



**Nyawara v Auto Hauliers (K) Limited (Civil Appeal E094 of 2022)  
[2024] KEHC 10093 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10093 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E094 OF 2022  
GL NZIOKA, J  
AUGUST 12, 2024**

**BETWEEN**

**FRED ONYANGO NYAWARA ..... APPELLANT**

**AND**

**AUTO HAULIERS (K) LIMITED ..... RESPONDENT**

*(Being an appeal from the decision of Honourable J. Ndengeri (SRM)  
delivered on 3rd November 2022, vide Naivasha CMCC No. 533 of 2020)*

**JUDGMENT**

1. By a plaint dated 1<sup>st</sup> October 2020 and amended on 21<sup>st</sup> June 2022 the plaintiff (herein “the appellant”) sued the defendant (herein “the respondent”) seeking for judgment for:
  - a. General damages
  - b. Special damages Kshs. 177,320
  - c. Cost of the suit and interest
  - d. Costs of future medical expenses to be stated at the hearing.
2. The appellant’s case is that on 2<sup>nd</sup> January 2020, he was lawfully driving motor vehicle registration number KCF 677Z along the Naivasha-Maai Mahiu road he came across the respondent’s motor vehicle registration KBM 805 J parked in the middle of the road without any indicators. As a result, his motor vehicle rammed into the respondent’s motor vehicle causing the accident.
3. That as a result of the accident sustained the following injuries:
  - a. Left segmental femur fracture;
  - b. Left tibia plateau fracture;



- c. Left tibia fracture;
  - d. Severe soft tissue injuries of the left leg;
  - e. Soft tissue injuries of the face.
4. The appellant blames the respondent's driver and/or agent of the accident and avers that he drove the motor vehicle in a careless manner, without due care and attention, in a zigzag manner, on the wrong-side of the road, at an excessive speed and failed to slow down, stop, brake, swerve or act in any way to avoid the accident. Further, he failed to be on the look-out, and have regard for other road users.
  5. The appellant relied on the doctrine of res ipsa loquitor and argued that the respondent has been sued under the doctrine of vicariously liability.
  6. However, the respondent filed a statement of defence dated; 25<sup>th</sup> November 2020 and denied the appellant's claim. It denied that it was the registered owner of the motor vehicle registration No. KBM 805J, that an accident occurred as alleged and the particulars of negligence attributed to it as outlined in the plaint.
  7. However, on a without prejudice basis, the respondent averred that if the accident occurred which is denied, it was caused solely or substantially contributed by the negligence of the appellant despite its driver exercising reasonable skill and due care in control of its vehicle.
  8. That the appellant drove motor vehicle KCF 677Z without due care and attention, at an excessive speed, in a zigzag manner, while the vehicle was defective vehicle, and failed to drive on the designated path.
  9. Further, the appellant failed to; maintain a proper lookout or have regard to traffic flow, maintain a safe distance, and see motor vehicle registration No. KBM 805J in sufficient time to avoid the collusion and hitting it causing the accident. The respondent denied that the doctrine of res ipsa loquitor applies.
  10. The case proceeded to hearing. The appellant case was supported by his own evidence. He adopted his witness statement as evidence in chief and stated that he was travelling from Kisumu to Nairobi in a Leyland Lorry Registration No. KCF 677Z and when he reached Longonot area near the bridge at around 3:45am he found a trailer stagnate on the road.
  11. That he tried to swerve but it was too late and collide with it. As a result, he was stuck in the cabin up to 6:00am when police officers assisted him and rushed him to Kijabe Hospital as he sustained three (3) fractures and soft tissue injuries on his leg and was admitted for three (3) week and incurred a cost of Kshs. 310,000. That Further, at the time he was testifying he could not walk properly.
  12. The appellant's case was further supported by the evidence of (PW2) No. 88990 PC Pauline Kibati a traffic office at Naivasha Police Station who produce the police abstract as plaintiff exhibit 4 indicating that the case was still under investigation.
  13. The defence did not call any witness but produced its documents by without calling the makers and subsequently the parties filed their respective submissions.
  14. By a judgment delivered on 3<sup>rd</sup> November, 2022, the trial court entered judgment in favour of the plaintiff against defendant as follows: -
    - a. Liability 30%:70% in favour of the plaintiff
    - b. General damages-----Kshs. 600,000



