



**Abere v Slumberland Kenya Limited & another (Civil Appeal  
E074 of 2024) [2024] KEHC 13600 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E074 OF 2024  
RE ABURILI, J  
OCTOBER 31, 2024**

**BETWEEN**

**NAVIGATOR MAKORI ABERE ..... APPELLANT**

**AND**

**SLUMBERLAND KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ASL CREDIT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising out of the Judgment of the Honourable F.M. Rashid in the Chief Magistrate's Court in Kisumu delivered on the 26th March 2024 in Kisumu CMCC No. E099 of 2023)*

**JUDGMENT**

**Introduction**

1. The appellant Navigator Makori Abere sued the respondents herein vide a plaint dated 20.2.2023 filed on the 4.4.2023 seeking general and special damages for injuries sustained on the 18.10.2020 following a road traffic accident.
2. The appellant averred that on the material day, he was a pedestrian walking along the Kisumu – Nairobi Road when at or near Nyamasaria area, he was hit by a motor vehicle belonging to and/or controlled by the respondents and that as a result, he sustained the alleged injuries.
3. The appellant adopted his witness statement dated 20.2.2023 as his evidence in chief reiterating the claims in his plaint and in cross-examination, he stated that he had not fully healed as he could not see very well.
4. From the trial court record, the respondents did not file any defence. However, on the 6.2.2024, the parties entered into a consent on liability in the ratio of 85:15 in favour of the appellant against the respondents. Consequently, the trial magistrate awarded general damages in the sum of Kshs. 320,000 and proven special damages of Kshs. 7,500.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 28<sup>th</sup> March 2024 raising the following single ground:
  - a. The learned magistrate ran into error in law and fact to award the appellant a sum so manifestly low in the circumstances.
6. The parties agreed to canvass the appeal by way of written submissions but only the appellant filed his submissions.

### **The Appellant's Submissions**

7. The appellant submitted that the learned trial magistrate's reliance on the case of Raymond Wollen Mills v Kate Moki Koki [1999] eKLR was grossly erroneous in both law and fact as that case dealt with a single injury, namely, eye injury (a corneal perforation with resultant traumatic cataract) exclusive of other injuries that he, the appellant, had pleaded herein.
8. It was submitted that neither did the respondents' doctor, Malik shook the contents of the appellant's evidence on the injuries sustained and treated for specifically as evidenced in the MRI report from Jaramogi Oginga Odinga Teaching and Referral Hospital.
9. The appellant relied on the case of Karanja v Mundia [2005] eKLR where the plaintiff was awarded Kshs. 1.2 million for similar injuries to those sustained by the appellant herein specifically; head injury fracture of the base of the skull anterior and middle cranial fossa, loss of consciousness for 48 hours and post traumatic epilepsy.

### **Analysis and Determination**

10. This appeal is against quantum of damages only. This being a first appeal, parties expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
11. In *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect.”
12. However, an appellate court would not easily interfere with the trial courts' discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. This position was reiterated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A M. Lubia and olive Lubia* (1985) 1 KAR 727. The court held that:

“.... 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 appeal 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 the damages....”

13. The same Court in *Odinga Jackton Ouma v Moureen Achieng Odera* [2016] eKLR stated that-  
“comparable injuries should attract comparable awards.”
14. The Respondent pleaded that he sustained the following injuries in the material accident:
  - a. Head Injury
  - b. Traumatic left eye injury
  - c. cut wounds on the left elbow
  - d. cut wounds on the frontal region of the head
15. The appellant further stated that he continued to experience pain at the site of the injuries. In support of his case, the appellant produced a number of documents including a P3 Form as PExh4, various treatment notes as PExh 5, Discharge summary as PExh 6 and Medical reports as PExh 7(a) (b).
16. The trial magistrate discounted a Persons with Disability Medical Assessment Report produced as part of the treatment notes on account that the same was not signed. I however note that the said document was part of documents produced by consent and further, that there was no objection by the respondents to its production. The said document also carried a stamp that was signed. Still on the said document, it was indicated that the appellant had sustained multiple injuries, soft tissue injuries and fracture involving the clavicle facial bone, soft tissue injuries to the pre-orbital and that these injuries impaired his vision.
17. The aforementioned injuries were reiterated in the letter dated 31<sup>st</sup> May 2022 from the Jaramogi Oginga Odinga Teaching and Referral Hospital and in the medical report dated 5.4.2021 by Dr. Morebu Peter Momanyi. Dr. Momanyi further noted that the appellant had wounds that would turn to large permanent ugly scars and that the appellant would face post traumatic epilepsy or psychosis.
18. No evidence was presented by the respondents to counter the evidence adduced by the appellant.
19. In my view, the evidence adduced by the appellant proved on a balance of probabilities that the appellant had sustained a fracture involving the clavicle facial bone and soft tissue injuries to the pre-orbital area. The after effects of the said injuries were also not controverted.
20. In *Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N* [2018] eKLR where the injuries sustained by the child were; head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The two doctors who examined the child concluded that the child sustained serious head injuries, which put him at risk of developing seizures as a long-term complication together with disfiguration resulting from the scalp and leg scars. The High Court awarded a sum of Kshs. 500,000/- general damages in December 2018.
21. In *GA (Minor suing thro’ her father and next friend BZ) v Paul Muthiku* [2020] eKLR where the High Court increased an award of Kshs 300,000 to Kshs 500,000.00 in general damages to an Appellant who suffered multiple fractures of the frontal left orbital roof (comminuted), multiple fractures of right temporal bones (petrous), bleeding in the skull airspaces (haemosinus), cut on the head (frontal) and cut on the chin, in May 2020.



22. In the case of Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR this court reduced an award of Kshs. 850,000 to Kshs. 500,000 in general damages for injuries comparable to those sustained by the appellant herein.
23. From the review of the decisions on the comparable injuries, although no two injuries can be exactly the same, I find that the trial court fell into error in the manner it assessed general damages for the injuries sustained by the appellant. The injuries in my view, as sustained by the appellant were more serious than those in the case relied on by the trial court.
24. I am therefore persuaded that this court should interfere with the award of general damages made by the trial court. As a consequence, the appeal herein against quantum of damages succeeds. I set aside the award by the trial magistrate and substitute the said award with an award of Kshs 500,000 taking into account inflation and time lapse since those comparable awards in the cited cases were made.
25. The award is subject to 15% contribution consented to in the lower court leaving a balance of Kshs. 425,0000 general damages for pain, suffering and loss of amenities. Interest shall be at court rates from the date of judgment in the lower court until payment in full.
26. As special damages were not disputed and the same was pleaded and proven by the production of receipts, I uphold the award of special damages.
27. As the respondent did not participate in the appeal herein, I order that each party bear their own costs of the appeal.
28. This file is closed.
29. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024**

**R.E. ABURILI**

**JUDGE**

