



**Totona v Janal Enterprises Ltd (Civil Appeal E035 of 2022)
[2024] KEHC 13126 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E035 OF 2022
RL KORIR, J
OCTOBER 30, 2024**

BETWEEN

CONSOLATA CHEPKURUI TOTONA APPELLANT

AND

JANAL ENTERPRISES LTD RESPONDENT

*(Being an Appeal from the Judgment of the Principal Magistrate, K. Kibelion
at the Principal Magistrate's Court at Bomet, Civil Suit Number E24 of 2021)*

JUDGMENT

1. The Appellant (then Plaintiff) sued the Respondent (then Defendant) for general and special damages arising from a road traffic accident on 12th August 2020. She claimed that she was a passenger in motor vehicle registration number KCP 771N/ZF 8663 when it was involved in the said accident along Bomet-Kaplong road causing her severe bodily injuries.
2. The trial court conducted a hearing where the Appellant called four witnesses and the Respondent called one witness.

The Plaintiff's/Appellant's case.

3. Through her Complaint dated 23rd March 2021, the Appellant stated that she was a passenger in motor vehicle registration number KCP 771N/ZF 8663 when it was involved in a road traffic accident along Bomet-Kaplong road.
4. The Appellant stated that the Respondent was the owner of motor vehicle registration number KCP 771N/ZF 8663 and its driver was negligent in causing the accident. The particulars of the negligence were listed in paragraph 5 of the Complaint.
5. That as a result of the accident, she sustained the following injuries:-



- a. Fracture of the 3rd right metatarsal bone.
 - b. Fracture of the 2nd right metatarsal bone.
 - c. Degloving injury on the right foot.
 - d. Bruises on the left shoulder.
 - e. Blunt trauma to the back.
 - f. Blunt trauma to the frontal region.
6. The Appellant's claim against the Respondent was for special and general damages as a result of the accident.

The Respondent's/Defendant's case

7. Through its statement of defence dated 10th May 2021, the Respondent denied that it was the registered owner of motor vehicle registration number KCP 771N/ZF 8663 and further denied that it was vicariously liable for the cause of the accident.
8. The Respondent denied the particulars of negligence levelled against it. That if any accident happened, it was caused solely by the negligence of the Appellant. It particularized the negligence in paragraph 7 of its Defence.
9. The Respondent denied that the Appellant suffered any injuries. The Respondent stated that the Appellant's suit was poorly pleaded, unclear and defective and ought to be struck out with costs.
10. In its Judgment dated 20th July 2022, the trial court found the Respondent 100% liable for the accident and awarded a net sum of Kshs 1, 097,050/= to the Appellant (then Plaintiff).
11. Being aggrieved with the Judgment of the trial court, the Appellant filed her Memorandum of Appeal dated 5th August 2022 appealing against the quantum of damages and relied on the following grounds:-
 - I. The learned Principal Magistrate erred in fact and in law in awarding the Appellant Kshs 1,000,000/= as general damages on quantum, which award was inordinately low in the circumstance.
 - II. The learned Principal Magistrate erred in fact and in law in awarding general damages so manifestly low as to amount to a misapplication of the principles of assessment of damages despite quoting them in the Judgement.
 - III. The learned Principal Magistrate erred in fact and in law in not positively considering the current and future medical requirements, continuing pain and suffering and medical complications in assessing damages.
 - IV. The learned Principal Magistrate erred in fact and in law by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 - V. The learned Principal Magistrate erred in fact and in law by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.



- VI. The learned Principal Magistrate erred in fact and in law when making his award by failing to consider the passage of time and incidence of inflation.
 - VII. The learned Principal Magistrate erred in fact and in law in over relying on the submissions and authorities of the Respondent to the detriment of the Appellant herein.
 - VIII. The learned Principal Magistrate erred in fact and in law in failing to apply proper legal principles regarding quantum and thus arriving at a wrong decision.
12. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR
 13. The present Appeal was canvassed through written submissions as directed by this court.

The Appellant's submissions.

14. In her submissions dated 16th June 2023, the Appellant submitted that she proved the injuries suffered as pleaded in her Complaint through her testimony and the Medical Report (P.Exh 4a). That she was yet to fully heal and further that the Medical Report assessed her disability at 40%. It was her further submission that according to the Medical Report, she required Kshs 350,000/= to remove metal implants at a future date.
15. It was the Appellant's submission that the Respondent did not discount the injuries she suffered.
16. The Appellant submitted that the trial court did not state any precedent when awarding her general damages of Kshs 1,000,000/=. That the trial court failed to consider her submissions in the trial court where she relied on *Guardial Singh Ghataurhae vs Parminder Singh Manku & 3 others (2018) eKLR* where the court awarded Kshs 2,500,000/= for comminuted intra articular fracture of the right tibia plateau and metaphysic, fracture of the right patella, comminuted fracture of the right distal radius, steoarthritis of the right knee, fracture of four ribs on the right side and severe lacerations, bruising and scarring. She further submitted that the award of Kshs 1,000,000/= was not commensurate to the injuries suffered.
17. It was the Appellant's proposal that this court awards her Kshs 3,000,000/= for general damages and relied on *Naomi Momanyi vs G4S Security Services Kenya Limited & another (2018) eKLR*.

The Respondent's submissions.

