Ndereba & another v Mbae (Civil Appeal E029 of 2022)
[2024] KEHC 4472 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E029 OF 2022

LW GITARI, J

APRIL 4, 2024

BETWEEN

DENIS NDEREBA ..... 1ST APPELLANT

ANITA KAARI NJERU ..... 2ND APPELLANT

AND

KAREN KARAMBU MBAE ..... RESPONDENT

JUDGMENT

1. The Appellants herein, being dissatisfied with the decision of the trial court in Chuka CMCC No. 154 of 2019, lodged this Appeal on 10th November, 2022 vide the Memorandum of Appeal dated 4th November, 2022.

2. The Appellants are seeking *inter alia* for;

    a. The Appeal to be allowed and the judgment of the Learned Trial Magistrate on liability be substituted with a finding that the Appellants were not to blame for the accident.

    b. The assessed general damages and special damages were excessive and the same be set aside and substituted with this court's just assessment.

    c. The Appellant be granted costs of this Appeal.

3. The Appeal is based on the following grounds:

    a. That the learned trial magistrate erred in law and in fact in finding the Appellant 100% liable and to blame for the accident in the absence of evidence to support such a finding and bearing the fact the police officer who adduced evidence on the same was not the investigating officer at the time of the accident.

b. That the learned trial magistrate erred in law and in fact by awarding manifestly excessive general damages in the circumstance considering the injuries that had been sustained by the Respondent and the evidence that was presented.

c. That the learned trial magistrate misdirected herself in law and in fact in not taking cognizance and applying the established principles in award of general damages.

d. That the learned trial magistrate erred in law and fact in failing to consider adequately, or at all, the submissions on liability and quantum that had been tendered by the Appellant and the authorities therein and in so doing arrived at an erroneous.

The Pleadings

4. The Respondent commenced the suit before the trial court vide a Plaint dated 31st August, 2019. The Respondent's claim against the Appellants was for general and special damages arising from a road traffic accident that occurred on 25th January, 2019 along Chuka-Meru road involving motor vehicle registration number KCG 246C Toyota Matatu and motor vehicle registration number KBE 992 V Isuzu Lorry.

5. It was alleged that on the material day, the Respondent was a fare-paying passenger in motor vehicle registration number KCG 246C Toyota Matatu and that as a result of the aforesaid accident, the Respondent sustained serious bodily injuries.

6. After a full trial, the learned trial magistrate entered judgment in favour of the Respondent against the Appellants jointly and severally in the following terms:

a. General damages for pain and suffering Kshs. 900,000/=;

b. General damages for loss of earning Kshs. 800,000/=;

c. Special damages Kshs. 207,786/=;

d. Cost and interest as pleaded.

Issues for Determination

7. I have carefully considered the judgment of the trial court, the grounds of appeal and the record of appeal as well as the submissions by the parties. The main issues that arises for determination are:

a. Whether the trial court erred in finding the Appellants 100% liable and to blame for the accident;

b. Whether the trial court's award of this court to assess and award the quantum of damages.

c. Who should bear the costs of this appeal?

Analysis

8. This is a first appeal. The role of the first appellate court is stated in many authorities. In *Kiilu and Another v. Republic* [2005] 1 KLR 174 the court held as follows:

> "an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision

in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."

9. In the celebrated case of *Peters v. Sunday Post Limited* (1958) EA 424 it was held that on a first appeal, the appellate court is entitled to review the evidence before the trial court as follows:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide..."

10. Guided by the above authorities, I now turn to the evidence that was adduced before the trial court.

The Respondent's Case

11. PW1 was Police Constable Janet Nyatich. It was her evidence that on the material day, they were on patrol along Chuka Chogoria Road when they got informed of an accident which had occurred along Chuka Meru Road at Kiriani area. PW1 then visited the scene of the accident. It was her evidence that it was the motor vehicle registration number KBE 992V Isuzu Lorry which lost control and crashed into motor vehicle registration number KCG 246C on the left side of the road while the matatu was on its own lane. That the Respondent was among the passengers who got injured as a result of the accident.

12. The Respondent testified as PW2. She adopted her statement dated 31st August, 2019 as her evidence and testified that she suffered injuries on her right hand as a result of the accident. That subsequently, her right thumb was amputated. It was PW2's testimony that the aforesaid lorry was to blame for the accident. Further, that she lost her job as a result of the accident and that she has been unable to secure another job because accounts involve a lot of writing.

