



**Aseghegedch v Algar & another (Civil Appeal E371 of 2021)
[2023] KEHC 4098 (KLR) (Civ) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4098 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E371 OF 2021
AN ONGERI, J
MAY 8, 2023

BETWEEN

GHIRMAZION ASEGHEDECH APPELLANT

AND

JUAN ALGAR 1ST RESPONDENT

ALGAR AGUILAR INVESTMENTS LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Judith Omollo
(RM) in Milimani CMCC no. 9573 of 2019 delivered on 28/5/2021)*

JUDGMENT

1. This appeal is only in respect of special damages in respect of travel and medical expenses for personal injuries sustained by the appellant.
2. A brief summary of the plaintiff's case is that the plaintiff was involved in an accident on May 2, 2019 at around 22.38 hours along Lower Kabete Road when the plaintiff's motor vehicle registration No KCC 990F Honda CR-V collided with the respondent's motor vehicle registration No KAU 661R Toyota Rav 4.
3. In his plaint dated December 19, 2019 filed in CMC 9573 of 2019, the plaintiff sought the following damage
 - i. Loss of motor vehicle 1,350,000
 - ii. Special damages
 - a. Kshs 1,614,954.18



- b. USD 2,282.45
 - c. EURO 5,041.41
- iii. Garage storage
 - iv. Cost of taxi services
 - v. Damages for pain & suffering
 - vi. General damages
 - vii. Costs of this suit
 - viii. Interest and costs
4. The defendant did not enter appearance or file a defence and interlocutory judgment was entered.
 5. The trial court upon hearing the evidence of the plaintiff awarded the following damages
 - a. Special damages 1,029,930
 - b. Costs of the suit and interest from the time of filing suit until payment in full.
 6. The appellant is aggrieved with the judgment and decree and has filed this appeal on the following grounds;
 - i. The learned magistrate erred in law and in fact by totally disregarding the appellant's claim for costs of the motor vehicle storage charges accruing at the rate of Kshs 580.00 per day, and by failing to consider the documentary evidence tendered by the appellant containing a receipt for the amount of Kshs 226,290.00 expended on garage storage charges.
 - ii. The learned magistrate erred in law and in fact by completely disregarding the medical reports and clinical notes produced by the appellant showing the injuries suffered by the appellant and linking the appellant's injuries to the road traffic accident and as a result, came to an erroneous decision in dismissing the appellant's claim for special damages for medical expenses incurred and general damages.
 - iii. The learned magistrate erred in law and in fact by completely disregarding the appellant's unchallenged testimony that she suffered from frequent headaches following the road traffic accident necessitating subsequent medical tests and an MRI which revealed that she had suffered brain injury and in doing so, erroneously failed to find that the injuries suffered were as a result of the road traffic accident.
 - iv. The learned magistrate erred in law and in fact by completely disregarding the appellant's uncontested testimony that she sought treatment within Kenya for the injuries suffered, before travelling for further treatment in Berlin, Germany following the results of the MRI report, and in doing so, erroneously failed to find that the injuries suffered and the treatment sought was directly as a result of the road traffic accident.
 - v. The learned magistrate came to an erroneous decision on the appellant's personal injury claim that was against the weight of evidence produced by the appellant.
 - vi. The learned magistrate erred in law and in fact by finding that the injuries suffered by the appellant as a result of the accident could only be ascertained by a P3 form or medico-legal



- report for the court to believe that the expenses incurred for the medical treatment resulted from the road traffic accident.
- vii. The learned magistrate erred in law and in fact and rendered a contradictory and erroneous decision by on the one hand concurring that the police abstract produced by the appellant confirmed that the accident was a slight injury traffic accident, and, on the other hand, completely ignoring the medical reports and clinical notes produced by the appellant showing the nature of injuries suffered and proceeding to dismiss the appellant's personal injury claim as an afterthought.
 - viii. The learned magistrate erred in law and in fact by failing to award any special damages at all for the expenses incurred by the appellant in seeking medical treatment and erred incompletely disregarding the appellant's uncontested testimony as to the nature and extent of the injuries suffered as a result of the road traffic accident.
 - ix. The learned magistrate erred in law and in fact, entirely misdirected herself and descended into the arena of litigation by arriving at the decision that the appellant's personal injury claim was an afterthought, which decision was not based on the evidence on record and was in stark contrast to the evidence adduced by the appellant.
 - x. The learned magistrate erred in law in failing to find that the appellant had proved her personal injury case on a balance of probability.
7. The appellant submitted before the trial court that, following the motor vehicle accident, her motor vehicle registration No KCC 990F was stored in a garage, whose expenses accrued at the rate of Kshs 580.00 for each day, including 16% VAT. On June 10, 2019, the appellant paid Kshs 20,880 to Peponi Autocare Limited, for storage charges for 36 days at the rate of Kshs 580.00 for each day, including 16% VAT, and the appellant made a further payment of Kshs 226,290.00. On November 13, 2020 being payment for storage charges for 397 days, being a rate of Kshs 570 per day including 14% VAT. As proof of this, the appellant produced the following documents before the trial court:
- a. Invoice No 2013393 dated June 10, 2019 together with a Legal Receipt for payment of Kshs 20,880.00 (at page 31 of the record of appeal) from Peponi Autocare Limited.
 - b. Invoice No 593 dated November 13, 2020 together with a legal receipt for payment of Kshs 226,290.00 (at page 159 of the record of appeal) from Thug Track Limited.
8. It was submitted that the appellant therefore proved that she spent a total of Kshs 247,170 in garage storage charges and despite this the learned magistrate only awarded Kshs 20,880.
9. It was submitted further that the appellant sustained serious bodily injuries as a result of the accident. She also suffered great pain and discomfort from the said bodily injuries and her life was significantly disrupted as she sought treatment for more than six months following the accident. In evidence of the medical expenses incurred whilst seeking treatment in Kenya the appellant produced receipts for accumulative Kshs 68,543.73. 21. The appellant also averred that she incurred expenses in the amount of Kshs 4,905.00 for courier services for ferrying her medical test results from Kenya to Germany on August 13, 2019 through DHL, and, as proof of this, she produced before the trial court, a receipt and invoice for the same.
10. The appellant further testified that she travelled to Germany to seek further treatment, and incurred expenses of USD 2,283.00 for a return ticket, and, as evidence of this, the appellant produced her travel itinerary, receipt No 6129006 for the said USD 2,283.00, and her Lufthansa Airline Boarding passes.



