



REPUBLIC OF KENYA



**Mogeni v Oremo (Civil Appeal 29 of 2019) [2023] KEHC 18284 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK**

**CIVIL APPEAL 29 OF 2019**

**F GIKONYO, J**

**MAY 31, 2023**

**BETWEEN**

**PAUL NCHORE MOGENI ..... APPELLANT**

**AND**

**DRUSCILLAH OREMO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon W. Juma (C.M)  
Delivered on 23.10.2019 in Narok CMCC No. 148 of 2015)*

**JUDGMENT**

**Appeal on quantum**

1. This appeal is on quantum of damages only. See the memorandum of appeal dated November 16, 2019.

**The impugned judgement**

2. In its judgment, the trial court on the October 23, 2019 made the following awards: -
  - a. Apportioned liability; 80% in favour of the respondent.
  - b. General damages Kshs - 2,800,000/=
  - c. Special damages - Kshs 1,450,918/=Total - Kshs 4,250,918/=
- Less 20% contribution - Kshs 850,183.60
- Total - Kshs 3, 400,734/=
- d. Costs of the suit and interest at court rates from the date of the judgment



3. Notably, the parties herein recorded a consent on liability in the ratio of 80:20 in favour of the respondent.

### **Injuries as per plaint**

4. According to the plaint dated July 30, 2015, the respondent sustained the following injuries:
  - a. Multiple compound fractures of the right upper limb
  - b. Inability to use the right upper limb.
  - c. Multiple compound fractures of the left humerus.
  - d. Deformation of the elbow joint.
  - e. Massive tissue loss of the left upper limb with exposed tendons
  - f. Inability to use the left upper limb.
  - g. Deformed fracture dislocation of the left elbow joint.

### **Appellant's Case**

5. The appellant did not call any witnesses.
6. The Appellant submitted that special damages must be pleaded and proved. That the respondent never pleaded special damages in her plaint yet the trial court proceeded to award the same. The finding by the trial court that invoices produced for receipts were unavailable would suffice is erroneous in itself.
7. The appellant submitted that Kshs 500,000/= would suffice for the injuries suffered.
8. In the end the appellant urged this court to set aside the judgement of the trial court and uphold the appeal with costs to the appellant.
9. The appellant relied on the following authorities;
  - i. [Kenya Bus Services Limited Vs Festus S Kibe \[2004\] eKLR](#). as quoted in [Swalleh C Kariuki & Another V Violet Owiso Okuyu \[2021\] eKLR](#).
  - ii. [Hahn V Singh Civil Appeal No 42 of 1983 \[1985\] eKLR](#).
  - iii. [China Wu Yi Limited & Irene Leah Musau \[2022\] eKLR](#).
  - iv. [Jogoo Kimakia Bus Services Ltd Vs Electrocom International Ltd \[1992\] KLR177](#).
  - v. [Denshire Muteti Wambua Vs Kenya Power & Lighting Co Ltd \[2013\] eKLR](#) as quoted in [Michael Okello V Priscilla Atieno \[2021\] eKLR](#)
  - vi. [Jitan Nagra V Abidnego Nyandusi Oigo \[2018\] eKLR](#).
  - vii. [Zachariah Mwangi Njeru V Joseph Wachira Kanoga, Nyeri HCCA No 9 of 2012](#) as quoted in [Francis Ndungu Wambui & 2 Others V VK \(a minor suing through next friend and mother MCWK\) \[2019\] eKLR](#).
  - viii. [Harun Muyoma Boge V dr Daniel Otieno Agulo, Migori HCCA No 86 of 2012](#) as quoted in [Francis Ndungu Wambui & 2 Others V VK \(a minor suing through next friend and mother MCWK\) \[2019\] eKLR](#).



- ix. Mbithi Muinde William V Rose Mutheu Mulatia [2019] eKLR as quoted in *DG(Minor suing through her next of friend MOR v Richard Otieno Onyisi [2021]eKLR*.
- x. *Naom Momanyi Vs G4S Security Services Kenya Limited [2018] eKLR* as quoted in Gladys Lyaka Mwombe V Francis Namatsi & 2 Others [2019] eKLR.
- xi. *Wakim Sodas Limited Vs Sammy Aritos [2017] eKLR* as quoted in *Gladys Lyaka Mwombe V Francis Namatsi & 2 Others [2019] eKLR*.
- xii. Section 27 (1) of the *Civil Procedure Act*.

