Saina & another v Abukhasia (Civil Appeal E048 of 2021)
[2024] KEHC 6940 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6940 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E048 OF 2021

G MUTAI, J

MAY 30, 2024

BETWEEN

RIANDO NELSON SAINA ..... 1ST APPELLANT

DANIEL KEEMPUA OSOI ..... 2ND APPELLANT

AND

MARGARET KHAYENDI ABUKHASIA ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 10th August 2021 by Hon. B. Cheloti, Senior Resident Magistrate in Kajiado CMCC No. 115 of 2019. The Court awarded Damages as follows:

    1. Liability 80:20.
    2. General Damages for pain and suffering and loss of consortium - Kes. 3,000,000/-;
    3. Future Medical Expenses - Kes.9,000,000/-;
    4. Loss of earning capacity - Kes.1,000,000/-;
    4. Special Damages - Kes.61,104/-;

    Total - Kes.10,448,883.20/- with costs of the suit and interest.

2. Aggrieved, the Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.

    a. The Trial Court erred in awarding damages for pain and suffering and loss of consortium at Kes.3,000,000/-.

    b. The Trial Court erred in law and fact in failing to consider the Appellant's submissions.

c. The Trial Court erred in law and fact in applying a multiplier of 20 years and arriving at inordinately high damages for nursing care at Kes. 6,000,000/=.

d. The Trial Court erred in law and fact in awarding damages that exceeded her pecuniary jurisdiction.

3. The Respondent instituted the suit in the lower court vide the Plaint dated 4th June 2019 claiming damages for an accident that occurred on 9th February 2019 involving Motor vehicle Registration Number KBN 323A. It was pleaded that the Respondent was a lawful pedestrian along Namanga Road at KAG Area when the 2nd Appellant negligently drove the 1st Appellant's Motor vehicle Registration Number KBN 323A so negligently that he lost control and knocked down the Respondent who suffered serious injuries as a result.

4. The Respondent set forth particulars of negligence for Motor Vehicle Registration Number KBN 323A. The Respondent also pleaded Kes. 61,104/- as Special Damages and stated injuries as follows:

a. Amputation of the right leg above the knee at the mid thigh

b. Major blunt soft tissue injuries to the pelvis

c. Dislocation of the sacral iliac joints

d. Dislocation of the midline of the pelvis

e. Injury to the vagina and the urinary bladder causing communication between them (Vesicle Vaginal Fistula)

5. The Appellant filed a Defence and denied liability.

6. Subsequently, on 21st February 2021, the parties entered a consent on liability at 80:20 in favour of the Respondent. The Appeal is on quantum only.

7. Parties also agreed to dispense with the suit by way of written submissions.

The Appellants' Submissions

8. The Appellant filed submissions on 18th July 2022.

9. It was submitted that the award of damages was inordinately high and negated the established principles.

10. The Appellant submitted that the damages for amputation of a knee would range between Kes.1,200,000/- and Kes.2,500,000/-. Reliance was placed on the on the case of John Kipkemboi & Another v Moris Kedolo [2019]eKLR where an award of Kes.2,000,000/= was given for pain and suffering.

11. It was further submitted that the award of Kes.9,000,000/- for future medical expenses was not supported by evidence and was erroneously granted.

12. The Appellant submitted that the award of house helper and diapers were not pleaded and ought not to have been granted.

13. It was also submitted that the court erred in awarding damages for loss of earning capacity, which was not proved. Reliance was placed on the case of Pelezia Bakari v Somoire Keen & 2 Others [2020]eKLR to canvass the argument that sufficient material must be laid to prove loss of earning capacity.

14. It further submitted that the Trial Court exceeded the pecuniary jurisdiction of Kes.7,500,000/-.

15. I was urged to allow the Appeal.

The Respondent's Submissions

16. On the part of the Respondent, it was submitted that the Grounds of Appeal were argumentative and lacked specificity.

17. Counsel submitted that the injuries suffered by Plaintiff well supported the award of Kes.3,000,000/- as damages for pain and suffering and loss of consortium. Reliance was placed on the case of Michael Wafula Malenya vs Mafruits Bus Ltd [2022]eKLR.

18. It was submitted that the Respondent's Doctor clearly stated the amount in future medical expenses that would be required. The Appellants' Doctor's medical report did not project any costs, and the court was correct in applying the amounts projected by the Respondent's Medical Doctor's Report.

