



Dinga v Kimani (Civil Appeal 153 of 2020) [2024] KEHC 5190 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL APPEAL 153 OF 2020

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

WASHINGTON OKUMU DINGA APPELLANT

AND

JOHN KIBUNGA KIMANI RESPONDENT

(Being an appeal from the Judgement by Hon E.K. Usui Principal Magistrate delivered on 6th March, 2020 in Chief Magistrate's Court at Nairobi, Civil Case No. 6724 of 2013)

JUDGMENT

1. This appeal arises from a Judgment and decree of 6th March, 2020, in Nairobi Chief Magistrate's Civil Suit No. 6724 of 2013. In the said suit, the Respondent (who was the plaintiff) sued the Appellant (who was the defendant) for both general and special damages arising from a road traffic accident in which he sustained personal injuries and suffered loss and damage.
2. The Appellant herein was the registered owner of the suit motor vehicle registration number KBM 986R, that hit the Respondent, a pedestrian, on 28/1/2013 along Arwings Kodhek Road causing him severe injuries to the head, subdural hematoma, subdural hygromas, blunt injuries to the ankles, cracked dental prosthesis and bruise on the left forehead. The suit was fully defended and the trial magistrate delivered her Judgment on 6th March, 2020, finding the Appellant 100% liable and awarded the Respondent special damages of Kshs. 2,266.809/=, general damages of Kshs 2,300,000/= together with costs and interest.
3. Being dissatisfied with the Judgment and the decree, the appellant filed this appeal citing the following grounds: -
 - i. That the Learned Magistrate erred in law and fact in holding and finding that the Appellant was to blame for the accident giving rise to the suit before the lower court.



- ii. That the Learned Magistrate erred in law and fact in failing to take into account the evidence presented before the trial Court and in particular failing to appreciate that the Respondent was not able to sufficiently establish to the court that the Appellant was to blame for the accident giving rise to the suit before the trial court and in particular that or that the injuries allegedly sustained by the Respondent arose out of the accident giving rise to the suit before the court.
 - iii. That the Learned Magistrate erred in law and in fact in failing to take into account the evidence presented before the trial Court and finding that the Appellant was to blame for the accident and was to bear the larger blame giving rise to the suit before the trial court or that the Appellant was to blame for the injuries allegedly listed by the Plaintiff that were alleged to have arisen from the said accident.
 - iv. That the learned Magistrate erred in law and fact in not appreciating the evidence adduced and arriving at the conclusion reached that the Appellants was to blame.
 - v. That the Learned Magistrate erred in law and fact in holding and finding that Respondent had proved his claim against the Appellant.
 - vi. That the Learned Magistrate erred in law and fact in failing to find that the evidence presented by the Respondent could not sustain the pleaded claim.
 - vii. That the Learned Magistrate erred in law and fact in making an award of damages that was manifestly excessive and unsupported by the evidence before him.
 - viii. That the Learned Magistrate erred in law and fact in making an award of damages that was unwarranted, grossly excessive and inconsistent with the evidence and or case law.
 - ix. That the Learned Magistrate erred in law and fact in holding and finding for the Respondent.
4. The Appeal was canvassed by written submissions.

Appellant's submissions

- 5. These submissions were filed by Anne W. Kimani and Co. Advocates and are dated 24th March, 2024. It is counsel's submissions that this being a first appeal, this court is duty bound to re-examine the evidence before the trial court and draw its own conclusion. In this, he relied on the case of *Abok James Odera and Associates V John Patrick Machira t/a Machira and Company Advocates* [2013] eKLR and the case of *Selle & Another v Associated Motor Boat Co. Limited & Others* [1968] EA 123.
- 6. Accordingly, he submitted on two issues namely; liability and quantum. He argued that the accident was relatively minor as was stated in the Police P3 form and abstract and reiterated by Dr. Kariuki who classified the injuries as minor blunt injuries. Further that Dr. Jabbal noted in his medical report that the injuries sustained by the respondent were relatively minor with no fractures other than a dislocation or displacement of one of the dentures.
- 7. Counsel submitted that it was until a later stage that the Injuries suffered by the respondent metamorphosed to grave injuries, which the appellant believes is not attributed to the accident that gave rise to the trial court suit. He elaborated further that the medical reports by Dr. Silverstein and Dr. Machogu showed that three months after the accident, the respondent, while working in Sudan was stung by a white scorpion that might have triggered neurological complication, which the respondent wrongfully attributed to the accident under the doctrine of causation in tort law.
- 8. On the law of causation, counsel submitted that the law on causation will only come into play where the plaintiff has shown that damages resulted from the defendant's negligence, and without proof of



causation, such negligence cannot be actionable. In support of this, he relied on the case of *Elijah Ole Kool v George Ikonya Thuo* [2001] eklr.