### **Respondent's Case.**

- 10. The respondent called one witness- the respondent.
- 11. PW1- Druscillah Oremo. She testified and confirmed the injuries she sustained. She stated that she found herself crying in deep pains. All her hands were injured, both at the elbows. Her left hand has metals and she has to keep it warm from cold weather. She was taken to Narok Referral Hospital. She was referred to Tenwek Hospital where she went the same date. She was at Tenwek from December 12, 2009 up to December 18, 2009. She was treated and was supposed to have a surgery but her blood group was not found. She then went to Mater hospital. She produced a discharge summary from Mater hospital dated February 9, 2010 as P Exh 4. She was in ICU to lower temperature then she was taken to theatre after blood transfusion.
- 12. Skin grafting was done, removing muscles from leg to the hand, metals were also fixed. From Mater after discharge she started going to Kijabe Hospital as Mater was expensive. She produced a medical report dated March 30, 2014 from Kijabe as P Exh 5.
- 13. She also produced a discharge summary from Kijabe for November 13, 2013, May 30, 2011, July 6, 2010, September 14, 2010, February 17, 2012, August 31, 2010 and June 10, 2010. the discharge summaries were produced as a bundle P Exh 6. She also produced a medical report from Kijabe dated April 19, 2015 as P Exh 7. She produced a medical report by Dr. Wadebi dated June 13, 2017 as P Exh 8.
- 14. PW1 testified that she had undergone 8 surgeries. She was given a loan by the employer to enable her fund her treatment and they recovered it from her pay slip through her earnings. She stated that she has not recovered. She still has pains. She cannot take care of herself, she needs a helper. She employed a worker and at times she pays kshs 10,000 which is too high. She cannot bath herself, cook or wash cloths. She can only walk. Her hands are not useful.
- 15. PW1 was recalled to produce receipts. She produced 2 invoices a total of Kshs 76,659 as P Exh 10A and 10B. She produced an invoice from Mater hospital of Kshs 1,470,889.89 as P Exh 11A and a bunch of receipts of kshs 1,162,799 as P Exh 11B. She produced a bundle of receipts from Kijabe Hospital of Kshs 285,619 as P Exh 12. she paid Kshs 500/- for search of motor vehicle. She produced an invoice stamped as paid as P Exh 12. she paid Kshs 2,000/= for the medical report prepared by Dr WM Wokabi. She also produced a receipt from protection house surgical clinic as Pexh 14.
- 16. She stated that she had completed payment of the loan for Kshs 202, 635/= she produced receipts of National Cereals and Produce Board as P Exh 15.
- 17. On cross examination she stated that she had spent approximately 1.6 million.
- 18. The respondent submitted that the respondent at paragraph 8 of her plaint claimed for special damages. Therefore, the respondent specifically pleaded for special damages and provided evidence in support of her case.



19. The respondent submitted that the subordinate court exercised its discretion judiciously and arrived at a sound decision which should not be disturbed.
20. The respondent relied on the following authorities;
  - i. China Wu Yi Limited & Another V Irene Leah Musau [2022] eKLR quoted the court of appeal case in Catholic Diocese of Kisumu Vs Sophia Achieng Tete Civil Appeal No 284 of 2001 [2004] 2 KLR 55.
  - ii. Moses Maiina Waweru V Esther Wanjiru Githae (Suing as the personal representative of the estate of the late David Githae Kiririo Taiti [2022] eKLR quoted the case Hellen Waruguru ( suing as the legal representative of Peter Waweru Mwenya) Vs Kiarie shore Stores Limited [2015] eKLR.
  - iii. Section 12, 107, 108 and 109 of the *Evidence Act*
  - iv. China Wu Yi Limited & Another V Irene Leah Musau [2022] eKLR.
  - v. Jogoo Kimakia Bus Services Ltd Vs Electrocom International Ltd [1992] KLR 177
  - vi. Mbuthia Macharia V Annah Mutua & Another [2017] eKLR.
  - vii. Peter Mogaka V Zipporah gesare Omuya [2022] eKLR

### **Analysis And Determination**

21. In law, first appellate court is under an obligation to re-evaluate the evidence and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court. See: *Selle & Another Vs. Associated Motor Board Company Ltd. [1968] EA 123*. In re-evaluating the evidence, the court is not beholden or compelled to adopt any particular style. Nonetheless, it must avoid mere rehashing of evidence or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permissible) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Thus, a good style would be one that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, the court will find little or no difficulty at all in making the final impression of the evidence and facts of the case and applying the relevant law thereto. I shall so proceed
22. This appeal is on quantum of damages only. The appellate court would not interfere with the discretion of the trial court in assessment of damages unless the trial court committed an error in principle or the award was inordinately low or high or is wholly erroneous estimation of damages. See the case of *Kemfro Africa Ltd v Lubia* (supra) as follows: -

' I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'
23. The trial magistrate awarded Kshs 2,800,000 in general damages; the appellant regards the award as inordinately high. The Respondent considers it fair compensation for the injuries sustained.