13. In her submissions, the Respondent prayed that judgment be entered in her favour for Kshs. 900,000/= as general damages for pain and suffering; Kshs. 800,000/= for loss of earning capacity; Kshs. 212,408/= as special damages and for the costs of the suit.

The Appellants' Case

14. On their part, the Appellants did not call any witnesses. It was however submitted on their behalf that the evidence of PW1 that the lorry was to be blamed for the accident cannot be admissible in evidence as PW1 was not the investigating officer in this case. That in the absence of the evidence of the investigating officer and the police file, PW1's evidence on liability is questionable as the police abstract that was produced in evidence showed that the matter was still pending under investigations.

15. On quantum of damages, the Appellants proposed that an award of Kshs. 300,000/= would adequately compensate the Respondent. That the allegation that the Respondent's ability to work diminished as a result of the accident was not substantiated by evidence. Further, that the Respondent was only entitled to Kshs. 5,000/= as special damages for getting a medical report as it was the Respondent's testimony that her medical expenses were catered for by NHIF and contributions from her uncle and her uncle has not demanded to be refunded. The Respondent relied on the cases of Kings Bakery Limited v. Eaphael Onjoro Oloo [2012] eKLR and *Mumias Sugar Company Limited v. Francis Wanalo* [2007] eKLR to buttress her submissions.

On Liability

16. It is trite that whoever alleges must prove. Sections 107(1) and 109 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provide as follows:

> "107(1). Whoever desires any court to give judgment as to any legal right or liability dependent in the existence of facts which he asserts must prove that those facts exist."
>
> "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person."

17. The Appellants in this case contend that without the evidence of the investigating officer, the allegation that the motor vehicle registration number KBE 992 V Isuzu Lorry was to blame for the accident was not proved.

18. The Respondent, who was an eyewitness of the accident, testified that the motor vehicle registration number KCG 246C matatu was on the left side of the road. PW1, who visited the scene of the accident, corroborated the evidence of PW2 that the aforesaid matatu was on its rightful lane. The Appellants never called any witnesses to challenge this evidence. The evidence of PW1 and PW2 was credible evidence on which negligence on the part of the 1st Appellant could be inferred and the failure to call the investigating officer to the stand was not fatal to the case. On reappraisal of the evidence on record, it is my view that although the investigating officer was never called to give his/her evidence in this matter, the trial court was correct to be persuaded by the evidence of PW1 and PW2 and find that motor vehicle registration number KBE 992 V Isuzu Lorry lost control, veered off its lane to the left side of the road where motor vehicle registration number KCG 246C matatu was and hit it.

    It is trite law that in civil matters, prove is on a balance of probabilities. It is the duty of the court to determine whether based on the evidence adduced by the party, enough material has been laid down before it to determine liability between the appellant and the respondent. The appellant did not adduce evidence. Its defence remains mere statements which were not sub-stantiated.

    The fact that PW1- was not the investigating officer does not rule out the truth of her testimony. She did visit the scene and gave evidence on what she gathered at the scene. An investigating officer is not a witness who asserts that he witnessed how the accident occurred. What he does is to investigate, records statements, observes the scene and forms an opinion as to who was to blame for the accident. The opinion is not blinding on the court, it has to come up with its own finding. In this case the only evidence on the occurrence of the accident was that adduced by PW1 & 2. The trial magistrate cannot be faulted for relying on the evidence to make a finding on liability as that was the only evidence present before him on how the accident occurred. The evidence shows on a balance of probabilities that the appellant's motor vehicle was to blame for the accident.

19. Accordingly, the learned magistrate did not err in finding the 1st Appellant, who was the driver of motor vehicle registration number KBE 992 V Isuzu Lorry, 100% liable for the accident and the 2nd Appellant vicariously liable for the acts of the 1st Appellant as the 2nd Appellant is the owner of the motor vehicle registration number KBE 992 V Isuzu Lorry. I further find that the apportionment of liability at 100% as against the Appellants was proper as the Respondent was a passenger in the matatu that got involved in the accident.

On Quantum

20. The principles guiding the award of damages by a court were set out in the case of *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where the Court held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question."

