Karoli v Laban (Civil Appeal E043 of 2023)
[2025] KEHC 5023 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E043 OF 2023

JK NG'ARNG'AR, J

APRIL 29, 2025

BETWEEN

TOO K. KAROLI ..... APPELLANT

AND

KIPROP K LABAN ..... RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate, Kwambai T. at the Principal Magistrate's Court at Sotik, Civil Suit Number E096 of 2021)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and damages arising from a road traffic accident on 24th December 2020. The Respondent stated that he was a pillion passenger on motorcycle registration number KMFG 903F along Mogogosiek-Kapkoros road when they were hit by motor vehicle registration number KAZ 138E (allegedly belonging to the Appellant) thereby occasioning him injuries. The Respondent blamed the Appellant for causing the accident.

2. The trial court conducted a hearing where the Respondent called three (3) witnesses and the Respondent called one witness before closing their respective cases.

3. In its Judgment dated 4th July 2023, the trial court found the Appellant 100% liable for causing the accident. The trial court further awarded the Respondent general damages of Kshs 600,000/=, special damages of Kshs 98,440/= and future medical expenses of Kshs 75,000/=.

4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 16th August 2023 and relied on the following grounds that: -

    i. The learned trial Magistrate erred and misdirected herself in fact and law by awarding damages to the Respondent that were manifestly excessive.

ii. The learned trial Magistrate erred in fact and in law in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.

iii. The learned trial Magistrate erred in failing to consider and critically analyse the submissions made on behalf of the defendant and thus arrived at an unjustifiably high award for the injuries sustained.

iv. The learned trial Magistrate's award on damages was so inordinately high.

v. The learned trial Magistrate erred in fact and in law in awarding damages that were neither properly pleaded nor sufficiently proved as by law required.

vi. The learned trial Magistrate was in error of law and fact in awarding damages that were not proportionate to the injuries sustained by the Respondent.

vii. The learned trial Magistrate failed to consider the Plaintiff had fully or substantially healed while assessing the award on damages.

viii. The learned trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident.

ix. The learned trial Magistrate's findings on liability went against the weight of evidence.

x. The learned Magistrate erred in law and in fact in failing to find that the Plaintiff/Respondent had failed to make out his case and hence dismiss the same.

xi. The learned Magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.

5. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of Kiilu & Another vs. Republic (2005)1 KLR 174.

6. I now proceed to summarise the respective parties' cases in the trial court and their submissions in the present Appeal.

The Plaintiff's/Respondent's case.

7. Through his Amended Plaint dated 21st March 2022, the Respondent stated that he was a pillion passenger on motorcycle registration number KMFG 903F when they were hit by motor vehicle registration number KAZ 138E.

8. The Respondent stated that the Appellant was the owner of motor vehicle registration number KAZ 138E.and was negligent in causing the accident. The particulars of the negligence were listed in paragraph 6 of the Plaint.

9. That as a result of the accident, the Respondent suffered a right fracture of the shaft of the femur.

10. The Respondent's claim against the Appellant was for special and general damages as a result of the accident.

11. In his written submissions dated 28th February 2025, the Respondent submitted that the award of Kshs 600,000/= as general damages was reasonable. That the Respondent went to Tenwek Hospital and received treatment which included open reduction and internal fixation of the femur fractures and was

discharged. He further submitted that his injury was supported by the discharge summary, P3 Form and the Medical Report by Dr. Elary Mutai. It was his further submission that the awards of Kshs 75,000/= as future medical expenses and Kshs 98,440/= was reasonable.

12. It was the Respondent's submission that the Appeal lacked merit and ought to be dismissed.

The Defendant's/Appellant's case

13. Through his Amended Statement of Defence dated 30th March 2022, the Appellant denied that he was the registered owner of motor vehicle registration number KAZ 138E and further denied the occurrence of the accident on 24th December 2020.

14. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the Respondent. He particularized the negligence in paragraph 8 of his Defence. The Appellant also denied that the Respondent suffered any injuries.

15. In his written submissions dated 25th October 2024, the Appellant submitted that the award of Kshs 600,000/= as general damages was high and this court ought to interfere with it. That the Appellant was only entitled to a fair compensation. The Respondent proposed the award of Kshs 350,000/= and relied on Ibrahim Kalema Lewa vs Esteel Company Limited (2016) eKLR and Erick Ratemo vs Joash Nyakweba Ratemo (2019) eKLR.

16. I have gone through and carefully considered the Record of Appeal, the Appellant's written submissions dated 25th October 2024 and Respondent's written submissions dated 28th February 2025. The two issues for my determination was whether the trial court erred when it held the Appellant 100% liable for the accident and whether the award of general damages was excessive.