18. Through its submissions dated 16th June 2023, the Respondent submitted that the award of Kshs 1,000,000/= was sufficient and this court should not interfere with it. That comparable injuries should be compensated by comparable awards. It relied on *Anyango Oyugi & another vs Dorothy Adhiambo Ogana (2022) eKLR* where the court upheld an award of Kshs 350,000/= for a fracture of the 3rd metatarsal bone with soft tissue injuries.
19. It was the Respondent's submission that the injuries contained in the authority (*Guardial Singh Ghataurhae (supra)*) used by the Appellant were severe in nature compared to the ones suffered by the Appellant and it could not be used to justify the proposal of Kshs 3,000,000/=.
20. The Respondent submitted that the trial court did not err when it failed to award future medical expenses. That future medical expenses was a special damage which has to be pleaded and proved. The Respondent further submitted that the Appellant did not plead the same and was not entitled to



the award. It relied on *Simon Taveta vs Mutitu Njeru (2014) eKLR* and *Daniel Kosgei Ngelechei vs Catholic Diocese of Registered Trustees of Eldoret & another (2016) eKLR*.

21. I have gone through and carefully considered the Record of Appeal dated 31st March 2023, the Appellant's and Respondent's written submissions both dated 16th June 2023. It was apparent that the Appeal was limited to quantum only. The only issue for my determination was whether the award on general damages was inordinately low.

Quantum

22. Having gone through the Appeal and the parties' respective submissions, there was no dispute as to the nature of injuries suffered by the Appellant. This much was confirmed by the Respondent who in its submissions dated 16th June 2023 confirmed the injuries suffered by the Appellant to be similar to the ones pleaded in the Plaint. The only point of departure as earlier alluded in this Judgement was the extent of general damages payable to the Appellant.
23. For this court to interfere with an award, it must be satisfied that the trial magistrate misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there had been a miscarriage of justice. See *Catholic Diocese of Kisumu vs Tete (2004) eKLR*.
24. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 1,000,000/= was inordinately low and she proposed an award of Kshs 3,000,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 1,000,000/= as it represented a fair award.
25. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.
26. The Appellant suffered the following injuries:-
- a. Fracture of the 3rd right metatarsal bone.
 - b. Fracture of the 2nd right metatarsal bone.
 - c. Degloving injury on the right foot.
 - d. Bruises on the left shoulder.
 - e. Blunt trauma to the back.
 - f. Blunt trauma to the frontal region.
27. I have found the following cases quite helpful in terms of comparison:-
- i. In *Mash East Africa Limited v Kamau (Civil Appeal E309 of 2020) [2024] KEHC 2118 (KLR) (Civ) (1 March 2024) (Judgment)*, the court dismissed an Appeal where the Respondent had been awarded Kshs 500,000/= for a fracture of the left 2nd metatarsal bone, Degloving injury to the left foot, pain, swelling and bleeding.
 - ii. In *China Wu Yi Company Ltd vs Stephen Muniu Kinyanjui (2021) eKLR*, the court upheld the award of Kshs 800,000/= for a fracture and dislocation of tarsal-metatarsal joint right foot and a Degloving injury medical aspect right foot.
 - iii. In *Jesca Kajumwa Masela vs Razick Aziz Obuba (2021) eKLR*, the court increased the award of Kshs 350,000/= to Kshs 500,000/= for a fracture of the first metatarsal on the left foot,



fracture of the proximal phalanx of the left big toe and a massive 10*4 cm Degloving injury on the left foot.

28. I have also considered the authority quoted by the Appellant i.e. *Guardial Singh Ghataurhae* (supra) and I have found that the injuries sustained were comminuted intra articular fracture of the right tibia plateau and metaphysic, fracture of the right patella, comminuted fracture of the right distal radius, steoarthritis of the right knee, fracture of four ribs on the right side and severe lacerations and bruising and scarring. It is my finding that this case is not comparable to the present one as the injuries are more severe than those suffered by the Appellant.
29. I have considered the authorities above and the nature of the injuries suffered by the Appellant and the fact that she suffered permanent disability assessed at 40%. I have also considered the current inflation rates and I find that the award of Kshs 1,000,000/= was insufficient. I hereby vacate the award of Kshs 1,000,000 and substitute it with an award of Kshs 1,200,000/=.
30. It was a ground of the Appeal that the trial court erred when it failed to award future medical expenses. In the case of *Tracom Limited & another vs Hassan Mohamed Adan* (2009) eKLR, the Court of Appeal stated: -

“...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 thereof 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 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...”

31. Further, in *Bonham Carter vs. Hyde Park Hotel Ltd.* (1948) 64 T.R. 177, it was stated:-

“The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it.....”
32. Flowing from the above, a prayer for future medical expenses was a special damage which had to be pleaded and proved. I have looked at the Plaintiff dated 23rd March 2021 and I have noted that the



Appellant did not plead such a prayer. It then follows that the Appellant was not entitled to the award of future medical expenses.

33. In the final analysis, I dismiss the Appellant's claim for future medical expenses. I substitute the award of Kshs 1,000,000/= with an award of Kshs. 1,200,000/= which in my view, represented a fair compensation for the injuries suffered by the Appellant.
34. In the end, the Appeal dated 5th August 2022 partially succeeds. The Appellant shall have half the costs of the Appeal while the costs and interest in the suit remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF OCTOBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Khaemba for the Respondent No Appearance for the Appellant, Siele (Court Assistant).