21. In *Stanley Maore v. Geoffrey Mwenda* Nyr CA Civil Appeal No. 147 of 2002 [2004] eKLR the Court of Appeal expressed itself as follows in this regard:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

22. In this case, there is the medical report on record dated 20th August, 2019 by Dr. Nicholas Nkonge, which report was produced in evidence by the Respondent and the trial court considered it. The said medical report indicates that the Respondent sustained the following injuries:

    a. Head injury

    b. Crush hand injury

    c. Soft tissue injuries

23. The said medical report further shows that the Respondent was admitted at Chogoria Hospital for one day and subsequently at Mater Hospital for 4 days. That an x-ray that was done on her right hand revealed open fracture of hand bones and the CT scan of the head showed a contusion of the brain. A physical examination was done and indicated that glasgow coma scale 14/15 mangled crashed right hand involving the thumb, index, and middle fingers multiple bruises. The trial court noted the aforesaid injuries and considered the proposals by the parties on the assessment of damages.

24. The principles upon which an appellate court can interfere with the assessment of damages by a trial court have been enunciated in many cases. In the case of *Jane Chelagat Bor vs. Andrew Otieno Oduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

25. The Respondent in this case relied on the case of *City Engineering Works (K) Ltd v Venatsio Mutua Wambua* [2016] eKLR. In that case, the Respondent therein was seeking for workman's compensation after his fingers were crushed with a rolling machine leading to the amputation of his fingers. The court in that case awarded the said Respondent Kshs. 600,000/= as general damages for pain and suffering.

26. In the case of *Blowplast Ltd v. Julius Ondari Mose* [2018] eKLR that was also cited by the Respondent, the fingers of the Respondent therein were chopped off while he was cleaning a blow molding machine used to make plastic bottles. In that case, the said Respondent was equally awarded Kshs. 600,000/= as general damages for pain and suffering.

27. On the other hand, the Appellants cited the case of *King Bakery Limited v. Eaphael Onjoro Oloo* [2012] eKLR wherein an award of Kshs. 200,000/= was made in favour of the Respondent who has sustained a traumatic amputation of the 2nd left finger at the distal part of the left 2nd finger, blunt injuries on the 3rd, 4th and 5t fingers on the left hand.

28. The Appellants also cited the case of *Mumias Sugar Company Ltd v. Francis Wanalo* [2007] eKLR. In this case, the Respondent was involved in an industrial accident sustained a traumatic amputation of the small finger of the right hand, crush injury to the fourth finger of the right hand and soft tissue contusion with bruises on the right thigh.

29. The learned trial magistrate considered the aforesaid authorities and found that the injuries cited in the authorities cited by the parties were similar to the injuries that the Respondent had sustained in this case. The trial court further noted that the only divergence in the said authorities was the period of time in which the decisions were made. The learned trial magistrate however noted that the authorities all showed an uPWard trajectory of the awards made by the court. The learned trial magistrate thus found that the Respondent's proposal of Kshs. 900,000/= was fair having considered the lapse of time and rate of inflation.

30. I have considered the cited authorities, and the effluxion of time since those awards were made. In my view, the finding of the trial court that the award of Kshs. 900,000/= was reasonable and fair in the circumstances of this case was not erroneous, excessive, or founded on the wrong principles. The learned trial magistrate duly considered the authorities submitted by both parties, and he adjusted the figure owing to inflation. For this reason, the ground of appeal that the award of Kshs. 900,000/= was manifestly excessive fails.

31. On the award of general damages for loss of earning, it was the Appellants submission that the degree of permanent incapacity at 7% that the Respondent suffered is too negligible to warrant an award for loss of earning capacity. The Appellants contend that the said incapacity would not negatively impact the Respondent's ability to earn. That the Respondent's right thumb was only amputated at the distal section and not entirely, hence the incapacity was negligible.

32. Notably, it is the Appellants' submission that the Respondent was referred for second medical examination to Dr. Wambugu P.M. and that vide a medical report dated 27th January, 2020, the said Dr. Wambugu confirmed that the Respondent had healed with her present complaints only being the absent part of the right thumb, stiffness of the right index finger, and occasional headaches. That the said Dr. Wambugu awarded the Respondent a 7% degree of permanent incapacitation.

33. As noted herein above, the Appellants never called any witnesses and their case was marked as closed. This means that no evidence was admitted in support of the Appellants' case. The only medical report that the trial court was bound to rely on is that of Dr. Nicholas Nkonge dated 20th August, 2019. In the said report of Dr. Nkonge, the medical officer drew the conclusion that the Respondent suffered injuries which caused permanent disability in the loss of function of right hand and suffered complications arising from head injuries. Dr. Nkonge also came to the conclusion that the Respondent was missing work to attend sessions for specialized care. In my view, the trial magistrate was correct to find that the Respondent was entitled to damages for loss of earning, capacity.

