expenses are not available for awarding.

Conclusion

56. In conclusion, I disallow the appeal for want of merit.

57. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Mattah for the Respondent

Court Assistant: Polycap