19. It was submitted that the multiplier of 20 years was correct, as the Respondent was 26 years old at the time of the accident. Reliance was placed on the case of the Board of Trustees Anglican Church of Kenya Marsabit Diocese vs THW [2019]eKLR.

20. On pecuniary jurisdiction, the Respondent, counsel submitted that the suit was not a nullity and was only allocated to a magistrate who upon assessment exceeded the damages.

Analysis of the Facts and the Law

21. This being a first appeal, the Court should, with judicious alertness, re-evaluate the evidence, consider arguments by parties applying the law thereto, and make its own determination of the issues in controversy.

22. Except, however, it should account for the fact that it neither saw nor heard the witnesses' testimonies.

23. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The Appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

24. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a Trial Court were clearly laid out in the case of Kenya Bus Services Limited vs Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal 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."

25. This Appeal being on quantum only, the principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary.

26. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another vs Lubia & another (No 2) [1985] eKLR 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.

27. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as follows regarding disturbing quantum of damages:-

> 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

28. The words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages are important to replicate herein thus:

> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community.The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

29. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari vs Aya [1985] eKLR thus:-

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

30. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard [1963] 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

31. It is thus common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

32. With the above guide, if the Award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

33. There is no dispute that the Respondent suffered amputation of the right leg above the knee, major blunt soft tissue injuries, dislocation of the sacral iliac joints and midline of the pelvis and injury to the vagina and urinary bladder.

34. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma vs Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

35. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

36. On damages for pain and suffering and loss of consortium, the Trial Court awarded Kes.3,000,000/-. The Appellant's contest is that the award was inordinately high. In the Trial Court, the Appellant submitted for an award of Kes.2.500,000/- as adequate compensation under this head. The Respondent on the hand submitted for an award of Kes.4,000,000/-.

37. I have analyzed the case of Daniel Kosgei Ngelechei vs Catholic Trustees Registered Diocese of Eloret & Another (2016)e KLR relied upon by the Appellant. Therein, I note the Plaintiff suffered amputation above the knee. The High Court awarded Kes.2,100,000/- for pain and suffering and loss of amenities which was upheld by the Court of Appeal.

38. The Respondent on the other hand did not fault the Trial Court's finding. It was submitted that the award of Kshs. 3,000,000/= was adequate damages and not inordinately high. They relied on Michael Wafula Malenya vs Matunda (Mafruits) Bus Service Limited [2022]e KLR. Therein, I note the Plaintiff suffered the following injuries:

I. extensive degloving injury left leg,

II. deep penetrating perineum,

III. grade IIIC fracture-dislocation on the bi-malleolus ankle,

IV. facial and scalp abrasion and

V. elbow laceration

39. The Trial Court awarded Kes.1,200,000/- that was enhanced to Kes. 3,000,000/= on Appeal. However, I note the injuries in that case are not comparable to this case.

40. I understand no single case is typically identical to the other. in Penina Waithira Kaburu vs LP [2019] eKLR, the Court stated thus on the issue of award of general damages:-

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

41. In Crown Bus Services Ltd & 2 others vs BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR the Plaintiff aged 5 years at the time of the accident lost his right leg above the knee by amputation and the court awarded Kes.3,000,000/- which the High Court reviewed on Appeal to Kes.2,500,000/- in 2020. Similarly, in the case referred to by the Appellant, the Plaintiff who suffered an amputation of the leg was awarded Kes.2,100,000/- in 2016.

42. On future medical expenses, the Trial Court awarded Kes.9,000,000/- constituted as follows:

a. Surgery Kes. 3,000,000/-

b. Nursing care applying a multiplier od 20 years: Diapers Kes.1,200,000/=-and Helper Kes.4,800,000/-.

43. In the case of, Tracom Limited & Another vs Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> "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.

44. However, as was held in the cases of Gulhamid Mohamedali Jivanji vs Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

45. The Medical Report of the Appellant's doctor recommended 80% disability. It was held by the Court of Appeal in Jackson K Kiptoo vs The Hon Attorney General [2009] KLR 657 that:

> "The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

46. In this case, I note that the Medical Doctor's Report by the Appellant's Doctor stated that the Respondent had suffered loss of urinal bladder control due to vesicovaginal fistula. The report proceeded that the Respondent would need surgical intervention and an artificial limb.

