**Barkrania and another v Kagau**

[2004] 2 EA 14 (CAK)

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Judgment:** 18 March 2004

**Case Number:** 21/02

**Before:** Tunoi, Githinji JJA and Onyango Otieno AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Damages – Special damages – Assessment of damages – Future medical expenses – Loss of earnings*

*– Whether evidence given of future medical expenses – Whether claim for loss of earnings remote or*

*proximate.*

**Editor’s Summary**

The Respondent sustained injuries in a road traffic accident due to the alleged negligence of the

appellants. He claimed general and special damages under various heads, including KShs 400 000-00 for

future medical expenses and KShs 2 800 000-00 for loss of business earnings. Liability was entered by

consent at 80% against the appellants. The trial Judge after considering the submissions, awarded

KShs 120 000-00 for future medical expenses and KShs 200 000-00 for loss of future earnings.

The future medical expenses were in relation to surgical operations required to regraft the fracture

sites and to remove the plates and screws inserted to aid healing of the fracture injuries suffered in the

accident. The loss of future earnings was in respect to two computer contracts awarded to a company run

by the respondent which were allegedly cancelled due to his injury.

The Appellants appealed against the two awards. They argued that the Judge ought to have awarded a

lesser sum for future medical expenses. They also argued that the claim for business loss should not have

been allowed because the net loss from the value of two cancelled contracts was not disclosed and the

said loss occurred to the company and not to the respondent.

**Held** – The trial court had properly considered the medical opinion that the respondent required further

surgery to improve his medical condition. Since the assessment of the quantum of damages was an

exercise of discretion by the trial court, the appellate court would not disturb the award unless it was

shown that the trial Judge proceeded on a wrong principle of law. *Butt v Khan* [1981] KLR 349.

Page 15 of [2004] 2 EA 14 (CAK)

The facts giving rise to the loss of business contracts were not strictly proved. Further, the loss of

business was not suffered by the appellant personally, and no proximity between the accident and the loss

of the contracts had been established. The trial court had failed to investigate the issue of causation.

*KCM Thyssen v Wakisu Estate Ltd* [1960] EA 288 considered. Hence, the claim for consequential

business loss was not proved and no sum ought to be awarded.

Appeal allowed in part. Award for future medical expenses upheld while award for business loss

overturned.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Butt v Khan* [1981] KLR 349 – **F**

*Hahn v Singh* [1985] KLR 716 – **F**

*KCM Thyssen v Wakisu Estate Limited* [1960] EA 288 – **C**

**Judgment**

**TUNOI, GITHINJI JJA AND ONYANGO OTIENO AJ:** This appeal is only against the award of

KShs 120 000 as future medical expenses and the award of KShs 200 000 as loss of earnings (business)

to the respondent.

The respondent, as the plaintiff in the superior court, claimed general and special damages for the

injuries he sustained in a road traffic accident due to the alleged negligence of the appellants.

He claimed special damages under several heads namely:

(*a*) Medical report - KShs 2 000

(*b*) Medical bills - KShs 200 000

(*c*) Police abstract - KShs 100

(*d*) Car hire services (loss of user) - KShs 273 000

(*e*) Future medical expenses - KShs 400 000

(*f*) Loss of earnings (business) - KShs 2.8 million.

There was a consent judgment on liability apportioning liability at 80% against the appellants and at 20%

against the respondent. The superior court (Mwera J) after considering the submissions awarded KShs

120 000 for future medical care and KShs 200 000 as loss of future earnings. The appellants appeal

against the two awards on the grounds that they were not convincingly proved by the respondent.

The assessment of damages is an exercise of discretion by the trial court. An appellate court will not

disturb the award unless it is shown that the Judge proceeded on a wrong principle of law or that he

misapprehended the evidence in some material respect and so arrived at a figure which was either

inordinately high or low as to represent an entirely erroneous estimate *Butt v Khan* [1981] KLR 349.

Regarding the award of KShs 120 000 for future medical expenses the respondent had suffered a

multiple fragment fracture of the left humerus and plates and screws were inserted. Doctor Njoka was of

the view that respondent

Page 16 of [2004] 2 EA 14 (CAK)

would require an operation to repair fracture site, which would cost about KShs 100 000 and also an

operation for removal of plates and screws, which would cost KShs 100 000.

