



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugo v Zolini (Civil Appeal 230 of 2021)  
[2023] KEHC 27542 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 27542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 230 OF 2021**

**F WANGARI, J  
MARCH 28, 2023**

**BETWEEN**

**MAINA EDWARDS MUGO ..... APPELLANT**

**AND**

**MARIO ZOLINI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Joe M. Omido in  
Kwale SPMCC No. 37 of 2018 delivered on 3rd November, 2021)*

**JUDGMENT**

1. This is an appeal on quantum. Parties had agreed on liability by consent at 80:20. The Judgment on quantum was entered by Hon. M. Omido on 3/11/2021 in Kwale SPMCC No. 37 of 2018. The appellant was the defendant in that matter.
2. The memorandum of appeal has 6 grounds of Appeal which can be summarized on one ground that the court awarded damages which were inordinately high, without regard to relevant principles on award of damages and as a result arrived on erroneous estimate of damages.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd*[1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Pleadings**

6. The plaintiff pleaded that the plaintiff suffered the following damages: -
  - a. Fracture of the neck of the left humerus
  - b. Fracture of the distal end of the left clavicle
  - c. Fracture of the distal end of the right tibia at the malleolus
  - d. Fracture of the distal end of the right fibula at the malleolus
  - e. Severe injury of the chest involving fractures of the left posterior 2nd, 3rd, 4th, 5th, 6th and 7th ribs.
7. The pleaded that he suffered 15% permanent incapacity. He pleaded the following special damages;
  - a. Medical reports Kshs. 2,000
  - b. Paid for P3 form Kshs. 2,000/=
  - c. Medical expenses Kshs. 1,035,744.80
8. These injuries were denied in the Defence dated 6/4/2018.

### **Proceedings**

9. The proceeding in so far as they relate to quantum, were that the plaintiff had a fracture on the right leg which was operated twice. A plate was placed in situ. It was to take Ksh. 250,000 to remove the plates. He produced various receipts from exhibits 6 to 19. Dr. Stephen K. Ndegwa testified on 13/2/2019 and produced another report and receipts for Ksh. 11,000. He said the Removal of the plate was to take Kshs. 250,000.
10. Dr. Udayan Sheth testified on 23/6/2021 and produced the medical report as Defence exhibit, he suggested the plate will be removed at Kshs. 200,000

### **Judgment by the court below**

11. The court entered judgment for:-
  - i. Liability 80:20



- ii. Special damages Kshs. 1,085,204.85
  - iii. General damages Kshs. 2,300,000/=
  - iv. Future medical expenses Kshs. 200,000/=
12. All of the above was subject to 20% contribution. He also awarded costs to the Respondent.

### **Future medical expenses**

13. These are of the nature of special damages. They must be pleaded and proved.
14. Justice A N Ongeri has this to say in *Koru Holy Family Mission Hospital v Koech* (Civil Appeal E003 of 2021) [2022] KEHC 3082 (KLR) (17 June 2022) (Judgment), while handling the issue of future medical expenses: -

“The court of appeal in *Tracom Limited & v Hasssan Mobamed Adan* [2009] eKLR held as follows: -

“...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 v 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...”

15. The Respondent pleaded a sum of Kshs. 250,000. The court awarded a lesser sum, upon relying on both medical reports. I do not find any issue legitimately raised on this aspect. The appeal in respect thereof is dismissed.

### **Special damages**

16. These must be strictly pleaded, specifically pleaded and strictly proved. This was succinctly so held in The case of *David Bagine v Martin Bundi* [1997] eKLR which settles what is requirements of special damages. The court of Appeal held as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabhani v. City Council of Nairobi* [1982-88] IKAR 681 at page 684: “...special damages in



addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the 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 prove it" We also refer to the cases of *Ouma vs. Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* [1991] 2 KAR 232 at page 235."

17. The Respondent pleaded special damages of Ksh. 1,039,774.80. The receipts were produced amounting 1,035,204.85. The court awarded Ksh. 1,035,204.85. The appeal touching on special damages is thus untenable.

### **The general damages.**

18. The test for General damages is settled; *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470).

"Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

19. In *Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* [1963] 2 ALL ER 625 Sykes J stated as follows:

"The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

20. The court used the correct principles. Therefore, the only question is whether, in awarding for the injuries, the court was plainly wrong. The injuries suffered were as stated in paragraph 6 above.
21. These injuries were severe. However, notwithstanding the severity, they did not reach the status where an award of Ksh. 2,300,000 could be made. The Respondent may never regain his full use of his faculties. The respondent was admitted on 8/10/2016 and discharged on 14/10/2016.
22. The special damages were high due to the nature of the hospital the plaintiff was hospitalized and not nature of the injuries. I am aware of the task at hand and I note the words of the English Court in *Lim Poh Choo v Health Authority* [1978]1 ALL ER 332 were quoted with approval in by Potter JA



in *Tayab v Kinany* [1983] KLR14, quoting Lord Morris Borth-y-Gest in *West (H) v Sheperd* [1964] AC 326, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the 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 method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis mine).

23. In *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR, the court, Meoli J, in March 2022, consist of fracture of the mid-shaft left femur and soft tissue injuries and the court awarded Ksh. 800,000
24. In *Joseph Kimanthi Nzau v Johnson Macharia* [2019] eKLR, the court, G.V. Odunga J. as then he was, considered a case where the plaintiff suffered cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4, fracture of 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the left scapula and cut wound on the left hand and left arm and awarded Ksh. 800,000 on 24th June, 2019.
25. In that case the plaintiff had skull x-rays taken which were reviewed by but chest x-rays availed to the doctor confirmed the fractures of the 2nd and 3rd rib fractures. According to him, the appellant was managed as an outpatient on appropriate medications and the fractures and head injuries were managed conservatively.
26. In *Peter Robert Kinuthia & another v Jackline Atieno Otieno* [2022] eKLR the court awarded a sum of Ksh. 1,000,000 on 14/3/2022 for more less the same injuries.
27. Consequently, the general damages that are available are to a sum of Ksh. 1,000,000. The Award of Ksh 2,300,000 was inordinately excessive and as such should be set aside.
28. I therefore set aside the award of general damages of Ksh. 2,300,000 and substitute with a sum of Ksh. 1,000,000. The Appellant is partially successful. He is entitled to costs assessed at Ksh. 60,000/= Determination
29. The appeal is allowed to the following extent: -
  - a. The entry of Judgment on General damages of Ksh 2,300,000 is set aside and in lieu thereof, I substitute the same with general damages of Ksh. 1,000,000
  - b. The rest of the judgment of the lower court remains undisturbed, that is the special damages of 1, 035,204.85 and future medical expenses of Ksh. 200,000.
  - c. The amounts awarded are subject to 20% contribution.
  - d. The appellant to have half costs of the appeal of Ksh 60,000.
  - e. The file is closed.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF MARCH, 2023.**

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**F. WANGARI**

**JUDGE**

In the presence of;

Busieka Advocate h/b for Ajigo Advocate for the appellant

Mungai Advocate for the Respondent

Turuki, Court Assistant