- c. Special damages-----Kshs. 114,750
  - d. Total-----Kshs. 714,750
  - e. Less 30% contribution
  - f. The plaintiff is awarded costs of the suit
  - g. Special damages to attract interest from date of filing the suit.
  - h. General damages to attract interest from date of judgment.
  - i. Costs to attract interest from time they are determined.
15. However, the appellant is aggrieved by the decision of the trial court and appeals against it on quantum on the following grounds as verbatim reproduced: -
- a. That the learned Magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.
  - b. That the learned trial Magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant.
  - c. That the learned trial Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.
16. As a result, the appellant prays for the following orders: -
- a. That the judgment decree of the honourable dated 3<sup>rd</sup> November, 2022 be reviewed and/or set aside and re-access damages payable to the appellant.
  - b. That the respondent do bear the costs of this appeal.
17. The appeal was disposed of vide filing of submissions. The appellant tendered submissions dated; 19<sup>th</sup> April, 2023 and cited the case of; *Kemfro Africa limited T/A Meru Express Services & Another vs A. M. Lubia & Olive Lubia (no. 2) (1985) eKLR* where the Court of Appeal stated the principles to consider before interfering with an award of quantum by the trial court.
18. The court stated that the appellate court must be satisfied that in assessing damages the trial court took into account irrelevant factors or left out a relevant one, or the amount was so inordinately low or inordinately high to be an erroneous estimate of the damages.
19. The appellant further submitted that the trial court's assessment of general damages of Kshs. 600,000 was too low taking into account the seriousness of the injuries which required specialized treatment and that Dr. Omuyoma classified the permanent disability at 40%.
20. That, in the trial court, the appellant prayed for general damages in the sum of Kshs. 1,500,000 and relied on the case of; *Teresiah Ngugi & another vs Michael Masai Kimende (2018) eKLR* where the plaintiff suffered serious bone and tissue damage that developed notable complications and 70% permanent incapacity. That the High Court awarded Kshs. 1,500,000 as general damages.
21. Further, in the case of; *Gilbert Nicholas Otieno vs Oil Corp Development Co. Ltd & another (2009) eKLR* the plaintiff was awarded Kshs. 1,200,000 as general damages where he sustained a fracture of



- the right inferior and superior pubic ramus, fracture of the socket of the hip, fracture of the pubic bone with a painful pelvic area without any disability.
22. Furthermore, in the case of Christine Mwigina Akoya vs Samuel Kairu Chege (2017) eKLR the plaintiff was awarded Kshs. 4,000,000 for more serious injuries while in the case of; Karunga Wanaswa vs Butali Sugar Millers Ltd (2018) eKLR the plaintiff was awarded Kshs. 1,500,000.
  23. Lastly, the appellant submitted that the trial court failed to make a finding on future medical expenses despite evidence by Dr. Omuyoma that the appellant required Kshs. 200,000 to remove the implants, which evidence was not rebutted by the respondent. He cited the case of; Tracom limited & Another vs Hasan Mohammed Adan (2009) eKLR where the Court of Appeal found that future medical expenses had been pleaded in the plaint and stated that even if it had not been pleaded it had been framed as an issue and left for the determination of the court. The appellant urged the court to allow the appeal with costs and interest.
  24. However, the respondent in submissions dated; 27<sup>th</sup> June, 2023 argued that the trial Magistrate considered all the evidence before her accurately in making her judgment and therefore the first ground of appeal lacks merit and should be dismissed. Reliance was placed on the case of; Omar Athumani Mohammed T/A Paint Work and General Maintenance vs Jumwa Kaingu [2021] eKLR where the High Court cited the case of Peters vs Sunday Post Ltd (1958) EA 424 where the Court of Appeal stated an appellate court's jurisdiction to review the evidence before the trial court so as to determine the trial court's decision should be upheld should be exercised with caution as it is not enough that the appellate court might have come to a different conclusion.
  25. The respondent further submitted that, the appellant was misleading the court alleging that the trial court failed to consider his submissions on general damages while it is evident from paragraphs 8, 13 and 14 of the trial court's judgment that the trial Magistrate considered the same.
  26. Further, the trial court considered the decision of; Teresiah Ngugi & another vs Michael Masai Kimende (supra) relied on by the appellant but held damages for injuries must be within consistent limits, represent a fair compensation and not excessive.
  27. On whether the court should interfere with the general damages awarded by the trial court, the respondent cited the case of; Omar Athumani Mohammed T/A Paint Work and General Maintenance vs Jumwa Kaingu (supra) where the High Court quoted the decision in Ken Omondi & two others vs James Okoth Omburah T/A Okoth Omburah & Company Advocates where the Court of Appeal set out the principles to be considered before interfering with the trial court's award of damage, which have already been stated herein.
  28. The respondent submitted that, the trial court considered and analysed all the evidence before awarding general damages of Kshs. 600,000 which was well reasoned and justified. That, the appellant was to blame for failing to properly guide the trial court by citing case-law that was excessive and that was not relied on by the trial court.
  29. Further, the appellant is attempting to introduce new case-law not cited in the trial court and therefore should not be considered on appeal. That, in the case of; Tarasila Wanja & Another vs Peter Karimi Muthuri [2014] eKLR the High Court stated that the appellant's counsel failed to submit relevant authorities to the trial court and therefore the court cannot rely on them in appeal and were ignored.
  30. Furthermore, in the case of; Cannon Aluminium Fabricators Ltd vs Alex Julius Mativo & another [2019] eKLR the High Court considered the submissions by the parties and found that the authority relied on by the 1<sup>st</sup> respondent was most relevant and held that the appellants had failed to establish



