**Kenya Bus Services Ltd v Gituma**

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

**Date of ruling:** 28 May 2004

**Case Number:** 241/00

**Before:** Omolo, O’Kubasu JJA and Ringera AJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Damages – General damages – Motor vehicle accident causing bodily injury – Damages assessed*

*piecemeal for each separate injury – Whether compartmentalisation of damages led to a wrong*

*assessment.*

*[2] Damages – Quantum – Fracture of tibia and fibula, right femur, right scapular – Soft tissue injuries*

*– Loss of power in right upper arm – Pain and suffering – Injuries.*

*[3] Damages – Special damages – Future medication – Future medication not pleaded – Whether*

*damages could be awarded for future medication if the same were not pleaded.*

**JUDGMENT**

**Omolo, O’Kubasu JJA and Ringera AJA:** The Respondent was injured in a self-involving road traffic accident on 7 January 1998 along Meru-Embu road when motor vehicle KAJ 073X (in which she was a passenger) plunged into Nithi river. She was taken to Chogoria Hospital where she was hospitalised for four months from 7 January 1998 to 6 May 1998. She sustained the following injuries: a closed fracture of the left tibia and fibula; injury to tendon leading to the big toe and the left leg with resulting loss of power; a closed compound fracture of the scapula; dislocation of the right shoulder joint; and complete brachial plexus injury with loss of power and sensation of the right upper limb. When she was examined on 23 November 1998 by Dr Macharia he observed that she was walking with a stick over her left hand, she walked with a drag of the left lower limb, the upper limb was held with an arm sling, the sensation and power of the whole of the right upper limb was absent, the left shoulder joint was dislocated with a false joint, the left lower limb was short by about an inch, the flexion (*dorsi*) of the left toe was poor, there was a scar over the lower third of the shin and tenderness over the lower third of the left tibia with a palpable callus, there was palpable callus over the mid-shaft of the right femur and tenderness on palpation, and there were multiple bruises over the right upper limb. The said Doctor concluded as follows: “As a result of the accident Jane Karambu Gituma sustained injury to the brachial plexus (nerves) of the right upper limb, there is resultant loss of motor and sensory activity of the limb. There is also complete dislocation and false joint of the right shoulder. This is a permanent injury and she will require to be on physiotherapy for the rest of her life. Fracture of the left tibia – fibula which has healed with shortening of the left lower limb and residual pains. Fracture of right femur which has healed with residual pains”. Five months later she was examined by Dr Omanga on 28 April 1999. He found the same injuries as Dr Macharia. She complained of headache, neck pain, pain in the right arm, pain in the right shoulder, backache and pain in the right and left legs. Dr Omanga’s examination revealed that the Respondent walked without support and that there was loss of sensation in the right upper arm from below the elbow to the hand and loss of power of the right arm. The right shoulder joint was dislocated with a false joint; swollen mid shaft of the right femur with a palpable callus; shortening of the left leg by about one inch; and a scar on the lower third of the left shin with the same area being hard, swollen and non-tender. He arrived at the same conclusions on the nature and extent of the Respondent’s injuries as had Dr Macharia. At the trial, Aganyanya J found 100% liability against the Appellant. He then concluded that the

Respondent’s injuries were severe and she was entitled to substantial damages. He proceeded to make an award of general damages as follows:

“1. Pain and suffering KShs 300 000

2. F racture Tibia and Fibula KShs 180 000

3. S oft tissue injuries KShs 50 000

4. F racture Right femur KShs 100 000

5. I njury to right upper limb KShs 200 000

6. L inear fracture of right scapula KShs 40 000

7. F uture medication (physiotherapy) KShs 100 000

Total KShs 970 000”.

The Appellant was dissatisfied with the judgment of Aganyanya J. It appealed to this Court against the

Judge’s findings on liability and quantum of damages on the following five grounds:

“1. The Learned Judge erred in law and fact on holding that the Appellant was liable for the accident when various liability had not been pleaded at all.

2. The Appellant could not be held liable in law for the acts of an alleged servant in the absence of pleading. The Appellant cannot in fact drive motor vehicles.

3. The Learned Judge erred in law and fact in awarding general damages piece meal for each injury suffered by the Respondent thus misdirecting himself and departing from the correct legal approach where a global award should be made for injuries suffered.

4. The Learned Judge erred in law and fact in awarding KShs 100 000 for “future medication (physiotherapy)” which was not pleaded at all.

5. The award of KShs 970 000 general damages was too high and excessive and without any relationship at all with the injuries suffered”.