Liability

17. This is a sister file to Bomet High Court Civil Appeal Number E042 of 2023 where the rider of the motorcycle was the Respondent. Similarly in that matter the trial court found the Appellant 100% liable. In other words, the trial court absolved the rider (Michael Sang) and his two pillion passengers, the Respondent herein included from any liability.

18. However, I disagreed with the trial court's finding on liability and found that the Respondent exposed himself to risk when he boarded an overloaded motorcycle. In the auspices, I found that the Appellant and his two pillion passengers each assume 40% liability while the Appellant assumes 60%. For clarity, the Respondent, Kiprop K. Laban was 40 % liable for causing the accident

Quantum

19. It is trite law that the burden of proof lay on the person who alleges. Section 107 of the *Evidence Act* describes the burden of proof as follows: -

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

20. The standard of proof in civil cases is on the balance of probabilities. In James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR), the Court of Appeal stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

21. In his Plaint, the Respondent stated that he suffered a fracture to his right femur. In his testimony, the Respondent stated that he suffered the injury as a result of the accident on 24th December 2020. He produced a Medical Report and Discharge Summary and P3 Form as P. Exh 3, P. Exh 5a and P. Exh 7 respectively. His testimony regarding the injuries he suffered remained uncontroverted upon cross examination.

22. I have looked at the Discharge Summary (P. Exh 5a) from Tenwek Hospital and it indicated that the Respondent and it indicated that he was discharged from Hospital after receiving treatment for a fracture of the femur. The Medical Report (P. Exh 3) in this case was not helpful because it belonged to Michael Sang (rider of the motorcycle).

23. The Respondent underwent a second medical examination and the Appellant produced a Medical Report by Dr. Malik as D. Exh 1. I have looked at the Report and it confirmed that the Respondent suffered a fracture to his right femur. It is my finding therefore that the Respondent suffered a fracture to his right femur.

24. As earlier stated, the trial court awarded Kshs 600,000/= as general damages, an amount the Respondent felt was reasonable but the Appellant felt was excessive. The Respondent proposed an award of Kshs 350,000/=.

25. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. In the case of Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] KECA 130 (KLR), the Court of Appeal stated that: -

> " It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964]AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

26. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In addition to the parties' authorities, I have found the following cases quite helpful in terms of comparison: -

i. In Francis Ndungu Wambui & 2 others v Benson Gichure Maina [2019] KEHC 2132 (KLR), the court reduced the award of Kshs 1,000,000/= to Kshs 600,000/= for a fracture of the right femur and soft tissue injuries.

ii. In Jacaranda Boda-boda Operators & another v Nyasero [2023] KEHC 23806 (KLR), the court reduced the award of Kshs 1,200,000/= to Kshs 750,000/= for a fracture of the right femur that was mixed with metal implants.

iii. In Kiautha v Ntarangwi (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment) the court reduced an award of Ksh.2,000,000/= to Ksh.800,000/= where the Respondent had sustained bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid shaft femur fracture.

iv. In Monyoro Mong'are Shem & another v Rose Kebaki [2021] KEHC 6773 (KLR), the court reduced the award of Kshs.1,500,000/= to ksh.600,000/=. where the Respondent sustained displaced fracture of the right femur, soft tissue injuries on the neck, soft tissue injuries of the chest, soft tissues injuries of the shoulder joint and soft tissue injuries of the forearms.

27. I have considered the authorities above and the nature of the injury suffered by the Appellant and I find that the Kshs 600,000/= awarded as general damages by the trial court was fair and commensurate to the injury suffered by the Respondent. I therefore uphold the award.

28. Regarding special damages, I have looked at the receipts produced as P. Exh 5b and I agree with the trial court's award of Kshs 98,440/= as special damages. I therefore uphold the award.

29. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of Tracom Limited & another v Hassan Mohamed Adan [2016] KECA 150 (KLR), the Court of Appeal 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: -
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> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require..."

30. This award was not faulted by either party. It is my finding therefore that the award of Kshs 75,000/= for future medical expenses was sufficient and reasonable. I therefore uphold the award.

31. The final computation is as below: -

    i. General Damages Kshs 600,000/=

    Add special damages Kshs 98,440/=

    Add Future Medical Expenses Kshs 75,000/=

    Kshs 773,440/=

    Less 40% Contribution Kshs 309,376/=

    Kshs 464,064/=

32. In the end, the Memorandum of Appeal dated 16th August 2023 is successful as the Appellant is found to be 60% liable and the Respondent is found to be 40% liable for the accident. The Appellant shall have half the costs of this Appeal while the other half goes to the Respondent.

    The costs in the original suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH APRIL, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the absence of the parties and their advocates. Siele/Susan (Court Assistants).