their grounds of appeal. The respondent urged the court not to vary the award of damages upward as the same was just and fair.

31. In considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.

32. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

33. Be that as it may, the law is settled that, the 1<sup>st</sup> appellate court will not interfere with the trial court’s discretion in assessing damages unless in exercising that discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkube -vs - Nyamuro* 1983 KLR 403.

34. In the same vein, the Court of Appeal in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs Musila* [1984] KLR 257).”

35. On the award of quantum, the Court of Appeal in the case of; *Coastal Kenya Enterprises Limited v Muchiri (Civil Appeal 84 of 2017)* [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated that:

“In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & Others vs Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd vs Shephard* [1964] AC 326 at 345 that:

“Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”



36. On the issue of future medical expenses, Court of Appeal in the case of Tracom Limited & another v Hassan Mohamed Adan (Supra) stated as follows: -

“The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated: -

‘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.’

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”

37. However, the Court of Appeal in *Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor (Civil Appeal 58 of 2020))* [2021] KECA 52 (KLR) (8 October 2021) (Judgment) in reference to the decision in Tracom Limited & another v Hassan Mohamed Adan (supra) stated as follows:

“28. As has been held above, in as much as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.

32. On the challenge to the award on future medical expenses which the appellant says had not been specifically pleaded and proved, this does not turn on much as the respondent had in their plaint stated that the minor requires additional and medical care. In our view, the functional prosthesis (artificial limbs) and their maintenance costs are covered under that prayer and as held in Tracom Limited & another v Hassan Mohamed Adan (supra) it was not mandatory for the respondent to delve into detail of the future expenses at that stage thus that ground of appeal fails.

38. Similarly, in the case of, *Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018)* [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal in overturning the decision of the High Court not to award future medical expenses on the ground



that the plaintiff had pleaded generally on the same but had failed to attach a specific figure thus lacked specificity stated as follows: -

“ 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.”

39. To revert back to the matter herein, I note that the award of general damages was stated to be based on the injuries that the appellant sustained as indicated in the plaint. The appellant in support of the subject injuries, produced a discharge summary from Kijabe Hospital dated, 20<sup>th</sup> January 2020, which indicates that, he was admitted in the hospital on 2<sup>nd</sup> January 2020 and discharged on 12<sup>th</sup> January 2020 a period of eleven (11) days.
40. That among the injuries he sustained was a fracture of the left femur and tibia. That he underwent an operation where a K-nail was fixed in the femur and tibia on 6<sup>th</sup> January 2020. He was discharged to continue on treatment at the orthopedic clinic.
41. The other document produced was a P3 form dated 10<sup>th</sup> August 2020, wherein the doctor observed that the appellant sustained soft tissue injuries on the left supra orbital region and had mild tenderness on the scar at the time of examination. That on the lower limbs, he had sustained a fracture on the left femur, segmented fracture on the left tibia and had a scar on the left thigh and at the medial malleolus. The injuries were classified as grievous harm. The examination was eight (8) months after the road accident.
42. In addition, the appellant produced a medical report by Dr. Obed Omuyoma dated 13<sup>th</sup> August 2020, which reflects the same injuries as tabulated in the amended plaint. That, at the time of examination, the appellant was experiencing pain in the leg but had healed bruises on the supra orbital region of the face. Further observation indicated that, the appellant had surgical scar on the left thigh and left shaft.
43. That, the x-ray of the left femur showed segmental fracture of the left femur of left tibia and fibula showed fracture tibia plateau and fracture mid shaft left tibia. The doctor formed the opinion that the appellant was involved in a road accident and sustained the injuries as stated in the plaint.
44. He further classified the degree of permanent disability at forty percent (40%) and the degree of injury as grievous harm. The doctor indicated that the appellant would require in future a sum of Kshs 200,000 for the removal of implant.
45. The defendant’s documents were admitted in evidence without calling the maker. The documents included a medical document by Mr. W.N. Wokabi a consultant surgeon dated, 17<sup>th</sup> August 2021. The report confirmed the appellant sustained a double fracture of the left femur. That he was operated on and fracture fixed with a K-nail and at the time of examination, he was walking with aid of crutches.
46. It is noteworthy that, Dr Wokabi examined the appellant one and half (1½) years after the accident. He further observed that, the appellant was not able to bend the left thigh properly. Further the X-ray taken at the time of examination showed that there was new bone formation at the fracture site and the K-nail was still in situ.