34. Whereas, the Respondent in this case did not plead for damages of loss of earning capacity, the trial court was properly guided by the holdings in the cases of *Benard Muli Kinyili v. DHL World Express & Another* [2018] eKLR and *Sophina Co. Ltd & Another v. Daniel Ngang Kanyi* [2006] eKLR wherein the courts observed that a claim of loss of earning capacity flows directly from a claim and need not be pleaded because such a claim is a general damages claim.

35. In *Tile & Carpet Center Warehouse v Okello* (Civil Appeal 74 of 2019) [2022] KECA 5 (KLR) (4 February 2022) (Judgment), the Court in considering an award of damages for loss earning capacity held that although loss of earning capacity is in the nature of general damages and need not be pleaded, it ought to be proved on a balance of probability. The court expressed itself as follows in this regard,

> "Loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. See *Cecilia W. Mwangi & another v Ruth W. Mwangi* [1997] eKLR. In *S J v Francesco Di Nello & another* [2015] eKLR, this Court held that: Loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Llyod's Law Reports 40 at pg. 14..."

36. Since the Respondent in this case prayed for general damages, it was therefore proper for the trial court to award her general damages for loss of earning capacity even if the same was not specifically pleaded. The remaining issue then is whether the damages assessed for loss of earning capacity was inordinately excessive considering the extent of the injuries suffered by the respondent.

37. In this case, the Respondent on cross examination testified that she lost her job as a result of the accident. That she was working as an accountant and that after the accident, she was paid for one month and thereafter her former employer cancelled her employment contract. That she is now self-employed and operates a kiosk as a shopkeeper. Further, that she was unable to secure another job because the accounting profession involves a lot of writing and that she was to do Section 6 of *CPA* examination in 2020 but was unable to because she could not write and therefore did not attend class.

38. In my view, the Respondent did not give sufficient evidence to substantiate her claim that she was employed as an accountant prior to the accident and that she lost her job as a result of the accident. Furthermore, the Respondent also did not adduce any evidence to show that she will be unable to get another job or an equally good job as a result of the injuries she sustained in the accident. In the circumstances of this case, it is my view that while the injuries sustained by the Respondent cannot be overlooked considering the alleged nature of her professional training, the evidence on record is not sufficient to justify the trial court's assessment of damages for loss of earning capacity and this leads to the conclusion that the award was excessive. As such, it is my view that this Court should therefore interfere with the trial court's award of Kshs. 800,000/= as damages for loss of earning capacity.

39. On the award of special damages, it is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court. In *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. JA. – as he then was, emphasized that:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves".

40. The rationale for requiring a party to plead and prove special damages was given by the Court in *Jackson Mwabili vs. Peterson Mateli* [2020] eKLR, as follows;

> " ....the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing." (Emphasis supplied)

41. In this case, it was the claim of the Respondent that her medical expenses while at the Mater Hospital amounted to Kshs. 247, 408/= and that Kshs. 40,000/= was covered by NHIF. It was the Respondent's testimony that it was her uncle who paid for her medical expenses and that the Respondent promised to refund him. I have carefully perused the record of appeal. Although it is clear from the record of the trial court's proceedings that a courier service receipt was produced in evidence as P. Exhibit 5B and that payment receipts totaling to Kshs. 207,435.62 were produced as P Exhibits 6(a), (b), & (c), the said receipts have not been attached to the record of appeal to enable this Court to re-evaluate the same. As such, it is my view that the Appellants have failed to prove to this Court why it should interfere with the award of special damages by the trial court.

Conclusion

42. From the foregoing analysis, it is my view that the instant appeal is partly meritorious and should be allowed only to the extent that the award made under the head of general damages for loss of earning capacity should be set aside. The respondent admitted that she is now self-employed and operates at kiosk as a shopkeeper. The degree to disability was minimal and her ability to earn was not deminished.

For these reasons I find that the appeal partly succeeds. I enter Judgment as follows:-

1. General damages for pain and suffering- 900,000/-
2. The award of general damages for loss of earning capacity is set aside.
3. Special Damages Kshs.207,786.00
4. Each party to bear its own costs of this appeal.
5. Interests on the general and special damages from the date of the Judgment of the lower court till the Judgment is settled.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF APRIL 2024.

L.W. GITARI

JUDGE