11. That in evidence of the medical expenses incurred whilst seeking treatment in Germany, the appellant produced various invoices and receipts in German and translated into English by a certified translator from Goethe Institute, Mr Nicholas Oloo Ndege. The said translator swore an affidavit on May 11, 2020 confirming that he was presented with the original medical reports, treatment notes and receipts from various places where the appellant had received medical services, which were in the German language, and that he had translated the said documents to the English language accurately, precisely and without alteration of the meaning whatsoever. The said affidavit was produced by the appellant as evidence. The appellant further produced receipts and invoices as proof of payment of the total sum of Euro 5,041.41 but despite of the weight of evidence produced the trial magistrate completely dismissed the appellant's personal injury claim.
12. It was argued further that from the medical reports, treatment and clinical notes, particularly the medical treatment and referral note dated August 8, 2019 issued by Dr Kewal Thakore and the medical report from Dr Med Djafar Nowzohour, it is clear that the appellant was seeking treatment for injuries suffered as a result of the road traffic accident which occurred on May 2, 2019, and not for any other reason. That the honorable magistrate therefore erred completely by disregarding the appellant's testimony to her injuries and the medical reports, treatment and clinical notes which were produced as proof of the injuries suffered as a result of the motor vehicle accident.
13. The appellant added that the impact of the accident could also be gleaned from the photographs of the scene and further that the appellants oral testimony and evidence adduced before trial remained unchallenged and stood uncontroverted.
14. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and to arrive at its own conclusion whether to support the findings of the trial court. In *Selle v Associated Motor Boat Co* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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.”
15. In particular, this 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 demeanor of a witness is inconsistent with the evidence in the case generally.”
16. The issues for determination are as follows;
 - i. Whether the appellant pleaded and proved the special damages to the required standard in civil cases.
 - ii. Whether the appellant proved general damages for pain and suffering.
17. I find that the appellant pleaded special damages as follows;

Kshs.



- i. Constructive total loss of vehicle 1,350,000.00
 - ii. Towing charges 11,000.00
 - iii. Garage storage charges 131,660.00
 - iv. Fees for valuation 7,500.00
 - v. Motor vehicle search 550.00
 - vi. Fee for taxi services 40,800.00
 - vii. Costs for medical care in Kenya 68,539.18
 - viii. Courier services for medical tests 4,905.00
 - ix. Costs of return ticket to Germany 2,282.45 USD
 - x. Costs of medical care in Germany 5,041.41 Euro
18. The appellant who testified as PW 1 gave evidence that he sustained chest, neck and knee injuries.
19. The record also show that he produced a medical report from Warwick Medical Centre and MP Shah Hospital at page 83 – 85 of the record of appeal.
20. The trial court dismissed the claim for general damages for pain and suffering on the basis that the police abstract merely indicated slight injury road traffic accident.
21. I find that the appellant proved that he sustained injuries and was referred to Germany and he produced receipts for the return flight and also medical expenses both in Kenya and Germany.
22. In the submissions filed in the trial court, the appellant asked for general damages for pain and suffering of Kshs 1,000,000 and relied in the following case
- i. Duncan Mwenda & 2 others v Silas Kinyua Kithela (2018) eKLR
 - ii. Samuel Muthama v Kenneth Maundu Muindi (2009) e KLR
 - iii. Daniel Muchemi & Anor v Rosemary Kawira Kiamba (2018) e KLR
 - iv. Lawrence Musyoka Mulinzi & Anor v Daniel John Kato Ndambuki (2020) e KLR
23. In these cases relied on by the appellant, awards ranging Kshs 380,000 to 1,200,000 were awarded for similar injuries.
24. The appellant sustained the following injuries
- i. Trauma and injury to the tailbone
 - ii. Blunt abdominal trauma
 - iii. Trauma injury to the neck
 - iv. Trauma injury to the chest
 - v. Trauma injury to the knee
 - vi. Injury to the eye
 - vii. Recurrent pain due to the injuries sustained.



25. I find that the trial court ought to have awarded the appellant general damages for pain and suffering and also the special damages in respect of travel expenses both in Kenya and in Germany.
26. I allow the appeal and award general damages for pain and suffering of Kshs 700,000/=.
27. Special damages in respect of travel expenses and medical expenses both in Kenya and Germany are also awarded as follows;
 - i. Medical care in Kenya Kshs 68,539
 - ii. Cost of return ticket from Germany 2,282.45 USD
 - iii. Costs of medical care in Germany 5,041.41 Euro
28. The judgment and decree of the trial court is accordingly upheld and in additional judgment be and is hereby entered in respect of special damages in the sum of Kshs 68,539 and also 2,282.45 USD and 5,041.41 Euro. plus cost from the date of this judgment in respect of general damages and from the date of filing suit in respect of special damages until payment in full.
29. The respondent to bear the costs of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
8TH DAY OF MAY, 2023.**

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant
..... for the 1st Respondent
..... for the 2nd Respondent