9. Accordingly, that in this case, the respondent gave oral testimony and confirmed that he was given first aid at Nairobi Hospital and discharged after 30 minutes, confirming further that the injuries sustained were not major ones. Additionally, he only attended Dr. Jabbal for correction of dentures. It was argued further that the respondent testified that after sting of a scorpion in Sudan, he started experiencing headaches and eventually lost consciousness, causing his admission in Nairobi Hospital. Counsel contends that, the accident and the neurological complication that caused the respondent's admission are not related and thus the respondent should not have been awarded damages for the neurological complication suffered later but only soft tissue injuries sustained in the accident.
10. Counsel submitted that the recourse for damages for the neurological complication ought to have been against the people that sent him to Sudan and not against the appellant. On that note, he argued that the trial court's claim was unfounded and urged this court to allow the Appeal and dismiss the trial Court suit, in the alternative allow damages for soft tissue injuries only.

Respondent's submissions

11. The respondent filed his submission dated 11th March, 2024, through the firm of S. N. Ngare and Company Advocates. Counsel rehashed the mandate of Court in Appeal and stated that this being a first appeal, the role of the Court is to re-evaluate, re-assess and re-analyze the the extracts on record and determine whether the conclusion reached by the trial court is to stand or not and give reason either way. This was the position of the Court of Appeal in *Abok James Odera t/a Odera & Associates v John Patrick Machira & Company Advocates* [2013] eklr.
12. On liability, counsel submitted on three issues; the occurrence of the accident, ownership of the vehicle and who is to blame for the accident. On that basis, he argued that the appellant did not lead evidence to challenge liability and thus 100% liability was apportioned on him. In this, the respondent relied on the case of *Unleek Electrical Company Limited v Joseph Fanuel Alela* NBI HCCC Appeal NO. 676 OF 200(ur).
13. On quantum, it was submitted that the trial court correctly directed itself on the facts and the law, in arriving at the damages awarded. He argued that the appellant has not shown how the trial court misdirected itself in arriving at the award given. Moreover, that the trial court did not consider any irrelevant factor in arriving at the award of pain and suffering and loss of amenities.
14. On the injuries sustained, counsel submitted that the respondent adduced evidence that showed that he had sustained posterior hematoma or internal hemorrhage that progressed with time and became chronic causing him neurological complications, which affected his earnings as he was unable to proceed with the Irrigation master plan project phase 2 in South Sudan due to the recurrent headache, altered memory and need to be monitored by a doctor in Kenya.
15. It was argued that there was no break of the causation between the accident that occurred on 28/2/2013 and the neurological effect that emerged while working in Sudan, as such the claim for further damages was well founded in law. In this Counsel cited the case of *Edward Mzamili Katana v CMC Motors Group Ltd & Another* [2006] eklr.
16. On damages awarded, counsel relied on the case of *Geoffrey Njogu Mwangi V Francis Mbugua Gichia & Another* [2015] eklr , where the plaintiff who had sustained major head injuries which led to loss of consciousness, loss of teeth and multiple deep lacerations on the neck, fracture of the femur and injury to the urethral passage was awarded Kshs 2,000,000/= in 2015 for pain, suffering and loss of amenities.



17. Counsel also relied on the case of *Gerald Musungu Otwani (suing through Father and next friend Ferdinand Emmanuel Otwani) v Kulsum Alibhai & IQBAL Mohamed Hussein*, Mombasa HCCC No. 250 of 2023, where the plaintiff who had sustained a head injury, multiple facial, arm and leg bruises and scalp laceration was awarded Kshs. 2,500,000 for pain and suffering and loss of amenities on 30.11.2006. Accordingly, that considering the inflation, the respondent ought to have been paid more than the Kshs 2,300,000 awarded. Nonetheless, since no cross Appeal has been made, the amount awarded is fair and the same should be affirmed by the court.
18. On special damages, it was submitted that the respondent prayed for payment of Kshs 3,066,809/=. However, that they produced a medical report receipt of Kshs 2,000/= and bundle of medical receipts amounting to Kshs 664,309/=. On loss of earnings, counsel argued that the Kshs. 2,400,000/= pleaded was due to the loss of the contract which the respondent had entered into with Rural Development Services Limited that was to pay him USD(\$) 10,000 every month for 3 months. He thus prayed for the award of special damages to remain undisturbed.
19. In conclusion, counsel urged this court to affirm the award granted by the trial court and dismiss the Appeal herein with costs.