At the hearing, of the appeal, counsel for the Appellant abandoned grounds 1 and 2 of the appeal. He concentrated on attacking the Learned Judge’s decision on quantum. He relied on *Cavito v Difilippo* [1957] EA 535 – a decision of the East African Court of Appeal – for the proposition that general damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of independent assessments for each injury. Counsel submitted that in light of that, the Learned Judge had in awarding general damages piecemeal for each injury misdirected himself and departed from the correct legal approach where a global award should be made for the injuries suffered. He argued that the effect of the wrong approach by the Judge was that an excessive award of damages was made. He relied on the cases of *Kamau v Mwaura* High Court civil case number 1559 of 1988 (UR) where an award of KShs 200 000 in general damages for pain and suffering resulting from fracture of the left femur and soft tissue injuries to the elbow, back and face was made in 1993; *Kilonzo v Madara* High Court civil case number 1637 of 1990 (UR) where an award of KShs 230 00 in general damages for pain and suffering as a result of fracture of the left tibia and double fracture of the left fibula was made in 1993; and *Oppon v Karuri* High Court civil case number 4621 of 1988 (UR) where an award of KShs 400 000 in general damages for pain, suffering and loss of amenities resulting from fracture of left tibia and fibula, injury to the left knee, cervical spine, left foot and left brachial plexus was made in 1994. He submitted that an award of KShs 500 000 would have been adequate compensation to the Respondent. In urging us to reduce the award, counsel for the Appellant, cited the case of *Zein and another v Mutua* [1994] LLR 353 (CAK) where this Court after referring to the cases of *Ilanga v Manyoka* [1961] EA 705 and *Kemfro Africa Ltd v Luvai and another* [1988] I KAR 727 stated the pertinent law 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 court are well settled. The appellate court must be satisfied either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage”. In canvassing ground 4 of the appeal, counsel submitted that future medication (physiotherapy) was special damages which ought to have been pleaded, but was not and, a accordingly, the Judge erred in making an award therefor. Counsel for the Respondent, in reply to the above submissions conceded that the trial court applied the wrong principles in making separate awards for the several injuries but submitted that such an error was not fatal to the award. He also relied on the case of *Cavito v Di Fillipo* (*supra*). In his view, the injuries suffered by the Respondent could have attracted an even higher award even if the Judge had applied the correct approach. Counsel for the Respondent also submitted that the case relied on by the Appellant concerned injuries of lesser magnitude than those suffered by the Respondent. He also asked us to consider inflation since those awards were made in the early 1990’s. He beseeched us not Page 95 of [2004] 1 EA 91 (CAK) to interfere with the award. As regards the damages awarded for cost of future medical care, counsel conceded that the Judge was in error. We have considered the submissions made to us by the learned advocates. As the Appellant has abandoned grounds 1 and 2 of the appeal, we are only concerned with the issue of quantum of damages. 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 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 as to represent a wholly erroneous estimate of damages (see, for example*, Kassam v Kampala Aerated Water Co Ltd* [1965] EA 587, *Idi Shabani v Nairobi City Council* [1982–88] 1 KAR 681, *Butt v Khan* [1981] KLR 349 and *Kimotho and others v Vesters and another* [1988] KLR 48). And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded. As Lord Donovan put it in *Perestrello v United Paint* [1969] I WLR 570, at 590: “If a Plaintiff has suffered damages of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the Defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the Defendant the case he has to meet”. In personal injury cases, the only damage that is contemplated by the law as arising naturally is the personal injury itself and the consequential pain and suffering. Accordingly, matters pertaining to hospitalisation, treatment and management, the need for further medical care, the disabilities and attendant pecuniary losses (past and future) are special damages which must be pleaded. Happily, in this appeal it was common ground that the element of the cost of future medical care in the form of physiotherapy was a special damage, which needed to have been pleaded, but was not pleaded although the Judge made an award to meet the same. How do those principles impact on this case? As pointed out earlier, counsel for the Respondent conceded that in making separate awards for the several injuries, the trial Judge applied the wrong principle. The concession was most apposite for the law is clear that in personal injury cases compensation is to be made for heads of loss or damage and not heads of injury. As the East African Court of Appeal said in *Cavito v Difilippo* (*supra*), the general damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of independent assessments for each injury. Be that as it is may, the application of the wrong principle *per se* will not result in the quantum of damages being disturbed. If the appellate court is satisfied that the sum awarded was no more than should have been awarded had the damages been assessed on the correct basis, it will not upset the award. In the matter at hand, we have, after careful consideration of the cases cited to us by counsel for the Page 96 of [2004] 1 EA 91 (CAK) Appellant, observed that they involved injuries of lesser magnitude than those suffered by the Respondent herein and that the awards in question were made about ten years ago. Taking into account that inflation has taken a toll on the value of the shilling over the past 10 years and the seriousness of the injuries suffered by the Appellant, we are of the view that although the trial court acted on the wrong principle, the sum awarded was no more than could reasonably have been awarded had the damages for pain, suffering and loss of amenities been assessed on the correct basis. Accordingly, we are disinclined to disturb the award of general damages pertaining to the injuries sustained by the Respondent. As regards the award made to meet the cost of future medication, the same must obviously be disallowed as the need for future medical care was not pleaded and the Judge was, accordingly, wrong to make an award in respect thereof. The upshot of the matter is that the appeal is allowed to the extent that the award of KShs 970 000 under the rubric of general damages is substituted with an award of KShs 870 000. As regards costs, we think that the Appellant having succeeded to a small extent only, it should get only one quarter of the costs of the appeal. Those, then, are the orders of this Court. For the Appellant:

*Information not available*

For the Respondent:

*Information not available*