24. Emphasis is made on the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. The respondent herein sustained the following injuries-
- a. Multiple compound fractures of the right upper limb.
  - b. Inability to use the right upper limb..
  - c. Multiple compound fractures of the left humerus.
  - d. Deformation of the elbow joint.
  - e. Massive tissue loss of the left upper limb with exposed tendons.
  - f. Inability to use the left upper limb.
  - g. Deformed fracture dislocation of the left elbow joint.
25. The Appellant cited authorities with the awards ranging from Kshs 300, 000/= to Kshs 450,000/=. The respondent relied on an authority where the court awarded Kshs 4,000,000/=. I do also note that the injuries in the authorities cited by the appellant entails either fracture on tibia /fibula or compound fracture of tibia /fibula or comminuted fracture of tibia/fibula. It does not have all the injuries suffered by the respondent in one set as compared to that cited by the respondent.
26. The appellant did not call any witnesses to dispute the injuries sustained by the respondent.
27. From the authorities cited by the respondent, it is clear that the trial magistrate made a commensurate and fair award in view of the injuries sustained by the respondent. An award of Kshs 2,800,000.00 is fair compensation for pain and suffering. The trial court did not commit any error of principle or made excessive award.
28. On the award of special damages, the appellant submitted that that special damages must be pleaded and proved. That the respondent never pleaded special damages in her plaint yet the trial court proceeded to award the same. The finding by the trial court that invoices produced for receipts which were unavailable would suffice is erroneous in itself.
29. The respondent submitted that the respondent at paragraph 8 of her plaint claimed for special damages. Therefore, the respondent specifically pleaded for special damages and provided evidence in support of her case.
30. Regarding proof of loss, while it is true that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No 88 of 2002 [2004] 2 KLR 269*, *Gulhamid Mohamedali Jivanji vs Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425*; [2003] 1 EA 98, *Coast Bus Service Ltd vs Sisco E Murunga Ndanyi & 2 Others Civil Appeal No 192 of 1992*.
31. It was therefore held by the Court of Appeal in *Jackson K Kiptoo vs The Hon Attorney General [2009] KLR 657* that:
- ' The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.'



32. Similarly, in *Hahn vs Singh*, Civil Appeal No 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

' Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.'

33. The respondent produced evidence of the receipts she paid monies for those she could trace. There were invoices for which receipts were not available. NHIF assisted her some payments and her employer made some recovered from her what it paid for her, she had to take a loan to pay up.

34. The respondent produced receipts of Mater hospital amounting to Kshs 1,162,799/= Kijabe hospital Kshs 285,619/=, search Kshs 500/= and Kshs 2,000/= for the medical report. The total was Kshs 1,450,918/=.

35. At paragraph 8(c) of the plaint, the respondent stated that 'hospitalization and medical treatment expenses to be provided.' I imagine that some expenses would be incurred whilst the case is pending and even up to the time of the hearing depending on the nature of the injury. Other expenses may be contingent upon future hospitalization, treatment or procedure occasioned by the injury. Such subsequent expenses should form part of special damages, although, they may not have been included specifically in the initial pleadings. I could be wrong, but I doubt the efficacy of a requirement for such untidy or speculative amendments of the plaint every time an expense is incurred due to the nature of the injury. Hence, 'the degree of certainty and particularity of proof required depends on the circumstances and nature of the acts complained of' (*Jackson K Kiptoo vs The Hon Attorney General* [2009] KLR 657 & *Hahn vs Singh*, Civil Appeal No 42 of 1983 [185] KLR 716).

36. The respondent had to undergo numerous procedures due to the injury with attendant costs. I find that the respondent pleaded and proved the special damages awarded to the her by the trial court.

37. In the upshot, I find that the appeal lacks merit and is dismissed with costs to the respondent. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 31<sup>ST</sup> DAY OF MAY, 2023**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Mr. Makori– CA
2. M/s Mwangi holding brief for Nyakundi for Respondent
3. Kimondo Gachoka for appellant – Ng'anyi h/b for Njuguna