Analysis and Determination

20. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh and arrive at its own conclusion. It also has to bear in mind that it did not see or hear the witnesses and ought to give an allowance for that. See *Selle & another V Associated Motor Boat Co Ltd & another* [1968] E.A 123; *Abok James Odera (supra)* among others
21. Having carefully considered the grounds of appeal, evidence on record, submissions and cited decisions by both parties, the issue for determination is pegged on both liability and quantum.
22. On Liability, it's not in dispute that the accident occurred on 28/2/2013, involving motor vehicle registration No. KBM 968R, which at the time was registered in the name of the appellant. It is not also contested that upon examination of the respondent at the Nairobi Hospital the doctors assessed the injuries as soft tissue injuries as per the letter from the hospital dated 15th April, 2013. What is disputed is whether the aggravated injuries to wit sub-acute subdural hematoma that occurred three months after the accident was caused by the accident of 28/2/2013.
23. The history of the case herein is that the respondent was involved in a road accident on 28/2/2013, where he was knocked down by the suit vehicle, became unconscious and rushed to Nairobi Women Hospital where he was diagnosed to have suffered soft tissue injuries and mild cuts on the face. First aid was carried out and he was discharged. Dr, Jabal, a dentist examined the Respondent on 7/3/2013 and found that an old fabricated fixed porcelain unit of six was well formed save for one unit which had dislodged due to the impact of the accident. The doctor ruled out any fractures.
24. The next day on 8/3/2013 a CT Scan was carried out by Dr, Auka, who stated that the respondent had subdural hematoma secondary to small acute subdural hemorrhage but was cleared to go back to work. Sometimes in May, 2023, while the respondent was working in Sudan, he was stung by a white scorpion and given hydrocortisone and returned to work. A week later, he noted weakness in the lower left limb causing him to stumble and fall. He was observed for a while in Sudan and a decision was made for him to be flown to Kenya for further management. Its upon arriving in Kenya that further tests, including CT-Scan were carried out and it was established that he had developed large right front parietal sub-acute subdural hematoma, where a surgery was successfully carried and he was discharged



- after about 9 days on 5th June, 2013, as per the discharge summary dated 5/6/2013 by Dr. Silvertein. Dr. Wokabi however stated that the respondent is at high risk of developing epilepsy.
25. The respondent's injuries were confirmed by the appellant's Dr. Wambugu, who examined him on 11th August, 2014 and stated that he had suffered subdural hematoma, which was successfully evacuated and the risk of post-traumatic epilepsy diminished after a 2-year fit free period.
 26. From the several medical reports produced, it is evident that the respondent had suffered a mild subdural hematoma due to the accident of 28/2/2013, which the doctor projected could heal after several months. However, it emerged later that the said Hematoma, did not heal but instead progressed to cause severe injuries that required immediate surgical procedure to evacuate.
 27. The appellant alleged that the subsequent complication reported by the respondent might have been caused by the scorpion sting, because its after that scorpion sting, that he was reported to have developed weakness of the left limb and arm, that caused him to stumble and fall, leading to the further injury on his head. The appellant thus argued that there is no nexus between the accident and the subsequent injuries. He however did not produce any evidence to link the scorpion sting with the further injuries suffered by the respondent, as such the same remains unproven.
 28. The respondent on the other hand produced in evidence several medical reports that linked the subsequent injuries to the accident. Dr. Wokabi, in his report dated 15/7/2023 stated in part that the small hematoma continued to enlarge over a period of time, giving rise to increased pressure within the granula cavity causing symptoms of headaches, dizziness, slow mentation and finally causing unconsciousness. Furthermore, during cross examination Dr. Wokabi ruled out the scorpion sting as a cause of the further injuries.
 29. The explanation given by Dr. Wokabi, was not challenged by the appellant as such his opinion, as a medical expert is convincing and matched what transpired in this case. On that basis, I am in agreement with the trial court that the accident caused a head injury that progressed to the severe injuries, the respondent experienced later. I am therefore of the view that the respondent successfully linked the further injuries with the road accident, thus the appellant is 100% liable.
 30. On quantum, the trial court awarded special damages of Kshs 2,266,809/=, comprising legal report Kshs. 2000/=, motor vehicle search of Kshs. 500/= treatment receipts 664,309/= and loss of earning Kshs 1,600,000/=, for the contract forfeited due to the injuries. The law on special damages is that such must be pleaded and strictly proved. The respondent exhibited the treatment receipts, motor vehicle search receipt and Legal report receipts all which added to Kshs 666,679/= which should be awarded.
 31. On loss of future earnings, the respondent prayed to be paid USD (\$) 30,000 for the three months' contract which he had secured, running between April and June and October, to November, 2013. The basis of this pay, is that due to the injuries sustained, the respondent was unable to proceed with his job in Sudan. The trial Court awarded the respondent two months' pay for the rest of the months not worked due to the injuries.
 32. The Court of Appeal in the case of *SJ - v- Francesco Di Nello & Another* [2015] eKLR held that:-

