



**China Road and Bridge Corporation v Ojunga (Civil Appeal
26 of 2018) [2024] KEHC 16736 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16736 (KLR)

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

CIVIL

CIVIL APPEAL 26 OF 2018

NIO ADAGI, J

JULY 30, 2024

BETWEEN

CHINA ROAD AND BRIDGE CORPORATION APPELLANT

AND

JOHN OMONDI OJUNGA RESPONDENT

(Being an Appeal from the Judgment of Hon. Mr. D.O. Mbeja (SRM) in Milimani Commercial Courts Nairobi in CMCC. No. 2237 of 2016 delivered on 20/12/2017)

JUDGMENT

1. On the 18th August 2015, the Respondent was lawfully working in course of his employment with the Defendant when the Defendant by its director or supervisor negligently in breach of its statutory duties of operating a defective drilling machine, it snapped and jumped and the impact thrust him up making him to fall as a consequence whereby he sustained severe bodily injuries, loss and damage. The Respondent filed suit claiming damages for negligence. During the proceedings, liability was apportioned by consent at 80:20 against the Appellant.
2. The only issue left for determination was that of damages. In the plaint, the injuries particularized by the Respondent were as follows; Fracture of the left fibula, Blunt trauma to the pelvic region, Traumatic injuries to the soft tissues fracture site left leg and Blunt chest trauma. The Respondent prayed for special damages of Ksh.2,000/- for the medical report.
3. The Respondent was awarded Ksh. 1,000,000/- as general damages and special damages as prayed. The substance of the appeal as encapsulated in the Memorandum of appeal and the submissions of the Appellant's counsel was that the general damages awarded were manifestly excessive as to be erroneous in the circumstances having regard to the nature and extent of the injuries.



4. The Respondent did not cross-appeal and his counsel supported the decision of the trial court.
5. The two medical reports were produced by consent. One by Dr. P. M. Wambugu dated 28th September 2016 and the other by Dr. K. Mwaura dated 7th October 2015.
6. Dr. P.M Wambugu examined the Respondent on 28th September 2016. He confirmed that the Respondent sustained a fracture of left fibula and blunt trauma to the chest and pelvic. This doctor referred to the X-rays taken then and reviewed the same at examination and confirmed the above fracture involving distal third of fibula. Chest, Pelvis and left knee joint X-rays were normal. In conclusion this doctor found that the Respondent had sustained skeletal and soft tissues injuries from which he has since made adequate recovery. The Fracture has united. No further complications are envisaged. In terms of function, he asserted that no total permanent incapacitation occurred.
7. Dr. K. Mwaura also examined the Respondent on 7th October 2015. He confirmed that the Respondent sustained Fracture of the left fibula, Blunt trauma to the pelvic region, Traumatic injuries to the soft tissues fracture site left leg and blunt chest trauma. This doctor concluded that the Respondent's injuries are in the healing process and may in future develop osteoarthritis of the fractured bones and increase residual pain which will require him to take anti-inflammatory analgesic drugs.
8. In the trial court, the Appellant submitted that the sum Ksh. 350,000/= was adequate to compensate the Respondent. It relied on three cases. In *Felistus Wanjiru Kamau v Logistics supplies Ltd & Anor* Civil Appeal No. 181 of 2009 (2017) eKLR the Plaintiff suffered compound fracture of the right tibia and fibula and right-side track pain the court awarded Ksh.350,000/-. In *Susan Kalekye Mbuvi v Andrew Nzomo Maladi* (2017) eKLR the Plaintiff sustained Fracture of distal fibula, Bimalleolar fractures left ankle joint and cut wound right foot. The trial court awarded Ksh.350,000/- which was upheld on appeal. In *S.D.V Transami K Ltd v Scholastica Nyambura* Civil Appeal No. 105of 208 (2012) eKLR the Plaintiff sustained Compound fractures of the right tibia fibula, Deep cut wound on the left leg and multiple cuts on the right leg. The trial court awarded Ksh. 360,000/- which was reduced to Ksh. 250,000/- on appeal.
9. The Respondent's submissions before the trial court are not in the Record of appeal. I have not therefore had an opportunity to consider them.
10. It is well established that the assessment of quantum in a claim for general damages is discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles.
11. The fact that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

“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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.



12. In the case of *Harun Muyoma Boge v Dr. Daniel Otieno Agulo* (2015) eKLR, the court held that:-
- “The assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of the injuries in relation to awards made by the court in similar cases. It is ensured that the body politic is not injured by making excessively high awards and that the Claimant is fairly compensated for his or her injuries”
13. In this case the Respondent sustained fracture of left fibula and blunt trauma to the chest and pelvic region and although the two medical reports differed on the extend of the healing process of the fracture with one showing the fracture has united. No further complications are envisaged. In terms of function, he asserted that no total permanent incapacitation occurred. The other showing that injuries are in the healing process and may in future develop osteoarthritis of the fractured bones and increase residual pain which will require him to take anti-inflammatory analgesic drugs.
14. Having regard to the injuries, I am of the view that the sum of Ksh. 1,000,000/- was manifestly excessive to warrant interference with the award.
15. I therefore reduce the sum for general damages to Kenya Shillings Four Hundred Thousand (Ksh.400,000/-). I am guided by the following cases with comparable injuries:-
1. *Simon Kimote v Agro Solutions Limited* [2021] eKLR where the Appellant sustained right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury and was awarded Kshs 350,000 which was upheld on appeal.
 2. *Reamic Investment Limited v Joaz Amenya Samuel* [2021] eKLR, the Court reduced an award of Kshs 600,000 to Kshs. 350,000 for injuries: open left femur fracture, abrasion on the left knees, face, neck, right upper limb and left upper lip as well as a contusion on the anterior chest.
 3. *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where Justice D.S. Majanja in a judgment delivered on the 12/10/2018 reduced an award of Kshs. 1,000,000/= to Kshs. 450,000/= for a Respondent who had sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and where a permanent disability was anticipated.
 4. *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR where the High court awarded Kshs, 500,000 to the 3rd a party who sustained the injuries of fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability as she was unable to walk without support.
16. In the result the appeal is allowed to the extent that the award of general damages is of set aside and substituted with an award of Ksh.500,000/-. This shall be subject to the agreed apportionment on liability. The Appellant shall have half the costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH JULY 2024

NOEL I. ADAGI

JUDGE