47. Comparing the above finding, I find correlation with the Respondent's Medical Doctor's Report to the extent of the injuries suffered. The Respondent's medical report however stated the effect of the injuries follows: estimated future artificial limb to cost Kshs. 3,000,000/=. Permanent disability at 100%. The Respondent would require diapers as long as the fistula remains and will require a helper at estimated cost of Kshs. 20,000/- per month.

48. Based on the above cited authorities, the award of Kshs. 3,000,000/- for general damages for pain and suffering and loss of consortium was in view not inordinately high. I will not disturb it.

49. The court also awarded damages for future medical expenses at Kes. 9,000,000/=. I also take the view that the Award of Kes. 9,000,000/= for future medical expenses was excessive. However, I note that both Medical Doctor's Reports concluded that the Respondent had suffered vesicovaginal fistula. Definitely, the expenses on diapers were thus applicable. The court awarded Kes.5,000/- per month. I do not find this unreasonable. Equally, the multiplier of 20 years was not excessive in the circumstances. I will not interfere with the discretion of the Trial Court. In the case of Monica Muthoni Kiruku vs Amalgamated Logistics International Ltd & another [2016] eKLR the High Court upheld a multiplier of 25 years to a Plaintiff who was 25 years old.

50. I say so because future medical expenses, it has been held, are based on medical opinion. They as such constitute an amount of pecuniary loss which the Plaintiff can prove based on the facts pleaded. I am persuaded by the reasoning of Odunga J, (as he then was) in Bash Hauliers Limited vs Peter Mulwa Ngulu [2020] eKLR where the learned Judge stated as follows:

> " 34. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

51. On the award of Kes.3,000,000/- for the cost of surgery, I find no basis to fault to finding of the Trial Court. It was based on the Medical Report by the Respondent's Doctor. The Appellant's Doctor failed to give his own opinion of the cost of the surgery but acknowledged that the Respondent would require surgery. I will not disturb the award under his head.

52. Therefore, although the Appellant has vehemently challenged the award of future medical expenses, the Appellant's Medical Report and evidence did not negate the fact that the Respondent would require expenses the expenses in relation to the diapers and helper. It was upon the defense medical officer to project whatever costs that would apply in his view for consideration by the Court. He did not.

53. The Medical Doctor of the Respondent projected Kes.20,000/- per month for a helper. I think this was excessive. An amount of Kes.7,240.95/= per month in my view would be adequate based on the applicable Minimum Wage Bill for 2021. This would give an award of Kes.1,737,820.80 as expenses payable under this head.

54. The total award on future medical expenses is thus Kes. 3,000,000/- +Kes.1,200,000+Kes.1,737,820.80= Kes.5,937,820/80.

55. As to the loss of earning capacity, the Trial Court awarded Kes. 1,000,000/- as a global sum. Loss of earning capacity has been held to constitute general damages.

56. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in Butler vs Butler [1984] KLR 225, as follows:-

    a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

    b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

    c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

    d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

57. I have perused the Plaint and the documents that the Respondent produced in court. In the circumstances of this case, I am unable to interfere with the award of Kes.1,000,000/- under this head. I do not find it excessively high or low. I take into consideration that the Respondent is incapacitated and only reliant on others. Therefore, the Trial Court did not fetter its discretion in making this award.

58. I also understand the Appellant to lament about the court's pecuniary jurisdiction; that the court erred in exceeding its limit of Kes.7,500,000/. I do not think the rule on pecuniary jurisdiction would strictly apply to general damages which are assessed and determined at the end of the trial. I am fortified by the reasoning of the Court in Sheila Kasiti Matsyi vs Mwikali Solo [2021] eKLR where the Court stated as follows:

> As I see it, it can also apply quite neatly to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction. In my view, it does not apply to cases of general damages where it is the Plaintiff who appoints, through their own assessment, what the amount of damages she would claim.

59. The Appellant did not appeal against the Special Damages which I will not interfere with.

60. The upshot of the foregoing is that I make the following orders: -

i. The Appeal on General Damages for Pain and Suffering and Loss of Consortium is dismissed;

ii. The Appeal on Loss of Earning Capacity is dismissed;

iii. The Judgement of the Trial Court on Future Medical Expenses is set aside and substituted with an Award of Kes.5,937,820.80.

iv. As the Appeal is partially successful, each party shall bear own costs in the Appeal.

61. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF MAY 2024.

Judgement delivered through Microsoft Teams Online Platform.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance for the Appellant;

No appearance for the Respondent;

Arthur – Court Assistant.