47. Mr. (Dr) Wokabi formed the opinion that, expectation for the fracture to unite fully and for the leg to achieve maximum rehabilitation would be within 18-24 months from the date of surgery. That, the maximum rehabilitation permanent disability would settle at eight (8%). Finally, that the effective removal of metal implant would costs eighty thousand (Kshs 80,000) in a medium cost hospital.
48. The plaintiff in the submissions in the trial court sought for Kshs 1,500,000 as general damages and relied on the case of Teresia Ngugi & another -vs- Michael Masia Kimende (HCCA No. 158 of 2017 (2018) eKLR. The defendant suggested an awarded of Kshs 200,000 and relied on three cases of: -
- a. Tabro Transpoters Ltd vs Absalom Dova Lumbasi [2015] eKLR where the High Court awarded Kshs. 400,000 as general damages
  - b. Amritlal S. Shah Wholesalers Ltd & Another vs Joshua Ekano [2012] eKLR where the High Court awarded Kshs. 350,000 as general damages
  - c. Daniel Otieno Owino & Another vs Elizabeth Atieno Owour [2020] eKLR where the High Court awarded general damages of Kshs. 400,000
49. The court awarded Kshs 600,000 and stated as follows:
- “The court considered the authority annexed and with particular regard to the extent of the injuries. The injuries in the authority were more severe and required lengthy hospital stays as well as specialized treatment. Considering the injuries suffered by the plaintiff this court opines under the vote general damages, an award of Kshs. 600,000 will be sufficient compensation.”
50. However, I note that, the trial court in arriving at the afore finding did not state or evaluate the authorities where allegedly the injuries sustained were more severe than those herein, and/or analyzed injuries in the authorities cited by either party with the injuries the appellant suffered herein.
51. It suffices to note that the authorities cited by the appellant were of much severe injuries compared to those herein. The plaintiff therein sustained compound fracture of right tibia/fibula, chest injury with fracture of 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> ribs, mild head injury and cut wound on the left leg and knee. He was on wheelchair and that the prolonged immobility led to the muscle wasting on both limbs. That full recovery could not be achieved and permanent disability incapacity was assessed at 70%.
52. On the other part, the authorities cited by the respondent are of injuries less severe than what the appellant sustained herein. Similarly, they are old as the year 2012 and 2015 and awards therein range between Kshs 350,000 and Kshs 400,000. Therefore, the proposed figure of Kshs 200,000 by the respondent was not serious.
53. In the instant matter, I note that both medical reports confirm the appellant suffered injuries as stated in the amended plaint. Of great significance is the double fracture of the left tibia and femur. He also sustained soft tissue injuries that healed leaving visible scars.
54. Further, he was hospitalized for eleven (11) days, with surgery performed on 6<sup>th</sup> January 2020, for insertion of K-nail, which was still in situ at the time of hearing of the case and the removal thereof is estimated to cost between Kshs 80,000 to Kshs 200,000. Furthermore, at the time of examination he had not fully healed and was still on crutches. The degree of permanent disability was assessed to be at least 8%.



55. Pursuant to the aforesaid, it evident that the appellant suffered severe injuries that left him on crutches for eight (8) months after the accident and could not fully bend the left thigh a year and a half after the accident. Therefore, a sum awarded as general damages needed to consider all these.
56. Furthermore, taking into account the appellant would require removal of the K-nail, I find the award of Kshs 600,000 by the trial court to be rather low. However, taking into account that, the appellant was awarded the sum incurred as hospital expenses in the sum of Kshs 114,750. I enhance the general damages to a sum to Kshs 850,000 which includes Kshs 100,000 as future medical expenses assessed on the figures in the two medical reports less 30% with costs and interest as awarded in the trial court is upheld. Each party shall meet the costs on appeal.
57. It is so ordered

**DATED, DELIVERED AND SIGNED THIS 12<sup>TH</sup> DAY OF AUGUST 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of: \_\_

Mr. Owour for the appellant

Ms. Aol for the respondent

Ms. Ogutu: court assistant

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