There was also a medical report of Dr RP Shah dated 17 June 1997 indicating that the respondent did

not require an operation for removal of the plate. The Learned trial Judge considered the two medical

reports and counsel’s submissions and awarded KShs 120 000. The appellants counsel does not show

where the Learned Judge went wrong. He submitted that a sum of about KShs 60 000 should have been

given which shows that the complaint is really on the quantum of damages. It has not been shown that the

Learned Judge either erred in principle or misapprehended the evidence in assessing the appropriate

award for future medical expenses and in our view the Learned Judge cannot be faulted.

The respondent’s claim for loss of earnings was based on his evidence that because of the injuries he

sustained as a result of the road traffic accident, he failed to perform two contracts worth KShs 2.8

million and as a result the two contracts were cancelled. The respondent gave evidence that he was the

managing director of a company called Intergalle Services Limited which had been awarded two

contracts – one from Messrs AJ Faulkner and Sons Limited for training 30 people on Informix

(Computer training) at KShs 20 000 per person – total KShs 600 000 and another from Messrs Afrostock

International Limited for supply of computers worth KShs 2.8 million. According to the respondent he

had to buy and supply the computers but did not do so because of the injuries and consequently the

contract was cancelled. The respondent’s counsel submitted at the trial that the claim for KShs 2.8

million should not be allowed because firstly, the net loss was not proved, and, secondly, the claim would

only have been made by the company and not by the plaintiff.

The Learned Judge agreed that the claim of KShs 2.8 million was not proved and said in part:

“That no figure was put forth as to what would have constituted the gross income and that the net income after

deduction of VAT, other taxes, expenses involved in the training and supplying computers is not placed

before the Court. However, the defence did concede that plaintiff suffered some loss though, except that it

was not quantified. It is true in a case like this, this Court ought to be guided as to what was expected from the

two deals and what would have been the net loss because plaintiff could not perform. This was a grave

omission on the part of the plaintiff. But if he had clinched the deals the plaintiff would have made some

money. But he was down with injuries from the accident. This Court thinks it fair to award KShs 200 000”.

The loss of earning quantified at KShs 2.8 million was pleaded as special damages, although the facts

giving rise to such loss were not pleaded. As this Court has often said, special damages must not only be

pleaded but also strictly proved *Hahn v Singh* [1985] KLR 716.

In the present case, the Learned Judge made a specific finding that the loss of earning claimed was not

proved but nevertheless proceeded to award KShs 200 000 certainly as an estimate of the loss without

any factual basis. In doing so the Learned Judge undoubtedly, erred in principle.

The claim for loss of earning was also fraught with the following other problems. Since the

documents relied on by the respondent at the trial showed that the two contracts were offered to a

company and not to the respondent as an individual, the Learned Judge should have considered the

appellant’s submission

Page 17 of [2004] 2 EA 14 (CAK)

that the loss of profits (if any) was incurred by the company and make the appropriate finding on that

issue proceeding to award damages.

Furthermore, the Learned Judge should have investigated the veracity of respondent’s claim that the

non-performance of the contracts was due to illness. The respondent suffered a left arm fracture on 7

August 1993 and was admitted in hospital for one week. That injury alone could not have stopped him

from buying computers and supplying them by 30 September 1993. He did not also explain what training

on informix entails and did not show that the injury could not have allowed him to conduct the training

from 6 September 1993.

Lastly, the claim for loss of earning, rather, loss of profitable contracts inevitably raised the

problematical question of remoteness of damages as what the appellant was asserting is that due to injury

caused by negligence of the appellant he was unable to perform two remunerative contracts and as a

consequence third parties cancelled the contracts. It is a question of law whether the loss of earnings

claimed in this case was caused by the negligence of the appellant or by a *novus actus interveniens* – ie a

new and independent act of third parties resulting in the cancellation of the two contracts. The Court did

not investigate the issue of causation. The case of *KCM Thyssen v Wakisu Estate Limited* [1960] EA 288

is a good illustration of the problem of remoteness of damages arising from personal injury claims.

It is evident from the foregoing that the respondent’s liability to pay the KShs 2.8 million loss of

earnings claimed or part of it was not established and the appeal against the award of KShs 200 000

should be allowed.

The appellant has partially succeeded and is entitled, in our view, to half the costs of the appeal.

For the above reasons, the appeal against the award of KShs 120 000 as future medical expenses is

dismissed but the appeal against the award of KShs 200 000 as loss of earnings is allowed and the award

set aside. We would give half of the costs of the appeal to the appellants.

For the appellants:

*Information not available*

For the respondents:

*Information not available*