“...Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.”



33. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 at pg 14 wherein Lord Denning M. R. said in part as follows:-

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

34. Similarly, in this case, the respondent proved that he entered into an agreement between Rural Development Services Limited and Sanyu Consultants Inc dated 22/3/2013, wherein the respondent is mentioned as the expert. What is not on record is any evidence of the termination of the said contract. He who alleges must prove and since, the respondent alleged that due to the injuries the said contract was severed, he ought to have tendered evidence to prove this fact in line with section 107 of the *Evidence Act*. I say this, considering that the Medical doctors that examined the respondent confirmed that he was healed and in fact the last two medical reports by Dr. Wokabi dated 15/7/2013 confirmed that he had healed and the possibility of a relapse was slim. The report by Dr. Wambugu dated 11/8/2014, also confirmed that the subdural hematoma had been successfully evacuated and the risk of post-traumatic epilepsy had diminished.

35. It should also be noted that none of these doctors mentioned anything on disability of the respondent resulting from these injuries. Therefore, the accident cannot be said to have stopped the respondent from proceeding on with his work in Sudan. Ultimately, the award for loss of earnings in my view was not proved and the same should therefore be set aside.

36. Turning to general damages, the court in the case of *Butt - v- Khan* [1981]KLR 349 set the guiding principle of when an appellate Court can interfere with an award of damages that:

“... An appellate court will not disturb an award of damages unless it is so 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...”

37. The trial court awarded the respondent Kshs. 2,300,000/= for pain and suffering, majorly basing its decision on the case of *Gerald Musungu Otwani v Kolsum Alibhai and Another* [2001] eKLR, where a plaintiff suffered severe head injuries with brain damage, multiple facial, arm and leg bruises and a scalp laceration. He was admitted to hospital in a state of coma, epileptic fitting and only responded to painful stimulation. As he required life support he was admitted in ICU for 20 days after which he was transferred to HDU for another 5 days. The injury to the eye resulted in a diagnosis of right optic atrophy. The nerve sending messages to the brain was damaged and in addition to facial palsy he also had defective speech. He was mentally retarded and had to be sent to a special school. Maraga, J (as he then was) made an award for general damages of Kshs 2.5 million in November 2006, which is 14 years before the impugned Judgment.

38. I have looked at the case relied upon by the trial court and it's obvious that the injuries sustained by the plaintiff in that case were more severe, in that the plaintiff stayed in ICU and HDU, cumulatively for 25 days and eventually became mentally retarded. Therefore, the case relied on by the trial court can be distinguished from the facts in this case and thus not comparable.

39. I have however looked at the case of *Lawrence Musyoka Mulonzi & another v Daniel John Kato Ndambuki* [2020] eKLR, where the plaintiff who had suffered subdural hematoma, fracture left olecranon process, injury to the chest and Injury to right knee, was awarded upon Appeal



Kshs.750,000/=. The injuries by the plaintiff in this case, in my view, are more comparable and relatable to what the Respondent had suffered herein. Moreover, no major complaints were raised by the respondent and the doctors that wrote the reports and testified in court regarding his future fitness.

40. In the end, I am of the humble opinion that the award for general damages herein ought to be interfered with by this court and reviewed downwards to Kshs 1,800,000/=. I therefore find merit in the Appeal which partially succeeds and I set aside the trial court's judgment on quantum and enter Judgment for the respondent as follows:

- i. Liability at 100% upheld
- ii. Special damages Kshs 666,679/=
- iii. General damages Kshs 1,800,000/=
- iv. Half costs to the respondent in the Lower court and High court
- v. Interest at court rates from date of the Judgment

41. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

